WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Luceno, 2015 ONCA 759
DATE: 20151106
DOCKET: C59248

Hoy A.C.J.O., Weiler and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Giuseppe Luceno

Appellant

Philip B. Norton, for the appellant

Susan G. Ficek, for the respondent

Heard: October 7, 2015

On appeal from the convictions entered on June 5, 2014 by Justice Robert F. Goldstein of the Superior Court of Justice, sitting without a jury.

Weiler J.A.:

A. OVERVIEW

[1] Following an 11-day trial, the appellant was found guilty of sexual assault. The complainant, then 13 years old, was not legally capable of consenting to sexual activity pursuant to what was then s. 150.1 of the *Criminal Code*, R.S.C.

1985, c. C-46.[1] The appellant's defence was that the sexual act did not occur. The appellant was also found guilty of sexual interference but his conviction was stayed on the basis of *Kienapple v. R.,* [1975] 1 S.C.R. 729.

[2] Apart from these offences, the appellant has no prior criminal record. He was sentenced to three and a half years' imprisonment after credit for restrictive bail conditions that included a form of house arrest for three and a half years.

[3] The appellant appeals his conviction only and seeks a new trial. He submits that the trial judge erred in his credibility assessments of the appellant and the complainant. The alleged errors include the trial judge's reasons for rejecting the evidence of the appellant, his use of evidence to corroborate the complainant's allegations, and his finding that the complainant had no motive to fabricate her evidence. The appellant submits that the cumulative effect of the trial judge's errors led to a misapplication of the test for assessing credibility, as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[4] Despite the appellant's able oral argument, we did not call on the Crown as we were of the opinion that the trial judge made no palpable and overriding error nor did he misapply the test in *W.(D.).* We indicated that the reasons for dismissing the appeal would follow shortly. These are those reasons.

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[1] The age of consent was changed from 14 to 16 on May 1, 2008: R.S. 2008, c. 6, ss. 13, 54.

B. FACTS

[5] The appellant and the complainant connected on a dating website in 2008. Both had profiles on several social media and dating sites. There was a dispute as to whether the complainant's dating profile indicated her actual age, 13, or 18. Whether the appellant's profile indicated he was 17 was also in dispute. The appellant testified he might have indicated on his profile that he was 18 or 19 because he was often told he looked younger, even though he was 25, but he never posted an age younger than 18.

[6] The complainant and her female friend R agreed that the appellant appeared younger than his actual age. It was conceded that the appellant sometimes passed himself off as 17 on the dating site through messages, but the appellant denied lying about his age in order to attract younger girls.

[7] The complainant and the appellant chatted online and via text message. The complainant testified that, in the early hours of the morning while the two were messaging on MSN, the appellant said he wanted to meet. The complainant snuck out of her house and got into the appellant's car, where the appellant started touching her leg and then had sexual intercourse with her. She believed this happened when she was in Grade 8 and before November 2008 when she had a boyfriend.

[8] The appellant testified that he never met the complainant in the middle of the night and denied having sex with her. He said he did not find her attractive. Based on the photographs on her profile, he could not tell that she was 13. He acknowledged that he made no attempt to ascertain her age.

[9] The complainant met the appellant on a separate occasion in the park near her house with her friend, R, to discuss having a threesome. R testified that she was with the complainant when they met the appellant in the park and that she was not in agreement with having a threesome. She did not take the suggestion seriously. The appellant agreed that he drove from his home in Toronto to Brampton to discuss having a threesome. There were other people in the general area, one of whom the appellant believed might have been R. He testified that he assumed R was around the same age as the complainant, whom he believed was 18. After speaking to the complainant for a few minutes, the appellant realized that the threesome was not going to happen and left.

[10] At trial, there was a dispute as to whether the idea of a threesome was initiated by the complainant or the appellant. The appellant asserted that the meeting in the park was the extent of his interaction with the complainant.

[11] A few days after the meeting, the complainant left a message on the appellant's dating profile to the effect of "Really? Seriously?" She was upset because they had sex then he stopped communicating with her.

[12] The complainant testified that about a month after she had sex with the appellant, a woman named Krista contacted her on Facebook when she became aware of the complainant's "Really? Seriously?" message. The complainant testified that she met Krista online in September 2008. Krista did not testify – all of the evidence surrounding her came from the complainant. Krista told the complainant she was dating the appellant and was pregnant with his child but the appellant had simply stopped talking to her. According to the complainant, the two women discovered that they were having sex with the appellant during the same timeframe.

[13] They became friends on social media and met in person once in 2010. The police recovered some, but not all, of their Facebook conversations. The complainant said she deleted her Facebook profile sometime between 2008 and 2011, and she assumed that the other messages were deleted along with it.

[14] In 2011, Krista contacted the police, alleging she had been sexually assaulted by the appellant. No charges were laid. The trial judge inferred that Krista told the police that the appellant had sex with the complainant when she was underage because the police then went to the complainant's house and interviewed her.

[15] The complainant testified that she did not know that Krista was going to tell the police about her having sex with the appellant when she was 13. There was

evidence of an angry exchange on Facebook after the police went to the complainant's house, wherein the complainant told Krista that she did not want to be involved with the police or a court case. Nevertheless, the complainant did attend at a police station to give a statement to the police in which she acknowledged having sex with the appellant in his car when she was 13.

[16] The appellant's position at trial was that the complainant and Krista colluded to frame him. He also submitted that R's evidence was tainted because R remained in the courtroom for part of the complainant's evidence in-chief during the preliminary inquiry, in violation of the court order excluding witnesses.

C. THE TRIAL JUDGE'S REASONS

[17] The trial judge's reasons followed the three-stage analysis set out in *W.(D.)*, at p. 757, for assessing credibility when an accused testifies, namely: (1) if the trier of fact believes the evidence of the accused, it must acquit; (2) if the trier of fact does not believe the testimony of the accused, but is left in reasonable doubt by it, it must acquit; and (3) even if the trier of fact is not left in doubt by the evidence of the accused, it must assess whether, on the basis of the evidence which it does accept, it is convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

(1) Rejection of the Appellant's Evidence

[18] The trial judge gave eight reasons for rejecting the appellant's evidence that he did not have sex with the complainant and held it did not leave him in a state of reasonable doubt, at para. 20:

1. The appellant was interested in meeting females under the age of 18. The appellant agreed that he communicated with females under the age of 18 and indicated that his age was 18 or 19 on his dating profile.
2. The appellant indicated in at least some communications on dating websites that he was 17, further support for the conclusion that the appellant was interested in girls under the age of 18.
3. The appellant's evidence that the complainant looked the same when she testified at trial as she did when he met her at age 13 was "contrary to human experience" and not credible.
4. There was no evidence the appellant made any inquiries about the complainant's age. Although the defence of mistake of age did not apply to the case, the appellant's lack of curiosity about the complainant's age was troubling. The appellant admitted in cross-examination that he knew that he might well have been meeting with someone underage.
5. The complainant's evidence that her profile indicated she was 13 was accepted, making it inconceivable that the appellant did not know her age.

6. The appellant maintained that he did not find the complainant attractive from the beginning, yet he continued to contact her via MSN and text.

7. The trial judge rejected the appellant's evidence that the threesome was the complainant's idea and "that he rejected it because he did not find the girls attractive." The trial judge stated:

> I observed both [the complainant] and her friend [R] during their testimony. [The complainant] was consistent throughout that the threesome was [the appellant]'s idea. [R] corroborated that evidence. [The appellant] testified that he was interested in the threesome because [the complainant] had said that her friend was hot, gorgeous and would be into it. [The appellant] testified that he thought that [the complainant] was unclassy, foul-mouthed, overweight, and unattractive. I do not believe that [the appellant] would have relied on the say-so of [the complainant] about her friend given his assessment of [the complainant]'s perceived looks and personality. I find that his evidence is not credible on this point.

8. The trial judge inferred that the police became aware that the appellant had sex with the complainant when she was underage because of information provided by Krista. Krista knew the complainant was underage from the complainant's dating profile, the appellant or the complainant – or from all three sources. While the trial judge recognized that Krista's knowledge could not be imputed to the appellant directly, the trial judge concluded that the circumstantial evidence suggested that the appellant must also have known that the complainant was underage.

[19] The trial judge recognized that a criminal trial is not a credibility contest. He relied on the decision of Doherty J.A. in *R. v. (D) J.J.R.* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 53, to hold that his outright rejection of the appellant's evidence based on a considered and reasoned acceptance of the complainant's evidence was an explanation for rejecting the appellant's evidence and holding that it did not leave him in a state of reasonable doubt.

(2) On the evidence accepted, the Crown had proven the elements of each offence beyond a reasonable doubt

[20] The trial judge held that, despite some problems with the complainant's evidence, she was credible on the central question of whether she and the appellant had sex. Therefore, the Crown met its burden to prove the offences beyond a reasonable doubt.

(a) Credibility of the Complainant Overall

[21] The trial judge found that the complainant was, overall, a credible witness. The trial judge rejected the defence theory that the complainant had schemed with the appellant's ex-girlfriend, Krista, to frame the appellant.

[22] He found the complainant had no motive to fabricate or to lie, pointing to the evidence that (1) the complainant had no interest in being a witness in a proceeding, let alone a complainant, (2) her anger over being contacted by police and charges being laid, (3) her strong animus toward Krista, (4) her lack of

animosity toward the appellant, and (5) her lack of sophistication to participate in the alleged scheme.

(b) Problems in the Evidence of the Complainant

[23] The complainant was 13 years old when she met the appellant. At the time the police interviewed her she was 15, at the time of the preliminary inquiry she was 17, and at the time of trial she was 19. The trial judge referred to the decision of McLachlin J. in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 134, in which the Supreme Court held that generally, the evidence of an adult witness is to be assessed as an adult but "inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying."

[24] The trial judge then addressed some of the problems with the complainant's evidence. The complainant had some difficulty in recalling details of the appellant's physical appearance such as his hair colour and whether or not he was circumcised. The trial judge concluded these gaps in the complainant's evidence did not significantly impact on her reliability given the limited opportunity the complainant had to observe the appellant over one brief sexual encounter at 3 a.m. in a car.

[25] The trial judge recognized that it was problematic that the complainant could not recall whether the appellant had ejaculated into a condom (or whether

he had worn a condom) or into a Kleenex, however taking into account the complainant's age and the passage of time, the complainant's inability to recall this detail was understandable.

[26] The trial judge rejected the appellant's submission that the complainant contradicted herself significantly as to whether the alleged sexual assault took place in April, September or November of 2008. He found that they met online in the spring of 2008 and that she consistently maintained that it was warm enough to wear a t-shirt when they met in person. In addition to the weather/clothing evidence, the trial judge accepted the complainant's evidence that she had a boyfriend in November 2008 and would not have met the appellant at that time.

[27] The trial judge rejected the appellant's position that they must have met in December because the complainant said she was wearing red snowmen pyjamas and there was a record of a call to the complainant's home phone on December 1, 2008. It is undisputed that the appellant and complainant communicated mostly by MSN and text message. The trial judge found that a record of a single call of less than one minute on December 1, 2008 did not support an inference that this is when the meeting took place.

[28] Finally, the trial judge found the issue of whether the complainant's relationship with Krista had developed through Facebook notes or messages was

a trivial one. The evidence ultimately went to the timing of the sexual encounter and whether the complainant had colluded with Krista, discussed below.

[29] In coming to his conclusions on some of these points, the trial judge found that the complainant's evidence was corroborated by her friend R. In particular, the trial judge noted the following aspects of R's evidence which corroborated the complainant's evidence:

- R's evidence that the weather was hot, not cold, when she met the complainant and the appellant to discuss a threesome;
- R's evidence that the complainant and the appellant communicated by cell phone because the complainant never used her home phone.

(c) Motivation to Fabricate and Collusion - R

[30] The defence alleged at trial that R's evidence was tainted by the fact that she had been in the courtroom during the preliminary hearing and heard the complainant's evidence. The trial judge found no evidence of collusion between the complainant and R, noting that no one, including the complainant, seemed to be aware that the preliminary hearing was in fact, about the complainant until very shortly before the preliminary hearing. R's testimony that she did not know she would be a witness and came with the complainant to support her had a ring of truth to it. Moreover, it was R, or the complainant, who brought R's possible involvement as a witness to the attention of the investigating officer after R's

name was mentioned during the complainant's examination-in-chief. Finally, there was no extrinsic evidence to support the appellant's submission that R tailored her evidence after hearing the complainant's testimony at the preliminary inquiry from which witnesses were excluded.

(d) Motivation to Fabricate and Collusion - Krista

[31] The complainant denied that Krista wanted her to report having underage sex with the appellant to the police. She believed the case involved charges against the appellant in relation to Krista, and only learned that she was the sole complainant shortly before the preliminary inquiry.

[32] The trial judge rejected the appellant's submission that the complainant and Krista colluded to get the appellant charged. He also rejected the appellant's argument that the complainant and Krista's Facebook argument was contrived, all to advance a fabricated allegation. Nothing in the complainant's demeanour suggested that she was lying to advance Krista's interests or that she bore animus toward the appellant. As noted above, if anything, she was upset to discover that her past sexual encounter with the appellant had come to the attention of police and unaware until very near the beginning of proceedings that she was the complainant in the proceedings.

(e) Conclusions on the Complainant's Credibility

[33] The trial judge concluded the following, at para. 65:

> Overall, however, these problems are balanced by much more important evidence that buttresses her credibility and reliability:
>
> - Lack of motive to fabricate;
> - Consistency on the main points of the meeting with [the appellant] and the sexual encounter, despite her age;
> - Corroboration by her friend [R], rather than collusion.

D. STANDARD OF REVIEW

[34] A trial judge's assessment of credibility should be afforded great deference. Credibility is a question of fact reviewable on the standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 25. However, a legal error made in the assessment of credibility may displace the deference usually afforded to a trial judge's credibility assessment and require appellate intervention: *R. v. A.M.*, 2014 ONCA 769, 123 O.R. (2d) 536, at para. 19; see also *Housen*, at paras. 8 and 37.

E. ISSUES ON APPEAL

[35] I begin with the issues relating to the trial judge's eight reasons for rejecting the appellant's evidence and for holding that it did not leave him in any reasonable doubt.

(1) Did the trial judge make speculative conclusions, not grounded in evidence, and impermissibly use hearsay evidence of Krista to impute knowledge of the complainant's age to the appellant?

[36] As was apparent from the trial judge's reasons, the question of whether the appellant knew the complainant's age was a significant factor in assessing the appellant's credibility. The trial judge stated in para. 20, reason 5: "Given my finding that the complainant was telling the truth that she indicated that she was 13 on her profile, it is inconceivable that [the appellant] did not know that. That throws the entirety of [the appellant's] evidence into question, although I hasten to add that it is not the only issue bearing on [the appellant's] credibility."

[37] The appellant submits that the trial judge, in reason 8, improperly imputed Krista's knowledge of the complainant's age to him. The appellant argues that this impermissible imputation of knowledge was decisive to the trial judge's ruling on the appellant's credibility. He submits that, in reason 5, where the trial judge indicates his conclusion that he found the complainant to be a credible witness on the issue of age, he references "reasons that I indicate below" as the basis for that finding. The appellant asserts that the "reasons below" that the trial judge references are those contained in reason 8 in which the trial judge imputes knowledge of the complainant's age to the appellant on the basis that Krista knew the complainant was underage.

[38] The Crown concedes the trial judge could not infer from Krista's knowledge of the complainant's age in 2011 that the appellant knew her age in 2008. The Crown asserts that the error was not material however, because the trial judge indicated well before he made the erroneous inferences in reason 8, that he believed the complainant's evidence that she stated on her profile that she was 13.

[39] I do not agree the trial judge qualified his finding in his second sentence in reason 5 as suggested by the appellant. Reading the reasons in their entirety, the trial judge's use of the word "below" appears to be a shorthand way of saying "at a later point in these reasons". For example, the trial judge uses the same word "below" at para. 51 of his reasons, wherein he stated, "As I note below, there was no collusion between [the complainant] and Krista." Immediately below, at paras. 52-56, the trial judge does not deal with collusion between the complainant and Krista; he deals with collusion between the complainant and R. Collusion between the complainant and Krista is dealt with at a later part of the reasons under the heading "Motive to Fabricate and Collusion – Krista", at paras, 57-63. Similarly, I read the second sentence of reason 5 as referring to the credibility of the complainant as a whole (not only on the issue of age) and the reference to "below" to refer to the later portion of the trial judge's reasons entitled, "Credibility of [the complainant] Overall".

[40] The trial judge's acceptance of the complainant's evidence that her profile indicated she was 13 was independent of any inferences drawn in relation to Krista.

(2) Did the trial judge impermissibly use the evidence of R to corroborate the testimony of the complainant?

[41] The appellant makes three submissions in relation to the use of R's evidence to corroborate the complainant's evidence. I will address each in turn.

(a) The Statements

[42] The complainant testified that she messaged the appellant a few days after they had sex. She felt used. The appellant replied and asked her what she was doing. She told him that she was with her friend. The appellant responded that he was in the area and asked if she and her friend were interested in a threesome. The complainant told him that her friend "won't do it".

[43] R testified that she and the complainant met with the appellant on one occasion. According to R, the complainant wanted her to meet someone. She told R she had sex with this person once, even though she wasn't expecting to have sex that night. He was interested in a threesome. R explained she didn't take the suggestion of a threesome, which she understood to come from the appellant, seriously. She was not interested and thought her friend was kidding.

[44] R testified that she was with the complainant when she was texting the appellant about meeting him in the park. R was not asked whether she read any of the text messages. The transcript is silent on this point. R could not remember when exactly this happened but described the weather as being decent, neither hot or cold.

(b) Positions of the Parties

[45] The appellant submits that the trial judge improperly used the evidence of R regarding the complainant's statements, to corroborate the evidence of the complainant that she had sex with the appellant and that it was the appellant's idea to have a threesome. As part of the narrative, R's evidence was "seemingly" relevant to the fact and timing of the statements, and could be used in the assessment of the complainant's reliability and credibility. The appellant acknowledges that the defence theory and its line of questioning opened the door for the Crown to lead evidence to rebut an allegation of recent fabrication.

[46] The Crown's position is that the trial judge was alive to the limited purpose for which prior consistent statements can be used. For example, the trial judge expressly stated that he was not relying on the complainant's prior statement to police or testimony except where put to the complainant and adopted at trial. He indicated that it was "incumbent on [him] as trier of fact to analyze [the earlier statements]" to determine whether there were contradictions.

[47] The trial judge used R's evidence to rebut the allegation of collusion between the complainant and Krista, which he was entitled to do. Evidence of what the complainant said to R was also admissible as part of the narrative to explain why the three were meeting.

[48] R's evidence corroborated the complainant's testimony with respect to the timing of events and her mode of communication with the appellant, namely, that she used her cell phone, not her home phone.

[49] Finally, in closing submissions, defence counsel relied on the complainant's prior statements to R as prior inconsistent statements that undermined the complainant's credibility. The trial judge's reasons were responsive to the appellant's position at trial.

(c) Analysis

Admissibility of Prior Consistent Statements

[50] Prior consistent statements made by a witness out of court are generally inadmissible because they are a form of hearsay, they lack probative value, they are self-serving, the repetition of a statement by the same person does not make it more likely to be true, and they are not corroborative because they lack independence: *R. v. Dinardo,* 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36; *R. v. Stirling,* 2008 SCC 10, [2008] 1 S.C.R. 272, at paras. 5 and 7.

[51] Two exceptions to the inadmissibility of prior consistent statements are applicable on this appeal – narrative of how the complainant's story was initially disclosed and rebuttal of an allegation of recent fabrication or collusion.

Permissible use of the Complainant's Prior Consistent Statements

a. Narrative

[52] The narrative may assist in determining the fact and timing of the statements which may in turn assist the trier of fact in the assessment of the credibility of the complainant or with respect to a fact in issue: *Dinardo,* at para. 37; *R. v. F. (J.E.)* (1993), 16. O.R. (3d) 1, at pp. 20-21.

[53] It is important to distinguish between using a prior consistent statement to establish the context of a complaint to assist in the assessment of the credibility of the complainant, and the impermissible use – to confirm the truthfulness of the complainant's testimony. In this case, the appellant rightly conceded that R's evidence of statements made by the complainant were relevant to the fact that the statements were made and when they were made, as it goes to the credibility and reliability of the complainant.

b. Rebutting Allegation of Recent Fabrication

[54] Where there is an allegation of recent fabrication, or collusion, by a witness, a prior consistent statement is admissible to rebut the alleged recent

fabrication or collusion. The prior consistent statements have probative value to the extent that they show a witness's story has not changed as a result of a new motive to fabricate: *R. v. O'Connor* (1995), 25 O.R. (3d) 19 (C.A.). It is not admissible for the truth of its contents. Only statements made prior to the time when the motivation for the alleged collusion arose are admissible: *Stirling*, at paras. 5 and 7; *F. (J.E.)*, at p. 14.

[55] In this case, the complainant's statements to R, that she had sex with the appellant and that it was his idea to have a threesome, were made prior to the complainant becoming aware of Krista's existence, which on the evidence, is the factual event which the appellant alleges, gave rise to the motive to fabricate. The fact and timing of the statements could be used to assist the trial judge in assessing the complainant's credibility regarding the two facts in issue to which they related.

The Trial Judge's use of the Complainant's Prior Consistent Statements

[56] The appellant submits that the trial judge's conclusion, at para. 65, that R's evidence was "corroboration not collusion" shows he relied on the complainant's prior consistent statements for the truth of their contents. I do not accept that the trial judge used R's evidence in this manner. The trial judge's reference to R's evidence as "corroboration not collusion" comes at the end of an exhaustive analysis of all the evidence. Put in context, it is clear that the trial judge meant to

convey that R's evidence corroborated the complainant's testimony that she made the statements and that those statements were made at a time before the motive to fabricate arose, as well as prior to any possible collusion with Krista because the complainant did not know of Krista's existence then.

[57] Specifically, in para. 65, the trial judge states his conclusion about the complainant's credibility, having previously fleshed out and reconciled points of alleged inconsistency. Among those points were areas where R's evidence corroborated that of the complainant's (the weather at the time of the meeting and the complainant's preferred mode of communication with the appellant). He also reviewed the various reasons why he rejected the argument of collusion between R and the complainant.

[58] Similarly, the trial judge's comment, at para. 20, that "[the complainant] was consistent throughout that the threesome was [the appellant]'s idea. [R] corroborated that evidence", cannot be read in isolation and divorced from its context. In isolation, the statement can be read as the appellant suggests, namely, that the trial judge used the complainant's prior consistent statements to her friend R, for their truth, an impermissible purpose. However, the trial judge's reasons must be read bearing in mind that the appellant relied on inconsistencies in the complainant's prior statements to undermine her credibility. The trial judge's comment that the complainant was consistent on the issue of whose idea

it was to have a threesome can be read as rejecting the defence position that, because her prior statements were inconsistent in some respects with her evidence at trial, she ought not to be believed on that point. Properly understood, his comment was that he found R's evidence corroborative because the statement as to who initiated the idea of a threesome was made prior to the time that the suggestion of collusion between the complainant and Krista ever arose.

[59] The appellant's submission is partly based on the trial judge's failure to discuss the proper use of this evidence. However, a trial judge is presumed to know the law: *R. v. B. (R.H)*, [1994] 1 S.C.R. 656, at p. 664. If a phrase in a trial judge's reasons is open to two interpretations, the one consistent with the trial judge's knowledge of the applicable law must be preferred over the one erroneously applying the law: *R. v. Smith*, 1989 ABCA 187, 95 A.R. 304, aff'd [1990] 1 S.C.R. 991.

[60] As this was a judge alone trial, the trial judge was not obliged to charge himself as he would have charged a jury. The appellant relies on *R. v. R. (A.E.)* (2001), 156 C.C.C. (3d) 335 (Ont. C.A.), a decision about a trial judge's obligation to give a limiting instruction to the jury as to the proper use of a prior consistent statement. In that case, the trial judge not only failed to provide a limiting instruction, but he also suggested that the jury could use the evidence as corroboration of the complainant's testimony generally. That is not this case.

[61] Moreover, it is apparent from the trial judge's reasons that he was alive to the limited use to be made of prior statements. He specifically addressed the limited use of prior statements in the context of reviewing excerpts of the complainant's statement to the police and preliminary hearing evidence, both of which were being used by the defence to impeach the witness.

[62] At no time in his reasons does the trial judge suggest that R's evidence corroborated the complainant's evidence that she had sex with the appellant, or that the threesome was the appellant's idea. The trial judge's conclusory bullet point (among two other generalized points which were also fully fleshed out in the reasons) that R's evidence was "corroboration not collusion", in light of the discussion which preceded it, cannot be said to reflect impermissible use of the complainant's prior consistent statements for a hearsay purpose.

(3) Did the trial judge err in admitting the evidence of R because the Crown failed to announce it was relying on recent fabrication?

[63] The appellant submits that the prior consistent statements were not properly admitted under the exception for rebutting an allegation of recent collusion since the Crown did not indicate this was the basis on which it was asking the questions. In support of his position, the appellant relies on *R. (A.E.)*, at para.13, and *F. (J.E.)*, at pp.14-15, in which Finlayson J.A. stated:

> [I]f the Crown is relying upon recent fabrication as the basis for the admissibility of prior consistent statements, it must wait until the defence has clearly opened this

> door by making an opening statement, or through cross-examination of the complainant or other Crown witnesses or…by the allegation of fabrication becoming implicit from the defence's conduct of the case…When the justification for the evidence is to rebut an allegation of recent fabrication, the Crown should announce to the court that that is the reason it is being led so that the trial judge is aware of this problem from the outset and defence counsel is firmly on notice.

[64] Unlike in *F. (J.E.)*, there was no objection by experienced defence counsel to the Crown leading evidence in-chief about the complainant's statements to R that she had sex with the appellant and that he suggested a threesome. Defence counsel cross-examined R on the complainant's prior statements to establish an inconsistency with her testimony at trial; namely, that the sexual intercourse was not rape or forced as she had told R, but simply unexpected sexual intercourse. That inconsistency was relied on in closing submissions.

[65] Admission of a prior consistent statement on the basis of an allegation of recent fabrication does not require the allegation be expressly made: *Stirling*, at para. 5. Moreover, I do not read the words of Finlayson J.A. as requiring the Crown to announce its reason for leading the evidence as a prerequisite for admissibility, but as advising an approach that ensures the appellant will not be surprised unfairly and will be able to object in a timely manner, if desired. Significantly, the appellant does not suggest that he was caught unfairly by surprise by the Crown leading this evidence.

(4) Did the trial judge err in failing to assess the reliability of R's evidence?

[66] The appellant submits that the reliability of R's evidence was indelibly tainted because she gave her statement to the police only after hearing the testimony of the complainant. Although the trial judge addressed the issue of fabrication and collusion between the complainant and R, he submits that the trial judge failed to address the reliability of R's evidence in a meaningful way.

[67] The Crown submits that defence counsel appears to have discounted the possibility that R's evidence was tainted inadvertently, by arguing at trial that the complainant and R couldn't get their story straight. The Crown also submits that the trial judge was entitled to rely on R's testimony as being reliable since the appellant confirmed a central aspect of her evidence, the meeting to discuss a threesome with the appellant.

[68] The trial judge accepted R's evidence and found that she had no motive to collude or to fabricate, despite R remaining in court during the complainant's examination-in-chief at the preliminary inquiry. It is apparent from his reasons that he believed R's violation of the court order excluding witnesses was not deliberate; she did not appreciate that she was going to be a witness at the time.

[69] When a witness has remained in court in violation of a court order, the witness is not necessarily disqualified. Depending on the circumstances, the trial

judge may exclude the witness's evidence. The effect that remaining in a courtroom in contravention of an order has on the weight given to a witness's evidence is for the trier of fact to decide: *R. v. Dobberthien*, [1974] 2 S.C.R. 560.

[70] In my opinion, even if R had not remained in the courtroom during the complainant's examination-in-chief, she would have been familiar with the complainant's story because she was her best friend. More importantly, the trial judge's reasons assess whether R colluded with the complainant to fabricate her evidence. In doing so, the trial judge was conducting an assessment of the overall reliability of R's evidence. I would not give effect to this ground of appeal.

(5) Did the trial judge improperly rely on the complainant's willingness to go through the criminal process to bolster her credibility and to find she had no motive to fabricate the allegations against the appellant? Did the trial judge reverse the burden of proof?

[71] The appellant submits that the trial judge improperly used the fact that the complainant went through the criminal process as lending truth or veracity to her complaint and bolstering her overall credibility.

[72] I would not give effect to the appellant's argument.

[73] In assessing whether the Crown had proven its case beyond a reasonable doubt, the trial judge rejected the appellant's contention that the complainant colluded with Krista to frame the appellant. He found she had no motive to fabricate or lie, reasoning as follows:

> [22] …[I]t was obvious [the complainant] had no interest in being a witness, let alone a complainant in a sexual assault criminal trial. The weight of the evidence shows that she was angry that charges were even brought. She could have ended the process at any time. She could have told the police that she and [the appellant] never had sex at the initial police interview. She could have refused to attend the police interview. She could have testified at the preliminary inquiry that she and [the appellant] never had sex. At this trial she found the cross-examination long, repetitive, bullying and painful, which occasionally resulted in flashes of anger and frustration on her part….She could easily have changed her story and ended the whole thing…She could have also simply failed to attend court, despite the subpoena although in fairness she likely thought she had no choice (she said as much)…
>
> …
>
> [62] Furthermore there was nothing in the complainant's demeanor that would lead me to believe that she wanted to be testifying… subjecting herself to endless days of repetitive cross-examination as well as to the allegation that she was a liar advancing the interest of a different scorned woman…

[74] While the trial judge noted the complainant was prepared to testify, he also observed that she was a reluctant witness who perhaps did not appreciate that she had a choice whether to go through the process or not.

[75] He did not find the complainant had no motive to fabricate because she went through the criminal process. Rather, he considered the complainant's demeanour, her lack of animus towards the appellant and her strong animus towards Krista, including their angry Facebook exchange.

[76] The appellant submits that if the trial judge improperly relied on this evidence to bolster the complainant's credibility, he reversed the burden on the Crown to prove that the complainant had no motive to fabricate her evidence and shifted the onus onto the appellant to explain why the complainant would lie.

[77] Having regard to the trial judge's reasons as a whole, and considering them in the context of the entire proceedings, the trial judge did not err by reversing the burden of proof.

[78] He expressly instructed himself on the principles of *W.(D.)*, and the burden of proof as it related to credibility, at paras. 13 and 15 of his reasons. He recognized that a criminal trial is not a credibility contest and during the trial proceedings, he reminded defence counsel that the appellant did not bear the burden of proving the complainant was lying.

(6) Other Alleged Errors in Rejecting the Appellant's Evidence

[79] The appellant submits that the trial judge's reasons provide little basis for rejecting the appellant's evidence on the main issue whether he had sex with the complainant. In reasons 1 and 2, the trial judge engaged in speculation and took judicial notice of facts beyond what was reasonable. Moreover, the appellant's admission that he sometimes passed himself off as 17 through messages is not contrary to his testimony that his profile never indicated that he was younger than 18.

[80] Reasons are to be read as a whole, not dissected in isolation: *R. c. C. R.* (1993), 81 C.C.C. (3d) 417 (Que. C.A.), per Rothman J.A. dissenting, at p. 419, dissenting reasons adopted by the S.C.C., [1993] 2 S.C.R. 226. Taken together, the trial judge's reasons are a considered rejection of the appellant's evidence. It was open to the trial judge to infer that the appellant was interested in meeting women under the age of 18 from the fact that he posted his age as 18 or 19 and that he sent messages stating he was 17.

[81] The appellant submits that the trial judge engaged in speculation when he rejected the appellant's evidence that the complainant looked the same as she did when she was 13. There was no contradiction of the appellant's evidence.

[82] The trier of fact is not bound to accept the evidence of a witness simply because there is no contradiction of it. It was open to the trial judge to apply his human experience that a person who is 19 will not look the same as she did when she was 13 and to reject the appellant's evidence. In any event, the trial judge indicated this was not a major consideration in his assessment of the appellant's credibility as looks can be deceiving and subjective and it was only one consideration among several reasons he gave.

[83] In relation to reason 4, the appellant submits that the lack of evidence of his inquiry into the complainant's age is of little import since he believed she was 18 and the age of consent was 14 at the time. He points out that contrary to the

trial judge's finding that he knew that he might well have been meeting someone underage, the appellant only admitted to communicating with persons under 18. He denied he would meet with anyone he knew was under the age of 18.

[84] The appellant testified that he "assumed" that R was about the same age as the complainant, whom he believed was 18. He agreed in cross-examination that there was a chance that she could have been younger. Therefore, there was a chance the complainant was younger than 18 yet the appellant was prepared to meet with her and not ask her age. It was open to the trial judge to find that the appellant, an adult of 25, was interested in dating women who were not adults and, as he did not make any inquiries to ascertain whether those he met were able to consent to a sexual relationship, he might have been meeting someone incapable of giving consent.

[85] I have already discussed reason 5 in which the trial judge accepted the evidence of the complainant that she stated on her profile that she was 13.

[86] Reason 6 refers to the trial judge's rejection of the appellant's evidence that he found the complainant unattractive. The appellant testified that the complainant instigated the communications and that his responses were curt. He submits that his evidence should have accepted since it was not contradicted.

[87] This aspect of the appellant's evidence was contradicted, at least indirectly, by the complainant's evidence. She explained that she flirted with the appellant and he told her he wanted her but that they did not explicitly discuss having sexual intercourse before meeting in person. According to the complainant, she lifted her top exposing her bra when the appellant asked her to expose her breasts on camera. She was also asked to engage in masturbation on camera but she refused. The appellant denied using a camera on MSN.

[88] Although the trial judge did not specifically refer to this evidence in rejecting the appellant's assertion that he found the complainant unattractive, it is part of the context for his finding that the appellant would not have continued to communicate with the complainant if he found her unattractive.

[89] In reason 7, the trial judge rejected the appellant's evidence that it was the complainant's idea to have a threesome and that it did not happen because he did not find the girls attractive. The trial judge misapprehended the appellant's evidence in making this finding. The appellant's evidence was that when he met the girls in the park, he knew or had a sense that the threesome was not going to happen. Other people were present. He felt he was wasting his time so he left.

[90] The trial judge also rejected the appellant's evidence since his testimony that he was interested in a threesome because the complainant told him her friend was "hot, gorgeous, and would be into it" was incredible. He did not believe

the appellant would rely on the complainant's assessment of her friend despite finding the complainant unclassy, foul-mouthed, overweight and unattractive.

[91] He also rejected the appellant's evidence on this point because of the timing of the complainant's prior consistent statement to R, which I have already discussed.

[92] It was open to the trial judge to reject the appellant's evidence as to whose idea it was to have a threesome for the reasons given. His misapprehension of the appellant's evidence as to why the threesome did not happen did not affect his assessment of the evidence as to whose idea it was to have a threesome.

[93] Accordingly, I would dismiss the appellant's submission that a new trial is required based on these other alleged errors in the trial judge's reasons for rejecting the appellant's evidence.

F. DISPOSITION

[94] For these reasons the appeal was dismissed.

Released: (K.M.W.) November 6, 2015

"Karen M. Weiler J.A."

"I agree Alexandra Hoy A.C.J.O."

"I agree G. Pardu J.A."