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Criminal Law Newsletters
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1. — A judge of the Ontario Superior Court of Justice sentences a lawyer who made up and propounded a false story to a refugee eligibility hearing to 12 months in jail

Justice Pomerance of the Ontario Superior Court of Justice recently passed sentence upon Ms Zaher, a lawyer, whom she convicted, after a lengthy trial, of fabricating evidence for use in a judicial proceeding, contrary to s. 137 of the *Criminal Code*. She also convicted Ms Zaher of two offences under *The Immigration and Refugee Protection Act*. Ms Zaher concocted and propounded a false claim for refugee protection for the benefit of someone whom she thought was her client.

In lucidly written reasons for the sentence, Pomerance J. shed light on when, and to what degree, an accused's psychological problems may be a mitigating factor and on the principle of "mercy" in sentencing.

Ms Zaher was an immigration lawyer in Windsor, Ontario. She was retained by a man named Gill, who said that he was from India. He told Ms Zaher that he had no problems in India, but that he nevertheless wanted to live in Canada. She advised Gill that he could make a claim for refugee status. She fabricated a story that portrayed Gill as a victim of persecution in India. That story, which, as Pomerance J. put it at para. 4 of her reasons for sentence, " . . . contained some truth, but much falsehood", was presented to an immigration officer in Windsor at Gill's eligibility hearing, the first stage in a claim for protection as a refugee.

The hearing was interrupted when police arrested Ms Zaher. Gill was not really her client; he was an undercover RCMP officer, as was the man who posed as his translator. All of their meetings with Ms Zaher were recorded and the recordings were played at her trial.

Justice Pomerance found that Ms Zaher made up the story upon which the claim for refugee protection was based. While the story was based on an actual event in India, Gill told Ms Zaher that he was not at that event. Ms Zaher's story not only put him at that event but portrayed him as the victim of threats by the police. As Pomerance J. put it at para. 6, " . . . The core details necessary to ground the refugee claim were all untrue".

Ms Zaher testified at the trial that she did not intentionally fabricate the story but her evidence was disbelieved by Pomerance J.

The Crown sought a substantial penitentiary sentence for Ms Zaher; her lawyer sought a conditional sentence of imprisonment.

Ms Zaher was a 54-year-old first time offender who had practised law for many years. She was highly thought of in the legal community and in the community at large. As a young woman, she was the victim of a violent crime that, to quote Justice Pomerance at para. 15, " . . . left her feeling shame, depression and isolation". It continued to have a detrimental impact on her life. She also suffered chronic pain, as a result of a "devastating car accident" that took place in 1994. That accident also contributed to feelings of depression and anxiety that she suffered from. She also suffered from decreased concentration owing to impaired cognitive function that was caused by the accident.

Why Ms Zaher committed the offences was unclear. Pecuniary advantage was unlikely as a motive because her fee was very modest. Ms Zaher testified at the sentencing hearing that she was on the verge of a nervous breakdown when she dealt with Gill and experienced disturbing flashbacks from her own past. She felt like she was "losing her mind" and became very concerned with the welfare of Gill's daughters in India and, in particular, that they might be molested without their father to protect them. That is why, she said, she came up with the story about Gill's difficulties in India.

Reports from her family physician and a psychiatrist confirmed that she was seeking and being treated for or receiving counselling for depression, anxiety and chronic pain during the time

frame when she committed the offences.

Justice Pomerance rejected Ms Zaher's evidence about the role of her concern for Gill's daughters had in the commission of the offence. The recordings of the intercepted conversations with Gill do not reflect any concern at all for his daughters. The few references she made to the daughters were light-hearted. Nor was it clear how gaining refugee protection for Gill would have helped his daughters. He may or may not have brought them to Canada. This was not a case in which the client was in need of protection. He was not in any danger in India or anywhere else. Falsifying his claim did not protect his children or the vulnerable; in fact, it left those who really deserved protection to continue to suffer persecution or harm.

To quote Pomerance J. at para. 29:

> I do not doubt that Ms Zaher is generally concerned about the plight of women and children who are vulnerable to violence. I do not doubt that she has devoted much of her practice to helping such individuals. But I cannot accept that this played any role in the decisions she made in this case. The evidence does not bear this out. As with the trial evidence, I am forced to conclude that Ms Zaher's stated concern about Gill's daughters is something that was arrived at after the fact.

Justice Pomerance held that the psychological problems Ms Zaher suffered from did not diminish the moral culpability of her actions because there was no satisfactory evidence *linking* her psychological problems to her decision to make up and assert a false claim. While Pomerance J. did not doubt that she was suffering from depression and anxiety, she noted, at para. 32, that the intercepted communications "tend to belie the suggestion that Ms Zaher was operating in a state of extreme dysfunction". She seemed "conversational, engaged, and in good humour" and "attentive and competent". There was, more importantly, as she put it at para. 31, " . . . no apparent connection between the physical and mental health concerns and the fabrication of Gill's refugee story". Relying on *R. v. Ellis*, 2013 ONCA 739, 2013 CarswellOnt 17091 (Ont. C.A.), Justice Pomerance observed that while her poor health is relevant to sentence on compassionate grounds, Ms Zaher's health difficulties did not significantly reduce her moral culpability such that the need for deterrence should be outweighed by the need for rehabilitation.

Justice Pomerance underlined the seriousness of the offences. As she put it at para. 36, " . . . the offences before the court are very serious. They strike at the core of the immigration system in Canada". In *R. v. Mendez*, 2004 CarswellOnt 6146, [2004] O.J. No. 5733 (Ont. S.C.J.), Justice Dambrot rejected a plea for a conditional sentence for an immigration consultant who counselled two families to make false statements in furtherance of a claim for refugee status. A conditional sentence, he found, did not adequately reflect the need for general deterrence and denunciation.

Justice Pomerance referred to the *Mendez* case with approval and held that the need for general deterrence and denunciation was all the greater because Ms Zaher was a lawyer. To quote her again at para. 42:

> Lawyers stand in privileged positions within society. They have a duty to their clients, but also to the courts and tribunals in which they appear. Those who work within the immigration system as lawyers are expected to maintain high ethical standards of honesty and integrity. When a lawyer breaches the trust reposed in him or her by clients or by the system, a denunciatory and deterrent sentence must be imposed.

Because the offender's actions " . . . threatened the very legitimacy of the immigration process and with it, the public trust that is so critical to its success . . . ", a conditional sentence was not appropriate. "Real jail" was required to express the principles of denunciation and general deterrence, despite what Pomerance J. observed, at para. 58, the offender's "positive antecedents".

Having regard, however, to her loss of her licence to practice law (and her attendant loss of reputation and standing) and to her depression and anxiety, the court also declined to impose a penitentiary sentence as the Crown had asked for. Justice Pomerance noted that the pre-sentence report described Ms Zaher as "dejected" and that her lawyer, in submissions, referred to her as "broken". The need for denunciation and general deterrence, Pomerance J. noted, had to be tempered with mercy. To quote her at para. 52:

> The sentence imposed by the court must reflect the gravity of the crimes and the moral blameworthiness of the offender. But it must not ignore rehabilitation, and it must not be crushing. Some cases will call for an element of compassion or, as it is sometimes described, "mercy".

She then quoted, with approval, from *R. v. Holt*, 2012 BCSC 408, 2012 CarswellBC 764 (B.C. S.C. [In Chambers]), in which Dickson J. (as she then was) had this to say:

> The role of compassion in sentencing requires particular attention and comment in certain cases. On occasion, justice without clemency may be injustice. Injustice in any form is to be assiduously avoided. As Shakespeare and others have observed over the centuries, we are elevated when mercy seasons justice.

In this very difficult case, Justice Pomerance imposed a jail sentence of 12 months, recommending that she serve the sentence in a correctional facility where she had access to appropriate psychological counseling and support.

R. v. Zaher, 2017 CarswellOnt 986, 2017 ONSC 582 (Ont. S.C.J.)

2. — A judge of the Ontario Superior Court of Justice holds that a Crown Attorney's

office is in a conflict of interest in a prosecution where the accused's lawyer accepted employment at that office just before the accused's trial

Barry Mandamin was charged with a ten-count indictment, which included aggravated assault, sexual assault and threatening, and was to be tried in the Ontario Superior Court of Justice in Kenora, Ontario in July of 2016.

On the eve of his trial, his lawyer accepted a position with the Crown Attorney's office there.

His lawyer, of course, could not continue to act for Mr Mandamin and he was duly removed from the record; nor could he take carriage of the prosecution because that would manifestly be a conflict of interest.

Would it be a conflict of interest if another Crown Attorney from the Kenora Crown Attorney's office — one of the former lawyer's new colleagues-conducted the prosecution?

Mr Mandamin argued that that would be a conflict of interest and brought an application in which he asked that Crown Attorneys from the Kenora office be disqualified from prosecuting his case.

Justice Shaw allowed the application and ordered that a prosecutor from another Crown Attorney's office assume carriage of the prosecution.

The application was argued on the basis of an agreed statement of facts and on an affidavit from the applicant's former counsel.

The agreed statement of facts suggested that the Kenora Crown Attorney's office is a small office. There were only eight Assistant Crown Attorneys in the Kenora office and three in an office in Dryden, all of whom were supervised by the Crown Attorney for Kenora. They also socialize from time to time outside of work at house parties and "after-work events". The agreed statement of facts also indicated that the Crown Attorneys spoke often about "innumerable files and other matters" at meetings, in each other's offices and so forth.

Mr Manadmin's former lawyer deposed in his affidavit, however, that he had not discussed Mr Mandamin's case with the Crown Attorney who was assigned the case after he joined the Kenora Crown's office or with anyone else at the office nor had he shared any confidential information that he received while as counsel to Mr Mandamin.

MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, 1990 CarswellMan 233 (S.C.C.) (also known as *Martin v. Gray*) is the leading case on whether there is a disqualifying conflict of interest when a lawyer who has received confidential information joins a firm that is acting for a party with opposing interests. In that case, Sopinka J., who wrote the majority judgment, held that the test must be such that the public represented by a reasonably informed person would be satisfied that no use of confidential information would occur. Two questions had to be

answered. First, did the lawyer receive confidential information attributable to a solicitor-client relationship regarding the matter at hand? Second, is there a risk that it would be used to the prejudice of the client?

Shaw J. quoted with approval and at length from the majority judgment in *Martin v. Gray* and held that it applied to this case.

Courts, Justice Sopinka wrote at paras 48-50 of *Martin v. Gray*, should draw the inference that lawyers who work together, share confidences, unless there is "clear and convincing evidence" that "all reasonable measures" have been taken to ensure that no disclosure will occur by the "tainted" lawyer to members of the firm engaged in the case or matter against the former client. "Undertakings and conclusory statements in affidavits without more, are not acceptable", Sopinka J. noted, because, as he put it, "It is no more than the lawyer saying'trust me'".

Justice Sopinka suggested, at para. 53 of *Martin v. Gray*, that "independently verifiable steps" must be taken by the firm to ensure that confidences are not disclosed in order for courts to find that the confidentiality of the client has been and will be protected.

As Justice Shaw noted, there was no evidence before him that the Kenora Crown Attorneys took any "independently verifiable steps" to protect the applicant's interests. Indeed, there was no evidence that any instructions were ever issued that there was to be no communication between Mr Mandamin's former counsel and the Crown Attorney or Crown Attorneys who had carriage of Mr Mandamin's prosecution. The affidavit from the former counsel was exactly the kind of thing that Sopinka J. held was not good enough to displace an inference that information might be shared, especially in a small office where counsel often socialized and spoke about cases of theirs. Thus, on the evidence before the court, Shaw J. could not find that the Crown's office had taken the necessary measures to protect the applicant.

There were two competing lines of authority concerning possible conflicts of interest where defence counsel join Crown Attorney's offices.

Justice Shaw followed the reasoning of Rowe J. (as he then was) in *R. v. F. (D.P.)*, 2000 CarswellNfld 168, *(*sub nom. *R. v. D.P.F.)* [2000] N.J. No. 170 (Nfld. T.D.). In that case, Justice Rowe observed that case law from Nova Scotia established the following principles, which were in accord, he said, with the reasons of Sopinka J. in *Martin v. Gray*:

> 1. in a conflict of interest situation that arises when a defence lawyer joins a Crown Attorney's office, an affidavit from the lawyer and senior Crown prosecutors that no confidential information has been or will be disclosed is not enough to meet the *Martin v. Gray* standard;
>
> 2. in absence of adequate "institutional safeguards", when a defence lawyer joins a Crown Attorney's office, everyone in that office is conflicted out from appearing against

former clients of the "tainted" lawyer (or the "tainted" lawyer's firm);

3. however, a Crown Attorney from another office is not so conflicted;

4. nor is a lawyer from outside the Crown Attorney's office, including a Crown agent (a per diem counsel);

5. as an exception to (1) above, there are circumstances (including where a conflict objection is raised at a late stage in the proceedings with limited scope for the misuse of confidential information) where an affidavit by the Crown Attorney is enough to meet the *Martin v. Gray* standard.

Thus, Shaw J. found that the Kenora Crown Attorney's office was implicated in a conflict and they were disqualified from the prosecution of the applicant.

R. v. Mandamin, 2017 ONSC 418, 2017 CarswellOnt 1125 (Ont. S.C.J.)

3. — The Ontario Court of Appeal allows an appeal and orders a new trial because the trial judge misused a prior consistent statement to bolster the credibility of the complainant

In a recent case, the Ontario Court of Appeal underlined that it is an error to use a prior consistent statement of a witness to bolster his or her credibility.

The complainant, A.Y., met the appellant on a social networking app. The appellant described himself as a photographer and they agreed to meet at his apartment for him to take photographs of her. According to A.Y., after he took some photographs of her, the appellant made advances to her and she told him to stop. She testified that he agreed to stop, but soon pushed her to a bed and groped her. She tried to push him away, but could not overcome him. He tried to have intercourse with her and, realizing that she could not stop him, she ceased resisting his advances (but did not consent to sexual intercourse with him). After some ten minutes, he stopped. She went to the bathroom, angry, and permitted him to escort her to a taxi stand near his apartment. She went straight to her home.

The appellant gave a very different version of the events that took place after he took photographs of A.Y. at his home. He denied that he initiated any sexual contact at all. A.Y. kissed him, he said at his trial, and he was surprised and shocked by this. He told A.Y. that he had a girlfriend and reminded her that she told him that she had a boyfriend. She was angry when he rebuffed her advances. He took her to a taxi stand and heard nothing about an alleged sexual assault until about 14 months later.

The complainant sent an email to the police the day after she got home from the appellant's. She felt angry and blamed herself for putting herself in a position where the appellant could take advantage of her. She could not sleep. Early the next morning, she decided to report the

assault by sending an anonymous email to the local police station. She did not use her usual email address, but instead used one she had not used in years.

She described the attack in some detail in the email and her narrative was consistent with her testimony at trial. She referred to the assailant as "Jay"-the alias he used online — and provided his telephone number. She asked that the police contact her and do something about the assault.

She sent the email the morning after the alleged assault. The police, unfortunately, did not check their mailbox for "a few months" and did not respond for some five and a half months. In their reply, they asked that she come forward and identify herself so they could commence the investigation. A.Y. testified that she initially checked regularly for replies after she sent the email, but she stopped doing so after she did not get a reply. She checked her mailbox over 6 months after the police sent their reply and read it at that time.

A.Y. was with her boyfriend when she read the police email. She became upset and told her boyfriend what had happened. He persuaded her to go to the police and she did so. The appellant was charged some 14 months after the incident.

A.Y. and the appellant were the only witnesses at the trial. The trial judge recognized that the outcome of the trial depended on his assessment of the credibility of the complainant and the appellant and he directed himself that he must evaluate the evidence in accordance with the principles expressed in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 1991 CarswellOnt 80 (S.C.C.).

He first considered the appellant's evidence and found that it was incredible and did not leave him with a reasonable doubt. Turning then to the complainant's evidence, he set out why he believed her evidence.

One of the reasons he accepted her evidence was that her decision to send the email and not follow up was consistent with the behaviour of a victim who was upset and ashamed of her own gullibility.

In his discussion of the last of the three reasons he believed the complainant, he had this to say: "most importantly, I find A.Y.'s email sent contemporaneously with the events, to be corroboration of her evidence".

He referred to the email six times in his reasons and at one point he said that the email " . . . did not differ in any significant way from the evidence that [A.Y.] gave at this trial". The Crown counsel argued at trial that the complainant's version of events had been consistent throughout, beginning with her description of the assault in her email and culminating in her testimony at trial.

The email was introduced into evidence during the examination-in-chief of the complainant.

She read the document in its entirety into the record and it was made an exhibit. There was no objection by trial counsel for the appellant and, unfortunately, no indication by counsel or the trial judge of the purpose for which the email was tendered or of any limitations on its use.

The Ontario Court of Appeal held that the trial judge was quite entitled to use the anonymous sending of the email and the failure to follow up as circumstantial evidence that was consistent with A.Y.'s testimony about her state of mind after the incident. Whether the contents of the email were true is irrelevant to this evidentiary use.

But, notwithstanding the arguments of the Crown, the trial judge went further than this. He used the email in a manner that was impermissible. He used it to bolster the credibility of the complainant in that it afforded "corroboration of her evidence". In *R. v. Dinardo*, 2008 CarswellQue 3451, [2008] 1 S.C.R. 788 (S.C.C.), the Supreme Court held that a trial judge's reference to a prior consistent statement as a "form of corroboration" of the complainant's evidence constituted reversible error. "Corroboration" refers to evidence from a source other than the witness whose evidence is challenged that confirms the veracity of the evidence of that witness. Because the email did not come from a source independent of A.Y., it could not be corroboration. Prior consistent statements that are consistent with testimony are generally inadmissible to bolster the witness's credibility.

The Court of Appeal found that the trial judge used the email improperly because there was no indication on the record by the trial judge or by either counsel at any time that the email could not be used for the truth of its contents or that it could not be used to support A.Y.'s credibility simply because its contents were consistent with her evidence. In fact, as was noted above, the Crown counsel unfortunately argued that the consistency in A.Y.'s accounts of what happened supported her credibility. He emphasized that A.Y. "never wavered" from her description of the events in the email to her evidence at trial. Moreover, the judge did not explain or clarify what he meant by "corroboration".

Because the trial judge's findings of credibility were tainted by an improper use of the email, the appeal against conviction was allowed and a new trial was ordered.

R. v. Zou, 2017 ONCA 90, 2017 CarswellOnt 1157 (Ont. C.A.)

4. — The Ontario Court of Appeal explains how prior consistent statements made can be admitted and used by triers of fact as "narrative as circumstantial evidence"

In another recent case, the Ontario Court of Appeal explained a gloss on the rule that prior consistent statements may not be used to bolster the credibility of witnesses who make them.

The respondent, a police officer, was convicted of one count of sexual assault. The complainant was a prisoner he was transporting to the police station. The complainant alleged that the police officer sexually assaulted her while searching her in the back of a police cruiser.

The summary conviction appeal court judge quashed the conviction and ordered a new trial because the trial judge erred in admitting and relying on a prior consistent statement made by the complainant.

The Court of Appeal held that the statement was admissible and was not used by the trial judge for an impermissible purpose. The appeal was allowed and the conviction was restored.

The complainant was arrested while in possession of cocaine.

The respondent, a uniformed police officer, was called to the scene of the arrest to take her to the police station. While she was handcuffed behind her back, the respondent patted down her arms and thighs. A short time later, he searched her for the second time by leaning into the cruiser and patting down her legs and thighs and chest. Just before they got to the police station, the respondent stopped the cruiser, opened the back door and leaned in. He then searched her a third time. He pulled the complainant's tank top away from her chest and looked down her top while shining a flashlight down it. She told him that she was uncomfortable and he returned to the driver's seat and drove to the police station.

When they arrived at the police station, the complainant was told by a female officer, Cst Flint, that she would search her, to which she said, "I've already been searched three times, why are they searching me again?" She became emotional and confused. When asked what she meant, the complainant replied, "I've been searched three fucking times. How many times am I going to be searched?" Cst Flint reported this to a staff sergeant who asked a sexual assault officer to interview the complainant.

The respondent was charged with sexual assault.

At trial, following a *voir dire*, the trial judge admitted the statement to Cst Flint on the basis that it was a "spontaneous utterance and as a prior statement to assist the court with the ultimate credibility of [the complainant]". He noted that because the defence directly asserted that the complainant fabricated the allegation of sexual assault, the prior statement took on greater significance. It was, as he put it, "but one factor" to be taken into account in a larger assessment of her credibility. The trial also suggested that the statement was also admissible under the principled approach to the hearsay rule because it was both necessary and reliable.

Justice Vallee, sitting as a judge of the summary conviction appeal court, held that the trial judge erred in finding the prior consistent statement was admissible under the principled approach to the hearsay rule as it was not "necessary" because the complainant testified at the trial. She also concluded that the trial judge erred in using the statement for the proof of its contents and that he used it for the impermissible purpose of bolstering the complainant's credibility by inferring truthfulness from repetition. Vallee quashed the conviction and ordered a new trial.

The starting point of the analysis of Justice Hourigan, who wrote for the majority, was that the complainant's statement to Cst Flint was presumptively inadmissible because it was either hearsay or a prior consistent statement and both are presumptively inadmissible.

Prior consistent statements are presumptively inadmissible because they lack probative value: *R. v. Stirling*, 2008 CarswellBC 506, [2008] 1 S.C.R. 272 (S.C.C.) at paras. 5-7. The fact that someone said the same thing on a prior occasion is, as a general rule, not probative of whether he or she is telling the truth.

The statement to Cst Flint could be admissible if it fell into an exception to the hearsay rule or into an exception to the rule against prior consistent statements.

The trial judge identified three possible routes of admissibility for the statement: admission under the traditional hearsay exception of *res gestae* or spontaneous utterance; admission under the principled approach to hearsay; and admission as an exception to the rule against prior consistent statements.

Because the Crown counsel at the summary conviction appeal conceded that the pre-conditions for the *res gestae* exception to the rule against hearsay were not met, Hourigan J.A. did not consider this.

Hourigan J.A. held that the statement was not admissible under the principled approach to the hearsay rule. While the absence of an opportunity to concoct a story tended to support the conclusion that the utterance was reliable, Hourigan J.A. held that the statement was not necessary. Necessity does not require that the witness is unavailable or unable to give evidence. Necessity may be met where a witness cannot give a full and frank account of the events or has difficulty in remembering significant details of the events. The record, however, did not establish that the complainant was unable or unwilling to give a full account of events or could not recall significant details of what had happened. Thus, the Court of Appeal held that the necessity test was not met, but for a different reason than the summary conviction appeal court judge.

The common law recognizes some exceptions to rule against prior consistent statements.

One of the exceptions to the rule against prior consistent statements is to rebut an allegation of recent fabrication. The statement is not admitted for the truth of its contents but rather to show that the witness did not come up with details after the time suggested by opposing counsel.

Prior consistent statements are sometimes admitted as "pure" narrative. If admitted as "pure" narrative, the statements carry no weight because they are tendered only to give background to explain how the complaint came to be before the court. The statement is not admitted for the truth of its contents, nor does its admission permit any inferences that would make the evidence of one person more compelling than that of any other witness. It is admitted

exclusively to assist the trier of fact in understanding what the Court of Appeal described in *R. v. F. (J.E.)*, 1993 CarswellOnt 137, 16 O.R. (3d) 1 (Ont. C.A.) as the "chronological cohesion" of the case.

But, as Hourigan J.A. observed at para. 31, sometimes "the circumstances surrounding the making of the prior consistent statement are such that the statement assists in assessing the reliability and credibility of a witness's in-court testimony", thus giving prior consistent statements admitted as "narrative" a "more substantive use": *R. v. Dinardo*, 2008 CarswellQue 3451, [2008] 1 S.C.R. 788 (S.C.C.) at para. 39. This is referred to as "narrative as circumstantial evidence".

As he put it at para. 33, "in some cases, prior consistent statements can be useful tools in assisting a trial judge in the assessment of the truthfulness or reliability of the declarant, whatever their age": *R. v. C. (M.)*, 2014 ONCA 611, 2014 CarswellOnt 11537 (Ont. C.A.) at para. 66; *R. v. Curto*, 2008 ONCA 161, 2008 CarswellOnt 1238 (Ont. C.A.) at para. 37.

As the Court of Appeal held in *Curto*, *supra*, it will not always be necessary to know why or how the complaint came to the attention of the police, but the fact that a statement was made, and the context in which it was made, can sometimes be helpful in assessing a witness's credibility.

The line between the permissible and impermissible uses of prior complaints is a fine one, as noted by the Supreme Court of Canada. As Charron J. put it in *Dinardo* at para. 20:

> . . . the evidence of a prior complaint cannot be used as a form of self-corroboration to prove that the incident in fact occurred. It cannot be used as evidence of the truth of its contents. However, the evidence can "be supportive of the central allegation in the sense of creating a logical framework for its presentation [. . .] and can be used in assessing the truthfulness of the complainant."

Hourigan J.A. concluded, at para. 43, that:

> . . . taking the reasons as a whole, the trial judge used the prior consistent statement for the permissible purpose of evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint, and the spontaneous nature in which it came out, in order to assist him in assessing the truthfulness of the complainant's in-court testimony.

The prior consistent utterance was, in view of what Hourigan J.A. called, at para. 44, the "sequence and timing of events" and the "emotional state of the complainant at the time of the utterance", evidence which could assist the trier of fact in evaluating the complainant's credibility.

Justice Doherty, who concurred in the disposition of the appeal, wrote a separate judgment in which he offered a more detailed, and perhaps a clearer, explanation for reason why the statement to Cst Flint was properly admitted.

He began his judgment with the suggestion that the admissibility of a prior consistent statement should not turn on whether it fits into a pre-existing common-law exception to the rule against prior consistent statements. This is in accord with the court's rejection of the "pigeon hole" approach to hearsay evidence. Courts, they have said, should instead focus on the broader issues of necessity and reliability.

Doherty J.A. proposed that courts should focus on broader considerations of relevance, materiality and probative value. The existing exceptions are, he suggested, to a great degree the product of the application of broader principles underlying the admissibility of evidence.

Where a prior consistent statement is tendered by a party, the court must consider the purpose for which the statement is tendered, whether it is tendered for the proof of its contents or otherwise. The purpose must have relevance to a material issue in the proceeding. Once the purpose of the statement is identified, the party tendering the evidence must demonstrate that it has some probative value in respect of the purpose for which it is offered. If the Crown, say, wishes to tender a prior complaint in a sexual assault trial, it must show how it can properly be used to evaluate the complainant's credibility. If the rationale for the admission of the evidence comes down to the suggestion that consistency between the prior statement and the complainant's evidence justifies admissibility, their argument fails because consistency on its own does not support credibility. But the statement may well be admissible if it has a bearing on the attack the defence makes on the credibility of the complainant.

In the case at bar, the complainant testified that she was searched three times by the respondent in his cruiser. The first two searches did not concern her. She was not familiar with police practices and assumed the respondent was following established procedures. During the third search, however, she became uncomfortable when the officer shone a flashlight down her top and looked at her breasts.

On her evidence, she did not know if the respondent's actions constituted a sexual assault. She had no intention of alleging that he had sexually assaulted her or of complaining about his behaviour when she arrived at the police station. She presented herself as a reluctant complainant who did not wish to initiate an investigation of the respondent and was only testifying because she had been served with a subpoena. On her evidence, it was the police and not her who initiated the investigation and they carried it forward to trial.

She was, as Doherty J.A. put it at para. 69, "vigorously cross-examined" at the trial. The defence alleged that she had fabricated the allegations and put to her various reasons why she decided to do so.

The complainant's evidence that she did not complain about the respondent's actions at the police station and that the police initiated the investigation in response to her exasperated utterance that she had been searched three times, was consistent with, and therefore tended to confirm, her trial evidence to the effect that she was a disinterested and reluctant complainant with no real interest in the outcome of the trial. Because of the manner in which the complaint was made — indirectly, as an exasperated response to being searched yet again — that tended to weaken the defence suggestion that she fabricated an allegation of sexual assault. Had she fabricated the allegation, she would likely have come out with it more directly instead of introducing it obliquely as a protest against being searched further.

R. v. Khan, 2017 CarswellOnt 1731, 2017 ONCA 114 (Ont. C.A.)

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