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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. S.S., 2022 ONCA 305
DATE: 20220421
DOCKET: C68062

Feldman, MacPherson and Thorburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

S.S.

Appellant

Jeff Marshman, for the appellant

Michael S. Dunn, for the respondent

Heard: January 17, 2022 by video conference

On appeal from the conviction entered by Justice Douglas K. Gray of the Superior Court of Justice on June 27, 2017, with reasons reported at 2017 ONSC 5459.

Feldman J.A.:

A. INTRODUCTION

[1] The appellant was convicted of two offences perpetrated on his niece when she was between six and eight years old, sexual assault and sexual interference. The convictions were based on the complainant's unsworn, videotaped police statement, which the trial judge admitted into evidence by application of the

principled exception to the hearsay rule, based on the requirements of necessity and threshold reliability.

[2] At the preliminary hearing, less than two years after the police statement was taken, the complainant testified that she did not remember giving the police statement or anything about what she described in it.

[3] In order to determine whether the complainant would be able to testify at the trial, the Crown arranged for a child psychologist to meet with her. The psychologist concluded that the complainant could not testify at the trial because it would be too traumatizing for her. The complainant was afraid that if she testified, she would be apprehended by the Children's Aid Society ("CAS") and taken from her mother's care, which is what happened after she gave the police statement. She told the psychologist that was why she testified at the preliminary hearing that she did not remember anything. The psychologist also gave her opinion that the police interview of the complainant was done in accordance with proper protocol, which is meant to ensure that the information provided by the child is as complete as possible and is not contaminated by the interviewer's suggestions.

[4] The Crown applied to have the hearsay video statement admitted into evidence at the trial on the basis that the complainant could not testify and the police statement had threshold reliability. The trial judge accepted the psychologist's opinion that the complainant could not testify at the trial without

being traumatized and that, if called, she would only repeat what she said at the preliminary hearing. He therefore ruled that the necessity requirement was met and that the complainant would not be called as a witness at the trial.

[5] The trial judge also found that the statement should be admitted based on threshold reliability. He accepted the psychologist's opinion that the police interview was conducted using the well-established interview protocol and also found that the complainant had no motive to fabricate the allegations. Having admitted the statement, he applied the test from *R. v. W.(D.)*, [1991] 1 S.C.R. 742, to all of the evidence, and concluded that the appellant's guilt was established beyond a reasonable doubt.

[6] The appellant does not challenge the necessity finding. He submits, first, that the trial judge erred in law by admitting the complainant's police statement based on finding threshold reliability. Second, he submits that the trial judge misapprehended the evidence regarding motive to fabricate, and therefore erred by finding that the complainant had no motive to fabricate. The second error affected both his threshold and ultimate reliability findings.

[7] I agree that the trial judge erred by finding threshold reliability, and in his positive finding that the complainant had no motive to fabricate. As a result, he erred by admitting the complainant's police statement. I would therefore allow the appeal.

B. FACTS

[8] The appellant lived with his sister, L.S., the mother of the complainant, E.B., and with E.B., who was between 6 and 8 years old during the relevant time period. The appellant was on probation. In March 2015, L.S. called the appellant's probation officer because she had some concerns about her brother's state of mind, his demeaning conduct toward E.B., his anger, hoarding, and adult conflict in the house. The probation officer called the CAS, which was already involved with the family, and reported these concerns.

[9] As a result of this communication, a CAS worker, Ms. T.S., went to E.B.'s school and met with her on March 31, 2015. During that interview, E.B. told Ms. T.S. that the appellant had pulled down his zipper and she used a hand motion to demonstrate that he had masturbated. She said that she had touched his penis and seen "white stuff". E.B. also told Ms. T.S. that the appellant called her a "little bitch", that there was a lot of yelling in the home, and that she didn't really like the appellant. She said that she did not want to live with him anymore. She also told Ms. T.S. that she had seen a pornographic movie with the appellant in which "a woman took off her clothes and the man was undoing his pants … and taking his penis in his hand and masturbating", which E.B. demonstrated by hand movements.

[10] Ms. T.S. immediately called the local police and took E.B. to a station where she was interviewed by Officer Cunnington in a videotaped statement. The officer testified that he talked to Ms. T.S. first. She told him that E.B. had disclosed some alleged sexual touching by the appellant and that she did not want to live with him anymore. Ms. T.S. reported to the officer some specifics of what E.B. had told her.

[11] The video interview took approximately 50 minutes. Officer Cunnington explained to E.B. the purpose of the interview and that it was being recorded on video. He emphasized the importance of telling the truth and asked her if she understood the difference between the truth and a lie. He asked open-ended questions, but also would remind E.B. of things she had said to Ms. T.S. in order to jog her memory. E.B. told the officer that she was afraid of her uncle and that she had already told her mother and Ms. T.S. what had happened with her uncle.

[12] The video interview was played in court and the trial judge summarized what E.B. disclosed in it. Early in the interview, she said that her uncle would unzip his pants and touch her “right here”, which she indicated by pointing to her vagina area. He told her to take off her pants and underwear. He also took off his pants. E.B. demonstrated with hand motions how he masturbated. She said she didn’t like it but that she felt she had to say that she did. When her mother was returning home, her uncle pulled up his pants, zipped them and put on his belt, and she put on her underwear, pants “and everything”.

[13] E.B. used the words “penis”, “cock”, and her “private stuff” without those words being suggested to her. She said that her uncle placed his “cock” in her “private stuff”. The officer asked E.B. what happened when her uncle did something with her private parts and she said that he put his penis “in here”, indicating her vagina, that she didn’t like it, and that it felt gross. Officer Cunnington mentioned to E.B. that she had told Ms. T.S. about “white stuff”. E.B. at first responded that she didn’t know about “white stuff” and did not remember anything about it, but later referred to it.

[14] After the sexual contact, her uncle would tell her to watch a movie on TV. When the officer asked what kinds of movies she watched, E.B. said she watched Barbie, Harry and the Hendersons, and similar movies. The officer asked whether she ever watched “any adult movies” or “any movies with [her] uncle”. E.B. did not mention any pornographic movies in her response.

[15] E.B. described how her uncle stopped when her mother came home and knocked on the door, which was locked with two locks. They would put on their clothes then open the door. Her uncle told her not to tell her mother. She told the officer that she had told her mother about it in the car when her uncle wasn’t there.

[16] When the officer left E.B. alone in the room for a few minutes, she sang to herself the following:

> Some day I want day – I wanna live with my mom but not my uncle. It’s just – I just wanna live. I wanna just live. I

> wanna sleep. So watching you where – I'm where, and I where am I? I am in a police officer's. Yeah, yeah. Mm, mm. I was born in British Columbia. It's the truth. I am not lying. And so you go I, I, I – how many minutes is a (inaudible)? [Emphasis added.]

[17] After consulting further with Ms. T.S., the officer returned and asked E.B. again to "tell me a bit more about … your uncle's penis and your vagina". She responded that he came from his room, told her to take off her clothes, then he stood in front of her and touched her vagina with his hands and it felt "just nasty". She also said her uncle was "playing with" his penis, and that "there's a little hole … in the middle" and "it comes out milk." It looked like "plain gross milk", and it went on her stomach. He also asked her to describe how her vagina felt when her uncle's penis was in there, and she said it felt "just nasty" but did not hurt.

[18] The officer asked E.B. how she felt about the appellant. She responded: "I feel nasty with uncle". The officer also asked E.B. how she feels about living with the appellant and she answered, "I feel not even good".

[19] Following this interview with E.B., the officer interviewed E.B.'s mother, L.S., then briefed Ms. T.S. Ms. T.S. told him that as a result of the two interviews, she was apprehending E.B. and placing her in foster care. On the ride to the foster home, Ms. T.S. told E.B. that the reason the CAS was removing her was because her mother had not protected her from her uncle. E.B. told Ms. T.S. that she was worried about her mother but she was glad she would not be living with her uncle anymore. E.B. remained in foster care for almost one and one-half years, and was

returned to her mother at the end of August 2016. However, CAS remained involved with E.B. and L.S. Ms. T.S. checked on E.B. at school once a month and had further interactions with L.S.

[20] The preliminary inquiry was held in November 2016. By this time, E.B. was nine years old. Officer Cunnington testified that he saw E.B. in the Crown's office before the preliminary inquiry, but she did not recognize him. E.B. testified under child-friendly conditions. After promising to tell the truth, she viewed her entire video statement, then testified that she did not remember the officer, the interview, or the events that she described in it, and maintained that position under cross-examination by the appellant's trial counsel.

[21] Prior to trial, in the spring of 2017, the complainant was interviewed twice at the request of the Crown by Dr. Louise Sas, a registered psychologist, who was qualified to give expert opinion evidence at the trial. She discussed with E.B. the issue of her testifying in court. E.B. made it clear that she did not want to go to a trial about her uncle; that she was upset that after giving her statement, she was apprehended by the CAS and taken away from her mother; and that she was afraid that would happen again if she testified. Dr. Sas testified that E.B. admitted to her that at the preliminary inquiry, "she had said she had forgotten everything, but in reality she had remembered, but she was too afraid to tell because she would be taken away again".

[22] Dr. Sas prepared a report that was made an exhibit at trial, and testified as well on the *voir dire*.[1] The trial judge noted that her firm opinion was that to force E.B. to testify would unduly further traumatize her. On cross-examination by the appellant's trial counsel, Dr. Sas acknowledged that a possible cause of trauma was the prospect of lying again, that is, if E.B. had lied in her statement, she would not want to lie again at the trial.

[23] L.S., E.B.'s mother, testified as a defence witness. As part of the child protection proceeding that allowed E.B. to be returned to her mother, L.S. had signed an Agreed Statement of Facts on April 12, 2016. In that agreed statement, L.S. acknowledged that her daughter had been sexually abused by the appellant and that she, L.S., made a mistake by leaving E.B. in the appellant's care, contrary to the CAS's direction. At trial, L.S. took the position that she had only signed the statement because it was a condition of getting her daughter back. She said that E.B. loved her uncle. She also testified about school friends of E.B. who had told her about sexual body parts and "white stuff" coming out of a penis.

C. FINDINGS BY THE TRIAL JUDGE

[24] There were two issues before the trial judge. The first was whether E.B.'s videotaped police statement should be admitted into evidence under the principled exception to the hearsay rule based on the requirements of necessity and

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[1] By agreement, the *voir dire* evidence was admitted as the trial evidence.

threshold reliability. If not, an acquittal would follow. If the statement was admitted, the second issue was, based on all the evidence, whether the Crown had proved the charges beyond a reasonable doubt.

[25] The trial judge initially gave brief oral reasons for admitting the video statement based on the principled exception to the hearsay rule, then later gave written reasons. I will refer to the relevant aspects of the oral ruling in the analysis portion of these reasons.

[26] In the written decision, on the first issue, the admissibility of the videotaped statement, the trial judge referred to the rule that hearsay is presumptively inadmissible for valid policy reasons, and in particular because the right to cross-examine the declarant has been considered an essential component of an accused person's ability to make full answer and defence. However, following the Supreme Court of Canada's decision in *R. v. Khan*, [1990] 2 S.C.R. 531, and subsequent decisions, a hearsay statement can be admitted if there are sufficient indicia of reliability to overcome the dangers posed by the absence of contemporaneous cross-examination. The trial judge expressed the view that the absence of cross-examination was more important when the trier of fact is determining whether the case has been proved beyond a reasonable doubt than at the admissibility stage of the analysis.

[27] The trial judge first found that the necessity criterion had been met in this case. From E.B.'s testimony at the preliminary inquiry, it was clear that she was "unable or unwilling to give any meaningful evidence" as she purported to remember nothing about the interview or its substance. He also accepted the opinion of Dr. Sas that if called, E.B. would repeat what she said at the preliminary inquiry and would suffer significant trauma.

[28] The trial judge then found that the threshold reliability requirement was also satisfied. He did so on two bases. First, he again accepted the evidence of Dr. Sas that Officer Cunnington had conducted the interview in accordance with the recognized protocol, using mostly open-ended questions posed in a relaxed atmosphere. The child understood the difference between the truth and a lie, she provided detailed information with physical descriptions, and there was some corroboration, if only on peripheral matters such as the layout of the apartment.

[29] The second basis for finding threshold reliability, which the trial judge described as "[o]f significance", was that he was satisfied that E.B. had no motive or reason to fabricate the allegations against her uncle.

[30] The trial judge rejected the suggestion that the fact that E.B. might have discussed sexual matters with classmates may have influenced her description of what occurred and therefore undermined the reliability of her statement.

[31] Having concluded that both necessity and threshold reliability were made out in this case, the trial judge admitted E.B.'s statement into evidence.

[32] The trial judge then turned to determine whether, based on all the evidence, the Crown had proved the charges beyond a reasonable doubt. The appellant did not testify in his defence. The trial judge first found that the evidence of L.S., who was called as a defence witness, did not add a great deal, and doubted her credibility. He then assessed E.B.'s police statement. He found that it was necessary for him to make allowances for her age, relying on *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 133, where the court said that deficiencies in the evidence of a child are not as significant as they would be for the evidence of an adult. He used, as an example, E.B.'s failure to mention to Officer Cunnington what she had told Ms. T.S. about watching a pornographic movie. He found that omission to be "not overly significant."

[33] The trial judge found that E.B.'s description of the events should be accepted, relying on features similar to the indicia of reliability that he considered at the admissibility stage: that the statement was given to a person in authority within a reasonable time after the incidents described, that the proper protocol for interviewing children was followed, and that there was corroboration of some peripheral details.

[34] Dealing with his finding that E.B. had no motive to lie, the trial judge stated that at this stage it had “some significance” but was not determinative. The trial judge viewed it only as “one factor in the equation” that, along with the other indicia of reliability that he found, supported his conclusion that the Crown had proved the case beyond a reasonable doubt.

[35] Finally, the trial judge observed that the court was being asked to make a finding of guilt notwithstanding the fact that the accused had been deprived of the right to cross-examine his accuser. Although he noted that cross-examination is “an important, if not essential, feature of a criminal trial”, he found that the denial of the right to cross-examine was not fatal to conviction. He was satisfied that the evidence as a whole “and particularly the hearsay statement of E.B.” was sufficient to prove the appellant’s guilt beyond a reasonable doubt.

D. ISSUES

[36] The appellant raises three issues on this appeal:

1) Did the trial judge err in law in his analysis of threshold reliability and by admitting the hearsay statement into evidence?
2) Did the trial judge err by misapprehending the evidence and finding that E.B. had no motive to lie? This was relevant to both threshold reliability and ultimate reliability, although this appeal turns on the finding of threshold reliability.

3) On a proper analysis, could the statement meet the high standard for threshold reliability and be admitted into evidence?

E. ANALYSIS

(1) Issue 1: Did the trial judge err in law in his analysis of threshold reliability and by admitting the hearsay statement into evidence?

a) General Principles: Admitting hearsay statements based on necessity and threshold reliability

[37] Normally, evidence is presented at a criminal trial by witnesses who give their evidence in court before the trier of fact, the judge or the jury, and are available to be cross-examined on behalf of the accused. This process is in accordance with ensuring that the accused can make full answer and defence.

[38] In general, where a witness who is called to testify has given a statement to police, that statement will not be admitted into evidence to prove the truth of its contents, because it is hearsay, a report of a previous statement: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paras. 34-36. However, it can be used in some circumstances to refresh the memory of the witness, and to challenge the witness in cross-examination where there are alleged inconsistencies between the earlier statement and the witness's in-court testimony.

[39] Section 715.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, applies specifically to victims and witnesses under 18 who have given a video statement

within a reasonable time after an alleged offence. Unless the judge is of the opinion that admission of the video statement in evidence would interfere with the proper administration of justice, the recording is admissible in evidence as part of the child's testimony in chief if, while testifying, the child adopts the contents of the video recording.

(1) The Principled Exception: Necessity and Threshold Reliability

[40] There are circumstances where relevant hearsay statements can be admitted under the principled exception to the hearsay rule, based on the two criteria of necessity and threshold reliability. If the statement is admitted, its ultimate reliability will be determined by the trier of fact as part of the analysis of proof beyond a reasonable doubt.

[41] Sometimes the necessity criterion may be satisfied because the declarant of the statement has died or, for another reason, is unavailable to give the evidence in court: *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 25. In those cases, the declarant will not be able to be cross-examined regarding the contents of the statement. There are other cases, however, where the necessity criterion is satisfied because the declarant has recanted the statement, such as in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, or has forgotten the statement. In those cases, depending on the circumstances, the veracity and accuracy of the contents of the statement may be able to be tested by cross-examining the declarant in court.

[42] Despite necessity, no statement will be admitted unless the trial judge determines that the statement is sufficiently reliable to overcome the dangers associated with the trier of fact considering hearsay evidence. In the most recent Supreme Court discussion of the rule, *Bradshaw*, Karakatsanis J., writing for the majority, explained the threshold reliability standard and set out the four hearsay dangers at para. 26:

> Threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it". These dangers arise notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact. In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them. The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity, and should be defined with precision to permit a realistic evaluation of whether they have been overcome. [Emphasis added; citations omitted.]

(2) Approaches to Threshold Reliability: Procedural Reliability and Substantive Reliability

[43] In *Bradshaw*, the court identified two bases upon which threshold reliability can be established, procedural reliability and substantive reliability: at para. 27; see also *Khelawon*, at paras. 61-63; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 30. These approaches may work in tandem and are not mutually exclusive. However, the threshold reliability standard "always remains high": *Bradshaw*, at para. 32.

[44] Procedural reliability addresses whether there are adequate substitutes for testing the truth and accuracy of the evidence, considering that it was not given in court, under oath, and under the scrutiny of contemporaneous cross-examination. The court identified the following substitutes: a video recording of the statement (for accuracy), the presence of an oath (for veracity), and a warning about the consequences of lying (for veracity). Importantly, the court emphasized that, in addition, for procedural reliability, "some form of cross-examination of the declarant, such as preliminary inquiry testimony or cross-examination of a recanting witness at trial, is usually required": *Bradshaw*, at para. 28 (citations omitted).

[45] Substantive reliability refers to indicia that the statement is inherently trustworthy, including the circumstances in which it was made as well as evidence that either corroborates or conflicts with the statement. Karakatsanis J. explained the substantive reliability standard in *Bradshaw*, at para. 31, by summarizing and endorsing the court's previous articulations:

> While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when

> the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true *(U. (F.J.)*, at para. 40).

[46] The seminal case of *Khan* is an example of the type of circumstances that indicate that the statement is substantively reliable. In that case, a three and one-half year old girl emerged from the doctor's office with a semen stain on her clothing and immediately told her mother what the doctor had done to her. The child was too young to testify in court. McLachlin J. summarized the circumstances that suggested that the child's statement was reliable and addressed the concerns that would have been tested by cross-examination at p. 548:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence.

[47] Consequently, the court could be satisfied that in-court cross-examination to test the child's statement was not needed as a substitute for contemporaneous cross-examination, because the issues that may have caused concern about the

reliability of the statement were effectively answered by the circumstances themselves.

[48] In *Bradshaw*, at para. 40, Karakatsanis J. explained that in assessing threshold reliability, the trial judge's role is focused on whether in-court cross-examination of the declarant would add anything to the trial process:

> At the threshold stage, the trial judge must decide on the availability of competing explanations (substantive reliability) and whether the trier of fact will be in a position to choose between them by means of adequate substitutes for contemporaneous cross-examination (procedural reliability). [Emphasis in original.]

b) Application to E.B.'s police statement

[49] The appellant submits that the trial judge erred in law by failing to apply the analysis required by the Supreme Court's case law to determining whether E.B.'s statement met the high standard of threshold reliability. He argues that the trial judge erred in his determination that the absence of cross-examination was of limited relevance to the threshold reliability analysis. As a result, the trial judge failed to consider several case-specific hearsay dangers that would arise from admitting the statement without any opportunity for cross-examination, and whether there were sufficient substitutes to overcome those dangers.

[50] I agree with the appellant that the trial judge improperly downplayed the importance of cross-examination in the threshold reliability assessment process.

[51] In his brief oral reasons for admitting the statement, the trial judge stated that while the ability to cross-examine the child is a factor when deciding the case, “it is not of particular relevance at this point.” He reiterated that view in his written reasons, where he stated that lack of cross-examination was a feature of the analysis at both stages, but more important when considering proof beyond a reasonable doubt than at the threshold reliability stage.

[52] In this case, the two most important of the four hearsay dangers identified by the Supreme Court in *Bradshaw* were perception and sincerity: whether the complainant accurately perceived what happened to her, and whether she was telling the truth. Despite the Supreme Court’s direction that “the scope of the inquiry must be tailored to the particular dangers presented by the evidence”, the trial judge did not advert to these dangers: *Khelawon*, at para. 4. He did not consider the case-specific dangers that would result from admitting the statement without any opportunity for cross-examination.

[53] By discounting the purpose and the value of cross-examination as a tool that could challenge the accuracy or veracity of the statement, the trial judge lowered the high bar for threshold reliability that the case law requires before hearsay statements can be admitted.

(1) Case-Specific Hearsay Danger: Perception

[54] In his reasons for finding that threshold reliability had been satisfied, the trial judge relied primarily on his acceptance of Dr. Sas's opinion that Officer Cunnington's approach to the interview followed the well-recognized protocol where the child was made to feel comfortable, mostly open-ended questions were asked, she understood the difference between the truth and a lie, the information she provided was detailed and accompanied by physical descriptions, and there was some corroboration, but of peripheral details such as the layout of the apartment.

[55] This protocol, however, does not assist in overcoming either of the hearsay dangers respecting the child's perception or truthfulness. As Dr. Sas explained in her evidence, the purpose of the interview protocol for alleged sexual abuse of a child is to ensure that the information the child provides is as complete as possible, and not contaminated by what she described as "suggestibility factors". Therefore, the use of the protocol will give comfort that the child is not being led to say something by leading questions, suggestions, or reactions by the interviewer. However, that does not ensure that the child has not been influenced in her perception by something that occurred prior to the interview, or that she is telling the truth.

[56] On the issue of E.B.'s perception of what occurred, there was evidence from the CAS worker, Ms. T.S., that E.B. had told her that her uncle had shown her a pornographic movie where a woman took off her clothes, a man undid his pants, took his penis in his hand and masturbated. There was also evidence from L.S. that E.B. had friends at school who told her about body parts, nude adults interacting on television, ejaculation, how babies are made, and what a man does during sex. This is the type of information that can have the potential to influence a child's perception of what happened to her or her description of what happened, and would ordinarily be the subject of cross-examination to explore that possibility.

[57] In his oral reasons for admitting the statement, the trial judge referred to "two main areas where one might question the reliability of the statement". One area concerned discrepancies in the stories that E.B. told different people. The trial judge gave the example of the pornographic movie. He noted that E.B. told the CAS worker that she had watched a pornographic movie with her uncle and described its contents, but she did not mention it to the officer, even when he asked her pointed questions about whether she had watched any adult movies. He concluded that such discrepancies in her evidence "are not fatal at this stage of the inquiry", but would be more relevant when deciding whether the statement can be relied on to prove guilt beyond a reasonable doubt.

[58] Then in his written reasons, the trial judge made no further reference to the issue of the pornographic movie at all. He did, however, comment on the possibility

that the complainant may have discussed sexual matters with classmates, saying that that would not "detract from the reliability of her recorded statement regarding sexual abuse."

[59] It is clear from these comments that the trial judge discounted the hearsay danger regarding the complainant's perception of what occurred, and therefore failed to turn his mind: first, to how the hearsay danger that the complainant's perception and description of what occurred with her uncle may have been influenced by seeing the pornographic movie; and second, to how that danger, and the danger from things she may have been told about sex by classmates, could be overcome without cross-examination, in order to satisfy threshold reliability.

(2) Case-Specific Hearsay Danger: Sincerity

[60] The other hearsay danger that arises with any statement is whether the declarant is being truthful or sincere. The trial judge considered that issue in two ways. The first was by noting that in the statement, the officer determined that the complainant knew the difference between the truth and a lie. The second was by finding that "there was simply no motive or reason for the child to fabricate her allegations". I will address this second point in more detail later in these reasons.

[61] The trial judge could not have been satisfied on this record that the difficulty of assessing the complainant's sincerity in her police statement could be overcome. There were two serious issues with E.B.'s sincerity.

[62] The first was that having found necessity based in large part on the complainant's testimony at the preliminary inquiry that she did not remember anything, the trial judge then failed to consider the relevance of what occurred at the preliminary inquiry and after it in assessing the threshold reliability of the complainant's police statement. Specifically, the trial judge erred by failing to take into account that although she promised to tell the truth at the preliminary inquiry, the complainant disclosed to Dr. Sas that in fact she had not.[2] Therefore, the trial judge erred by failing to take into account that the complainant admitted to lying in court in these proceedings and by failing to consider how that would affect the threshold reliability analysis.

[63] Second, the trial judge also did not advert to Dr. Sas's acknowledgement that testifying in court could traumatize E.B. if she had lied in her police statement and did not want to lie again. Neither of these serious issues regarding the analysis of E.B.'s sincerity could be followed up without cross-examination.

[64] In addition, procedurally, while not exactly a recantation of her police statement, E.B.'s preliminary inquiry testimony amounted to a repudiation of that statement. In *B. (K.G.)*, the Supreme Court was prepared to find that the threshold reliability of police statements that witnesses had recanted at trial could be

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[2] Like all the evidence of what the complainant told anyone, Dr. Sas's evidence that E.B. told her she had lied at the preliminary inquiry was hearsay and not available for the truth of its contents (i.e., that E.B. actually lied). However, the trial judge was obliged to consider it, as he was for example with what she told Ms. T.S., for the non-hearsay purpose that E.B. said this to Dr. Sas.

established only because the witnesses were available at trial for cross-examination, so that the court process for testing reliability would be in place. In this case, where the complainant was not available to be cross-examined in court, the trial judge was left to determine whether E.B.'s police statement, which she later repudiated, was "sufficiently reliable to overcome the dangers arising from the difficulty in testing it" without any cross-examination: *Khelawon*, at para. 49. However, the trial judge did not address this issue.

[65] Without in-court cross-examination, there was no substitute that could assist the court to address these serious issues regarding E.B.'s sincerity. The fact that the police statement was taken using the proper protocol does not provide a circumstantial guarantee of veracity or a substitute for cross-examination, nor does the fact that the complainant was able to demonstrate she knew the difference between the truth and a lie when she gave her police statement, particularly when she had repudiated that statement under a promise to tell the truth at the preliminary inquiry.

(2) Issue 2: Did the trial judge err by misapprehending the evidence and finding that E.B. had no motive to lie?

[66] The second way that the trial judge addressed the hearsay danger that the declarant was not being sincere or truthful was by making the finding that the

complainant had no motive to lie. This brings in the second ground of appeal raised by the appellant.

[67] In his oral reasons for admitting the statement, the trial judge included in the indicia of reliability his conclusion that the complainant had “no apparent motive to fabricate”, stressing the word apparent. In his written reasons for admitting the statement, he put the point much more strongly, saying: “Of significance, I am satisfied that there was simply no motive or reason for the child to fabricate her allegations against her uncle.”

[68] The problem with this finding is that the trial judge either misapprehended or ignored evidence that belied the conclusion that E.B. had no motive to fabricate the allegations. For example, E.B. made numerous statements to different people to the effect that she did not want to live with her uncle and wanted to live only with her mother. E.B. said this to Ms. T.S., the CAS worker; she said it to Dr. Sas; she said it in her police statement; and she sang it in the police interview room when the officer left her alone for a moment. She also told Ms. T.S. that she “didn’t really like” her uncle, that he had called her a “little bitch”, that she did not like the conflict he caused at home, and that her mother and uncle were always fighting.[3]

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[3] I note again that some of these statements were available only for a non-hearsay purpose, and not for the truth of their contents. Nevertheless, in order to conduct the threshold reliability analysis, the trial judge was obliged to consider this evidence for its non-hearsay purpose, that is, for the fact that E.B. told various people that she disliked her uncle or did not want to live with him.

[69] The trial judge did not address this evidence, and gave no explanation for his finding, in the face of this evidence, that E.B. had no motive to fabricate. This evidence could reasonably lead to the inference that E.B. might have told the story of sexual abuse and assault in order to have her uncle removed from the home. Without any cross-examination, that inference could not be discounted. By finding that the complainant had no motive to fabricate, the trial judge had to have ignored or discounted all of that evidence.

[70] The Crown argues that the evidence on this point was “mixed” because L.S. testified that E.B. had a good relationship with the appellant and that E.B. loved her uncle. However, the trial judge had “significant doubts” about L.S.’s credibility and noted that her natural inclination was to support her brother. If this evidence had formed any role in the trial judge’s finding of no motive to fabricate, in light of his rejection of L.S.’s credibility, he certainly would have provided an explanation for relying on it.

(3) Conclusion on Issues 1 and 2

[71] In deciding that E.B.’s statement satisfied the requirement of threshold reliability, the trial judge erred in law by failing to identify the specific hearsay dangers associated with the statement, based on the evidence of what the complainant disclosed to the CAS worker and to Dr. Sas, testified to at the preliminary hearing, and said in the statement itself. He further erred by failing to

tailor his threshold reliability analysis to the specific hearsay dangers at play. As a result, he failed to determine whether there were procedural or substantive substitutes for contemporaneous cross-examination that could overcome those dangers, in a case where there would be no in-court cross-examination of the declarant.[4]

[72] In addition, he erred by making a positive finding that the complainant had no motive to fabricate, without explaining how that finding was available given the significant potentially contrary evidence in the record regarding her animus toward the appellant, and used that finding to support the reliability of the statement.

[73] In coming to the conclusion that the trial judge erred by admitting the police statement, I am acutely aware of the challenges involved in eliciting evidence from children and the importance of ensuring that vulnerable children are adequately protected in circumstances where testifying may result in serious psychological

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[4] Although it was not argued on the appeal, in my view, the trial judge erred in law by admitting the police statement without also admitting the preliminary inquiry evidence of the complainant. This procedure was contemplated by the Supreme Court in *Bradshaw*, at paras. 28, 109; *Khelawon*, at paras. 75-79; *R. v. Hawkins*, [1996] 3 S.C.R. 1043, at para. 84; and *B. (K.G.)*, at pp. 786-87. In *B. (K.G.)*, Lamer C.J.C. observed that "[t]he reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness": at pp. 786-87, quoted in *Khelawon*, at para. 78. In *Hawkins*, a witness testified twice at the preliminary inquiry, first implicating the accused and later recanting most of her initial testimony. On the appeal to this court, Arbour J.A. noted that "[t]he Crown concedes that if [the witness's] evidence is to be read in at trial, it will have to be put to the jury in its entirety": *R. v. Hawkins* (1995), 22 O.R. (3d) 193 (C.A.), at para. 23, aff'd [1996] 3 S.C.R. 1043. In the case at bar, by admitting only one statement, when the declarant made another recanting or repudiating statement under oath, the trial judge created an unbalanced and skewed record for the trier of fact (this case was tried by a judge alone, but in another case, the trier of fact could be a jury). See *R. v. Fisher*, 2003 SKCA 90, 238 Sask. R. 91, at paras. 70-77, leave to appeal refused, [2004] 3 S.C.R. viii (note); and *R. v. Ansary*, 2004 BCCA 109, 184 C.C.C. (3d) 185, at paras. 5-19. In my view, had both statements been admitted at trial, with no further ability to cross-examine the child, it would have been clear that the trier of fact could not be satisfied of the appellant's guilt beyond a reasonable doubt.

harm. I am also mindful that the right to cross examine is a critically important feature of a criminal trial. In this case, given the serious concerns about the threshold reliability of the police statement, it was an error to admit it where the child was not available to be cross-examined on it.

(4) Issue 3: On a proper analysis, could the statement meet the high standard for threshold reliability and be admitted into evidence?

[74] In this case, there were no substitutes for contemporaneous cross-examination on the police statement because E.B. was not able to testify at the trial and be cross-examined. However, there were significant procedural reliability and substantive reliability concerns at play. There was evidence that the complainant's perception could have been influenced by what she heard from other children and from watching a pornographic movie. Further, there was evidence that could be seen to support a motive to lie. Finally, the complainant had made inconsistent statements about whether she remembered what had happened to her and whether she had told the truth when testifying on a promise to tell the truth at the preliminary inquiry.

[75] The major circumstance that made the statement reliable in the eyes of the trial judge was that the officer who interviewed E.B. did so in the appropriate manner so that the statement was not tainted by any suggestions made by the

officer. The trial judge also relied on some corroboration, but correctly noted that it was only on peripheral matters such as the layout of the apartment.

[76] Using *Khan* as a comparison: the statement in the case at bar was not made immediately following the event; it was not made as a spontaneous disclosure by the complainant but came about as a result of the CAS worker questioning her about her uncle; the language and description of the event that the child used could have been influenced by what she had heard from other children and from watching a pornographic movie; the complainant had repudiated her statement under a promise to tell the truth at the preliminary inquiry; and the complainant had a possible motive to fabricate in order to have her uncle removed from the home as she wanted to live alone with her mother.

[77] I conclude that without an adequate substitute for contemporaneous cross-examination, the normal one being cross-examination at the trial, none of these concerns with reliability could be addressed and potentially overcome. The fact that the officer conducted a proper, non-suggestive interview is not a sufficient indication of substantive reliability to overcome the other reliability problems with the statement. As in *Khelawon*, it simply cannot be said that E.B.'s evidence was "unlikely to change under cross examination", such that cross examination would add little or nothing to the process: at para. 107; see also *Bradshaw*, at para. 31.

[78] Consequently, had the trial judge undertaken the proper analysis, he would not have had the basis to admit the statement into evidence based on threshold reliability. As the Crown conceded at trial that the conviction was dependent on the admission of the statement, the appellant would have been acquitted.

F. DISPOSITION

[79] I would therefore allow the appeal, set aside the conviction and enter an acquittal.

"K. Feldman J.A."
"I agree. Thorburn J.A."

MacPherson J.A. (dissenting):

[80] I have read the draft reasons prepared by my colleague in this appeal. She concludes that the appeal must be allowed for two reasons:

> [T]he trial judge erred by finding threshold reliability, and in his positive finding that the complainant had no motive to fabricate. As a result, he erred by admitting the complainant's police statement.

[81] With respect, I do not agree with these conclusions and the reasons supporting them.

(1) The threshold reliability issue

[82] On this issue, my colleague concludes:

> I agree with the appellant that the trial judge improperly downplayed the importance of cross-examination in the threshold reliability assessment process.
>
> …
>
> By discounting the purpose and value of cross-examination as a tool that could challenge the accuracy or veracity of the statement, the trial judge lowered the high bar for threshold reliability that the case law requires before hearsay statements can be admitted.

[83] I do not agree with this analysis and conclusion.

[84] I begin with a brief recitation of the crucial facts that led to a police investigation, criminal charge, preliminary inquiry and trial. On March 31, 2015, a Children's Aid Society worker came to the complainant's school and interviewed

the seven (almost eight) year-old complainant. Immediately following this interview, the worker drove the complainant to the police station.

[85] At the police station, the CAS worker told Officer Cunnington that she had brought the complainant to the police station based on what she had been told by the complainant at school. Officer Cunnington proceeded to arrange to interview the complainant. The interview lasted about 50 minutes and was recorded. Two crucial points should be made about the interview.

[86] First, the location and conduct of the interview were exemplary. The interview took place in a small private room with a comfortable couch and chairs. Only Officer Cunnington and the complainant were in the room. Officer Cunnington was friendly and polite. He asked simple, non-leading questions and there was nothing even remotely concerning or threatening about his demeanour, voice or language.

[87] At the trial, Dr. Louise Sas was qualified to testify as an expert in child behavioural and clinical psychology, child memory, behaviours of victims of child sexual abuse, and child witnesses. She estimated that she had been qualified as an expert in Ontario courts about two hundred times.

[88] Based on Dr. Sas's expert report and trial testimony, the trial judge concluded:

> [T]he interview was done in accordance with a protocol that was discussed in some detail by Dr. Sas, at page six

> of her report and in her evidence before me. I will not review those points except to note that there are nine separate points. It was Dr. Sas's opinion that the interview was conducted in accordance with the protocol and the nine points that are listed in her report, and about which she testified were adequately established.

[89] To this I would simply add, having viewed the interview, that this conclusion is entirely reasonable. In the context of an interview of a seven year-old girl about possible criminal sexual activity by a close relative, Officer Cunnington's structure and conduct of the interview were very impressive indeed.

[90] Second, the performance of the seven year-old complainant throughout a 50-minute interview with a strange man in a strange room, and about an awkward subject matter, was also impressive. It needs to be recalled that at this juncture the complainant was answering questions about the same matter she had discussed with the CAS worker earlier in the day. She had not been taken into CAS custody (that happened after the interview), she did not know that her mother might be very unhappy about what she was saying, and she certainly did not know that she would not live with her mother for the next 17 months. Without all of this knowledge about the future that would flow from what she was saying (and which obviously had a role in what later happened at the preliminary inquiry and the trial), her answers to the police officer's questions were clear, thoughtful and, I say again, impressive.

[91] Against this backdrop, I turn to a consideration of my colleague's conclusion that the trial judge "improperly downplayed the importance of cross-examination in

the threshold reliability assessment process" and thus "lowered the high bar for threshold reliability" by failing to address the "significant procedural reliability and substantive reliability concerns at play."

[92] I do not agree with this conclusion. While the trial judge considered cross-examination to be more important to ultimate reliability, he was alive to its role in the threshold reliability analysis. In his written reasons, he said that hearsay "remains presumptively inadmissible, for valid policy reasons. Foremost of these is the lack of ability to cross-examine." He went on to remark that hearsay can be admitted "only where there are sufficient indicia of reliability to persuade the judge that the lack of right to cross-examine can be overcome."

[93] Further, the trial judge's reasons show that the statement and its context convincingly address procedural and substantive reliability. Procedural reliability centres on "whether the trier of fact will be in a position to rationally evaluate the evidence": *R. v. Khelawon*, 2006 SCC 57, at para. 76. The trial judge noted several factors enabling a rational evaluation, including:

> As observed by Dr. Sas, the interview was conducted in accordance with a well-recognized protocol. It was conducted in a relaxed atmosphere. The interviewee displayed no symptoms of concern at being interviewed. For the most part, open-ended questions were used.

[94] Moreover, at the beginning of the interview the complainant promised to tell the truth. Section 16.1(6) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5,

requires that a person under fourteen make such a promise instead of an oath before giving evidence. The complainant was seven years-old at the time of her police statement.

[95] Officer Cunnington also told the complainant to correct him if he made a mistake. Dr. Sas's report says she did so on three occasions. Most notably, when describing the assault, the complainant said she was lying down and the appellant was standing. The officer repeated that the appellant was standing on the bed, but the complainant corrected him to say he was standing on the floor.

[96] In my view, all these indicia contribute to put the trier of fact in a position to rationally evaluate the evidence. The absence of contemporaneous cross-examination is serious, but the fact that the statement was video recorded, that the complainant promised to tell the truth, and that she corrected the officer on significant details all buttress the statement's procedural reliability.

[97] Substantive reliability describes a statement so reliable that it is unlikely to change under cross-examination: *R. v. Bradshaw*, 2017 SCC 35, at para. 31, or where the only likely explanation is that the statement is true: *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, at para. 40.

[98] Here, the inherent trustworthiness of the statement emerges from the fact that its truth explains how the complainant was able to give such detailed descriptions of these acts. The same was true in *R. v. Khan*, [1990] 2 S.C.R. 531,

where McLachlin J. (as she then was) relied on necessity and reliability to find that the trial judge could receive a three year-old's statement to her mother that she had been sexually assaulted by her doctor. Citing this court's decision in *Khan*, she noted that "young children…are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken." As such, "the evidence of a child of tender years on such matters may bear its own special stamp of reliability": at p. 542.

[99] In this case, the complainant gave a detailed description of sexual acts well beyond her development stage. She described her uncle masturbating (she called it "playing with himself"), she showed the officer how long the appellant's penis was using her hands, she demonstrated how he pushed his fingers on her vagina, and described her uncle ejaculating onto her stomach: Dr. Sas's Report, at p. 9. In my view, the inherent trustworthiness of her statement is the only likely explanation for her vivid descriptions.

[100] I turn to a second component of my colleague's reasons on this issue, one she labels Case-Specific Hearsay Dangers – Perception and Sincerity. I will deal with these in turn.

(a) Perception

[101] My colleague finds that the protocol used to conduct the complainant's interview did "not ensure that the child has not been influenced in her perception

by something that occurred prior to the interview, or that she is telling the truth". She points to evidence on the record that the complainant may have seen a pornographic movie where a man undid his pants, took his penis in his hands, and masturbated. Similarly, the complainant may have had schoolyard conversations about ejaculation, how babies are made, and what a man does during sex. This evidence, my colleague concludes, offers alternate hypotheses for the detail in her allegations, and injects doubt into its reliability.

[102] I do not agree. These alternate hypotheses could certainly explain some of the detail in her allegations, like her description of the appellant masturbating or her unprompted use of the word "cock". However, this evidence does not subsume all details. For example, the complainant's approximation of the length of the appellant's penis or that the ejaculate "smelled gross" are untouched by the pornographic video or schoolyard discussions with her friends.

[103] In addition, the complainant said "I can't say no, I have to say yes" when asked what she responded to her uncle asking her if she liked the assault. Her answer to this question is hard to reconcile with her conversation with friends, and nearly impossible to relate to the pornographic videos.

[104] Consequently, I do not believe the trial judge erred in finding that other evidence, particularly that of the complainant's mother, did not "cas[t] sufficient doubt" on the statement so as to render it inadmissible. As the alternate

hypotheses leave some details unexplained, the only likely explanation is that the statement is true.

(b) Sincerity

[105] My colleague finds that the statement and its context do not dispel the possibility that the complainant is being untruthful. Her conclusion here is two-fold: first, the complainant admitted to lying at the preliminary inquiry; second, the record evidenced a motive to lie. Therefore, "[t]he trial judge could not have been satisfied on this record that the difficulty of assessing the complainant's sincerity in her police statement could be overcome".

[106] I do not agree with either finding. In my view, my colleague takes too narrow a view of the evidence going to sincerity. Viewed as a whole, the concerns relating to the complainant's truthfulness are minor, and do not detract from the statement's reliability.

[107] My colleague finds that the complainant could have been insincere in her statement because she promised to tell the truth at the preliminary inquiry, but later admitted to Dr. Sas that she had lied.

[108] With respect, this reasoning ignores what happened to the complainant immediately after her police interview. Basically, her life turned upside down. When the interview ended, the CAS immediately apprehended the complainant and

placed her in a foster home. She stayed there for 17 months. Only then did she return to her mother's care.

[109] In addition, by the time Dr. Sas became involved with the complainant, she was extremely guarded, disclosing only the information permitted by her mother. It is worth remembering that the complainant's mother testified on her brother's behalf at his trial. Accordingly, while the complainant admitted to Dr. Sas that she had lied at the preliminary inquiry (by saying she could not remember the earlier events), I am not convinced that this has an impact on the sincerity of her police statement. During the police interview, there was no spectre of CAS detention, foster care, her mother's anger and support for the appellant, and long-term separation from her family.

(2) The motive to lie issue

[110] In his oral reasons on the threshold admissibility issue, the trial judge said, referring to the complainant: "There is no apparent motive on her part to fabricate the allegations."

[111] In his written judgment at the conclusion of the trial, the trial judge said: "Of significance, I am satisfied that there was simply no motive or reason for a child to fabricate her allegations against her uncle."

[112] My colleague disagrees:

> The problem with this finding is that the trial judge either misapprehended or ignored evidence that belied the conclusion that [the complainant] had no motive to fabricate the allegation. For example, [the complainant] made numerous statements to different people to the effect that she did not want to live with her uncle and wanted to live only with her mother. … She also told [the CAS worker] that she "didn't really like" her uncle, that he had called her "a little bitch", that she did not like the conflict he caused at home, and that her mother and uncle were always fighting.

All of this leads my colleague to conclude: "The trial judge did not address this evidence, and gave no explanation for the finding, in the face of this evidence, that [the complainant] had no motive to fabricate."

[113] With respect, I do not agree with this conclusion. In my view, the evidence is less categorical than that set out by my colleague. The complainant said that the sexual activity with her uncle made her feel "nasty" and repeatedly described her allegations using the word "gross". Thus the evidence shows that the complainant could have disliked the appellant *because* of the sexual assaults. Accordingly, the trial judge was entitled to conclude that the complainant's police statement was not a "deliberate untruth … about a sexual act which in all probability is beyond their ken": *Khan*, at p. 542.

[114] In any event, the complainant's motive to lie is but one factor in the analysis: *R. v. Blackman*, 2008 SCC 37, at para. 42. Whatever acrimony exists between the complainant and the appellant does not undermine the reliability established by the procedural guarantees and the statement's substance.

Disposition

[115] I would dismiss the appeal.

Released: April 21, 2022 “K.F.”

“J.C. MacPherson J.A.”