COURT OF APPEAL OF YUKON

Citation: *R. v. M.J.H.*,
2019 YKCA 15

Date: 20190806
Docket: 18-YU837

Between:

Regina

Respondent

And

M.J.H.

Appellant

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Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Hunter

On appeal from: An order of the Territorial Court of Yukon, dated July 30, 2018 (*R. v. M.J.H.*, 2018 YKTC 45, Whitehorse Docket 17-00019).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon May 15, 2019
Place and Date of Judgment:	Vancouver, British Columbia August 6, 2019

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Hunter

Summary:

H was convicted of breaking and entering and committing sexual assault. At trial, he and J, his girlfriend at the time of the alleged offence, testified that he could not have committed the offence because he was elsewhere when it was committed. Eight months after the alleged offence was committed, but seven months before trial, H disclosed to the Crown that he would be calling that alibi evidence. The trial judge concluded that the evidence was concocted on the basis that H and J had discussed the incident prior to trial, and drew an inference of guilt against H on that basis. H appeals and applies to admit fresh evidence. Held: application to admit fresh evidence dismissed; appeal allowed. The judge erred in inferring that the alibi was fabricated, and drawing an adverse inference of guilt against H. There was no independent evidence of concoction to support his conclusion.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] At trial, L.D. said that M.J.H. sexually assaulted her on December 1, 2016. Mr. H. said he was at home asleep at the time Ms. D. said the offence was committed and therefore could not have committed the offence.

[2] Mr. H. was convicted on July 30, 2018, in the Territorial Court of Yukon of breaking and entering and committing sexual assault contrary to s. 348(1)(b) of the *Criminal Code*. A conditional stay of proceedings was entered on a second count of sexual assault contrary to s. 271 of the *Code*. He appeals the conviction.

[3] Although Mr. H. raises a number of issues, in my view, the trial judge erred in his analysis of Mr. H.'s alibi defence and I would allow the appeal and order a new trial on that basis without considering the other grounds.

Background

[4] The complainant, Ms. D., testified that her friend C.S. had brought Mr. H. to her residence on December 1, 2016, and that they drank vodka together. She testified that none of them did drugs together that day.

[5] In the afternoon, there was a telephone call between Mr. H. and his girlfriend, R.J. According to Ms. J., she was surprised that Mr. H. was at Ms. D.'s residence and she asked Mr. H. to go home. Mr. H. testified that Ms. J. wanted him to get

home before 4:30 p.m., when she finished work for the day. Mr. S. and Mr. H. left in the late afternoon or early evening.

[6] According to her evidence, Ms. D. went to sleep after they left, but woke up with Mr. H. on top of her with his penis in her vagina. She pushed him off and asked, “What the fuck are you doing?” He said that she had told him to come back. She testified that her pyjamas and underwear were pulled to her right side. She said she grabbed a poker from the stove and told him to “get the fuck out”. She called her sister, A.D., right after it happened. A.D. came over and took her to a nursing station. Ms. D. testified that Mr. H. had not been wearing a condom but she did not think he had ejaculated inside of her. She initially agreed to have a rape kit completed, but after the swab was taken she changed her mind, as she did not trust the RCMP. She reported the incident to the police on March 7, 2017.

[7] Mr. S. testified that he and Mr. H. had arrived at Ms. D.’s house at approximately 3:30 p.m. He testified that he and Mr. H. were drinking beer and that Ms. D. was drinking vodka. The three of them had some shots of vodka. He testified that he and Mr. H. stayed there between one and one and a half hours and that none of them used any drugs while they were there. He estimated that he and Mr. H. left Ms. D.’s house between 4:30 and 5:30 p.m. He said that Ms. D. walked them to the door and did not invite either of them to return later. Mr. S. said that the next day Mr. H. told him that Ms. D. had chased him out of her house with a stove poker. He was not cross-examined on a statement to the police in which he said that Ms. D. had told him about the stove poker <u>before</u> he spoke with Mr. H.

[8] A.D. testified that she received a phone call from Ms. D. at approximately 6:30 p.m. Ms. D. was upset and wanted her sister to come over. On her way there, A.D. called Ms. D. again and Ms. D. told her she had been raped. Telephone records were filed as an exhibit showing phone calls between Ms. D. and A.D. between 6:34 and 6:37 p.m. on December 1.

[9] When A.D. arrived at Ms. D.’s residence, Ms. D. said she had woken up to find Mr. H. on top of her. A.D. said that Ms. D. told her she then passed out and

when she woke up again, Mr. H. was still there, and Ms. D. told him to leave. A.D. took Ms. D. to the nursing station. She testified that although L.D. was initially willing to allow a rape kit to be prepared, she decided she did not want to do so.

[10] No issue was taken with the admission and use of the prior consistent statements on appeal, and I do not intend to address them.

[11] Mr. H.'s testimony starkly differed from Ms. D.'s. He said that he did not return to her house after leaving with Mr. S. He also said that while he was at Ms. D.'s residence, she and Mr. S. had been smoking crack cocaine. He said he told Ms. D. that he would not have sex with her because he heard she had HIV. He said that after leaving, he walked home, arrived there shortly before 4:30 p.m. and passed out on his bed with his clothes on. He knew he needed to get home by 4:30 p.m., because that was when Ms. J. finished work. Ms. J. woke him up at some point so that he could eat. He denied saying anything to Mr. S. about Ms. D. chasing him with a poker.

[12] Ms. J. testified that she received a call from Mr. H. when he was at Ms. D.'s house. She thought it odd because Mr. H. had never been to Ms. D.'s house, and he usually stayed home to drink. She asked Mr. H. to go home. When she returned home from work at approximately 4:35 p.m., Mr. H. was asleep in bed, still wearing his clothes. She cooked hamburger soup while he slept. He woke up, ate some soup, and then went back to bed. She said neither of them left the house later that night.

[13] An RCMP officer, Cst. Rousseau, testified that he had spoken with Ms. J. on April 3, 2017, as he had been looking for Mr. H. in order to arrest him. Cst. Rousseau obtained an arrest warrant on April 7, 2017, and contacted Ms. J. to tell her about the warrant and to request that she pass the information along to Mr. H. so that he could turn himself in. Ms. J. provided Cst. Rousseau with a statement in November 2017. In that statement, she said that she first learned about the allegations approximately eight months after the incident occurred. In her testimony she said that she had been mistaken, and that she was actually aware of

the allegations in April 2017. She said she did not provide a statement to the RCMP earlier because she was not asked to do so and she does not have a good relationship with the police.

[14] Notice of Mr. H.'s alibi evidence was given to the Crown just prior to the November 9, 2017 court appearance at which the trial date was fixed.

[15] Mr. H.'s trial counsel (who was not counsel on appeal) did not cross-examine A.D. on an earlier statement she had made to police that when she spoke with Ms. D., she had advised her to bring her clothes to the nursing station because of their evidentiary value. She did not bring her clothes with her, and in fact burned them. His trial counsel also did not cross-examine Mr. S. on a statement he had made to police that Ms. D. had told him about chasing Mr. H. away with a stove poker before Mr. S. had spoken to Mr. H., and that Ms. D. had told him that she was not sure if Mr. H. "actually did anything because she was in panic mode".

Trial judgment

[16] The judge rejected Ms. J.'s testimony, in part because she did not disclose her evidence until eight months after hearing about the alleged assault. He found that her recollection of details was "unusual" because the day had been unremarkable. He also rejected her evidence because her demeanour was "angry and argumentative." He also noted—although he did not "place any particular weight on this"—that her provision of the alibi coincided with her break-up with Mr. H. and that this could lead to "a common sense inference" that the alibi was a point of contention between them.

[17] He concluded that Ms. J. fabricated Mr. H.'s alibi in association with Mr. H. He found that "[Mr. H.] and R.J. together decided to have R.J. provide him with an alibi to avoid him being found guilty of having sexually assaulted L.D." He found that Mr. H. and Ms. J. would have had the opportunity to discuss the various details of the alibi, including the content of their phone call, what time Mr. H. needed to be home, and that Ms. J. made Mr. H. supper. He drew an inference of guilt against Mr. H. as a result of his conclusion that the alibi was fabricated.

[18] He continued, and said if he were wrong in having decided that Mr. H. collaborated with Ms. J. to fabricate his alibi, he would nonetheless have rejected Mr. H.'s evidence and would have convicted him.

[19] Given his rejection of Ms. J.'s evidence, the judge found that Mr. H.'s denial did not raise a reasonable doubt.

[20] I will address the judge's reasons in more detail in my discussion of his analysis of the alibi evidence.

Issues

[21] Mr. H. raises the following issues:

1. Did the trial judge err in his treatment of the alibi evidence?
2. Did the trial judge fail to properly apply the principles in *W.(D.)*?
3. Did the trial judge misapprehend evidence?
4. Did Mr. H. receive ineffective assistance from his trial counsel?

[22] Given that I agree with Mr. H. that the judge's treatment of the alibi evidence was in error, it is not necessary to address the other three issues.

Fresh evidence application

[23] Mr. H. applies to adduce the following fresh evidence in support of his submission that he received ineffective assistance of counsel:

1. Evidence of statements made by Mr. S. to the RCMP, in which he says that Ms. D. told him that she had chased Mr. H. from her house with a stove poker before Mr. H. did and that Ms. D. was not sure if Mr. H. "actually did anything."
2. Evidence of statements made by A.D. to the RCMP, in which she says that she told Ms. D. to take her clothes to the nursing station because of their evidentiary value.

3. An affidavit of trial counsel explaining why she did not ask certain questions in cross-examination.

[24] He further submits the following evidence in support of his ground in relation to the alibi error:

4. An affidavit of Mr. H., in which he deposes that he had disclosed his alibi to his defence counsel at the earliest opportunity.
5. An affidavit of Ms. Kailey Irwin, in which she deposes that she had been copied in email correspondence in which Mr. H.'s defence counsel advised that an alibi issue had been raised in her first meeting with him.

[25] Mr. H.'s previous counsel has unfortunately passed away and, thus, the evidence of Ms. Irwin was tendered in place of the evidence of counsel.

[26] As I would order a new trial on other grounds, I do not find it necessary to address the issue of ineffective assistance of counsel, and therefore do not need to address the admissibility of the first three statements. In terms of the alibi, the Crown concedes that the alibi was disclosed to it and does not argue the late disclosure of alibi as a basis for drawing an adverse inference against Mr. H.

[27] I will address the affidavits of Mr. H. and Ms. Irwin in the analysis in relation to the alibi error.

Alibi

[28] There are several errors raised with respect to the trial judge's handling of the alibi evidence. These include: i) a misapplication of the law in relation to finding independent evidence of fabrication before drawing an adverse inference against Mr. H., ii) that he misapprehended the evidence of Ms. J. with respect to why she recalled the day in particular, why her demeanour was angry on the witness stand, and why she did not report the alibi to the police at the first opportunity of hearing of the offences, and iii) that having drawn an adverse inference of guilt, the trial judge

said if he was wrong in that regard, he would still disbelieve Mr. H. without giving any reasons for doing so.

[29] The trial judge correctly and extensively set out the law in relation to alibi. He did not, however, properly apply the law.

[30] The issues I intend to address are whether the trial judge erred when he concluded that Ms. J.'s failure to advise the police of the alibi at the first opportunity weighed against her credibility, whether her failure to report the alibi could result in an adverse inference against Mr. H., and whether there was any independent evidence from which the trial judge could find that the alibi was concocted by or with the knowledge of Mr. H. in order to deceive.

Analysis

[31] When the accused advances an alibi defence, they are claiming that they were elsewhere when the offence was allegedly committed and therefore could not have committed it. An accused raising an alibi has an obligation to give notice of the alibi in order to provide the police or Crown a meaningful opportunity to investigate it. The obligation of the accused to disclose to the Crown the substance of an alibi defence they plan to raise at trial is a limitation on the accused's constitutional right to silence: *R. v. Wright*, 2009 ONCA 623 at para. 1; *R. v. Cleghorn*, [1995] 3 S.C.R. 175 at paras. 20–25 (*per* Major J., dissenting). Where the accused failed to disclose that information in a timely way, the trier of fact may draw an adverse inference.

[32] But that adverse inference can only be drawn against the defence itself: *R. v. Noble*, [1997] 1 S.C.R. 874 at para. 111, citing *Cleghorn*. The distinction between drawing inferences about the defence itself and about the accused's guilt is vital to the careful but fair treatment of alibis. Late disclosure in and of itself does not give rise to an adverse inference of guilt.

[33] Failure to make timely disclosure of an alibi can bear on the credibility of the defence: *R. v. Chambers*, [1990] 2 S.C.R. 1293 at 1319; *R. v. Crawford*, [1995] 1 S.C.R. 858 at para. 26.

[34] The evidence disclosed that the alleged offence occurred around 6:30 p.m. Ms. D. testified that she called her sister as soon as Mr. H. left. Telephone records show their calls between 6:35 and 6:37 p.m. Mr. H. and Ms. J. testified that Mr. H. was at home in bed by 4:35 p.m. and that he did not leave the house for the rest of the night. The evidence raises a pure question of alibi in that Mr. H. said he could not have committed the offence as he was home when Ms. D. said the offence was committed.

[35] Two aspects of alibi are raised in this appeal: whether the trial judge wrongly considered the timing of the disclosure of the alibi by Ms. J. and whether he erred in drawing an adverse inference against Mr. H. on the basis that the alibi was concocted.

i) Assessing credibility based on late disclosure of an alibi

[36] An alibi should be disclosed to the Crown or police in a timely way and with sufficient detail to permit it to be investigated prior to trial: *Wright* at para. 20. While this is not a legal requirement, the failure to do so may result in the trier of fact giving the alibi less weight: see *Cleghorn* at paras. 20–25 (*per* Major J., dissenting) and the cases cited therein. The requirement that the accused must disclose their alibi is an exception to the accused's right to silence: *R. v. M.B.P.*, [1994] 1 S.C.R. 555 at 578; *Cleghorn* at para. 23 (*per* Major J. dissenting).

[37] A negative inference cannot be drawn against an accused for failing to disclose the alibi immediately upon arrest, on the basis that an innocent person would have made such a disclosure, provided that there was timely disclosure. *Cleghorn* at paras. 24–25; *R. v. Parrington* (1985), 20 C.C.C. (3d) 184 at 188 (Ont. C.A.); *Taillefer c. R.*, [1989] R.J.Q. 2023 at 2039 (C.A.).

[38] In the *Inquiry Regarding Thomas Sophonow* (Winnipeg: Manitoba Justice, 2001), the Honourable Peter Cory, who acted as Commissioner in that inquiry, made the following recommendation with respect to the disclosure of alibi evidence:

> 1. The alibi defence should be disclosed within a reasonable time after the Crown disclosure has been completed and the Defence has reviewed it and

> is in a position to know the case that must be met. When that disclosure should be made by the Defence will vary from case to case. It will obviously depend upon the extent of the Crown disclosure, how long it will take the Defence to review that disclosure and how quickly Defence Counsel can prepare the alibi evidence disclosure. To the extent that it is possible, the disclosure of the alibi evidence should be in the form of statements signed by the witnesses.

[39] As can be seen, the Commissioner suggested that the timing of the disclosure should be made after the Crown disclosure has been completed. In my view, that is one important consideration; however, each case will turn on its own facts.

[40] It is key in this appeal to keep in mind that the rationale for prohibiting a negative inference if the alibi is disclosed in time to allow investigation is that the accused has a right to silence, the exercise of which cannot be used against him. As noted above, the requirement to disclose an alibi defence is an exception to that right that must be circumscribed narrowly.

[41] There is no obligation on a third party to go to the police and no negative inference may be drawn against an accused from the failure of a third party to tell the police that the wrong man had been charged: *R. v. Hahn* (1995), 62 B.C.A.C. 6 at paras. 47–48 (C.A.).

[42] The Crown did not argue at trial that an inference should be drawn against Mr. H. because of late disclosure of the alibi. The alibi was disclosed in November 2017, some seven months in advance of the trial. The Crown on appeal agrees that there was no issue with the timeliness of the disclosure, in that it was disclosed with sufficient time to be investigated.

[43] The defence submitted that the trial judge erred in finding that Ms. J.'s testimony was false based on the fact she did not tell the police about the alibi until November. He cites *Parrington* at 187–88, as affirmed in *R. v. Maracle* (2006), 206 C.C.C. (3d) 36 at para. 17 (Ont. C.A.):

> The governing principle is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor to be

> considered in determining the weight to be given to the alibi evidence: see *R. v. Mahoney* (1979), 50 C.C.C. (2d) 380, 11 C.R. (3d) 64 (Ont. C.A.), and *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13, 138 D.L.R. (3d) 221, 28 C.R. (3d) 324 (Ont. C.A.). Where, as in this case, there is adequate time for investigation then the time of disclosure is no longer a factor for consideration and no reference should be made to it in the charge to the jury.

[44] The trial judge did not believe Ms. J.'s alibi evidence, in part because of her failure to immediately disclose the alibi to the police upon learning of the allegations. He concluded that Ms. J. would surely have tried to exonerate Mr. H. immediately, as she knew he was innocent. The trial judge did not accept the reasons given by Ms. J. for failing to tell the police, which were essentially that they did not ask her and she did not trust them. He was unaware of the evidence that defence counsel was trying to arrange to see her, and that the alibi had been disclosed to defence counsel at their first meeting.

[45] He then drew a direct line between disbelieving her evidence and drawing an inference against Mr. H.

[46] As noted above, the law is clear that late disclosure of an alibi only weighs against the reliability of the alibi when there is insufficient time for meaningful investigation. That did not occur here. The question is whether the same analysis applies to the disclosure of an alibi by a witness, or whether the trier of fact can take into account the failure of a witness to raise the alibi at the first possible moment when considering the witness's credibility.

[47] In *R. v. Gulliver*, 2017 ABCA 223 at para. 8, aff'd 2018 SCC 24, the majority concluded that:

> …The trial judge rejected the evidence of the appellant's friend. He found it unreliable. This was an assessment amply supported by the evidence. The alibi witness conceded that his memory had been ruined by excessive drug use. Justice Miller found the alibi evidence contrary to credible evidence corroborating the complainant's evidence. He noted that the appellant's alibi was not disclosed to Mr. Gulliver's trial counsel until approximately eighteen months after the appellant's arrest. Justice Miller was entitled to rely on this late disclosure in evaluating the strength of the alibi evidence.
>
> [Emphasis added.]

[48] While such a delay cannot be held against an accused because of the right to silence, I know of no reason why the trial judge could not consider it when assessing the credibility of Ms. J. There is a difference between concluding that alibi evidence is unreliable because it was disclosed late—a conclusion that can only be drawn where the evidence could not be properly investigated—and concluding that the credibility of a witness suffers when that witness does not immediately come forward to the police. In my opinion, the latter was an assessment within the judge's discretion and, despite the explanation she provided, it cannot be said that he erred. However, his analysis did not end at an adverse credibility assessment. He also used the late disclosure by Ms. J. for an evidentiary purpose as one of the bases for drawing an adverse inference against Mr. H., which he was not entitled to do. No adverse inference could be drawn against Mr. H. because of Ms. J.'s delayed reporting of the alibi.

[49] In addition, as noted above, late disclosure precluding meaningful investigation means an adverse inference can be drawn against the legitimacy of the defence, but does not permit the leap to an inference of guilt.

ii) Drawing an adverse inference from a fabricated alibi

[50] There is a significant distinction between an alibi that is disbelieved and an alibi that is fabricated or concocted for the purpose of deceiving the trier of fact: *R. v. Coutts* (1998), 126 C.C.C. (3d) 545 at para. 13 (Ont. C.A.). The former has no evidentiary value, whereas the latter is a form of after-the-fact conduct upon which an adverse inference may be drawn against the accused: *R. v. Tessier* (1997), 113 C.C.C. (3d) 538 at paras. 24–27 (B.C.C.A.); *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365 at paras. 26–27 (Ont. C.A.). In other words, evidence of a fabricated or concocted alibi is after-the-fact conduct from which a trier of fact can infer consciousness of guilt: *R. v. Laliberté*, 2016 SCC 17 at para. 3.

[51] It is only when an alibi has been concocted to deceive the trier of fact that the rules against self-incrimination and the right to silence may be set aside and an

inference capable of supporting guilt may be drawn: *O'Connor* at paras. 17–19 (Ont. C.A.).

[52] Finding that an alibi was fabricated for the purpose of deception permits the Crown to place the accused's false statements on the scale against him. The principle was enunciated by Justice Rowles in *Tessier*:

> [45] The words "proof of falsity" were used by Martin J.A. in [*R. v.*] *Davison*, [20 C.C.C. (2d) 424] at 430 [(Ont. C.A.)]: "*Proof* of the falsity of the alibi may constitute affirmative evidence of guilt". His reference in that regard was to *Kahn v. The Queen*, [1967] 1 All E.R. 80 at 83 in which Lord Hodson stated:
>
> > What is found against the appellants is that *the statements were concocted for the purpose of escaping from the consequences of their crime* and, if false, are admissible to show guilt. As has been said: "The recourse to falsehood leads fairly to an inference of guilt".
>
> [Emphasis in *Kahn* quotation added by Rowles J.A.; emphasis in *Davison* quotation in original.]

[53] However, mere disbelief of an alibi does not stand for the fact that the event occurred. As explained in *Tessier*:

> [49] While an alibi is a denial that the accused was present at the scene of the crime, the alibi, if disbelieved, is not evidence to the contrary. "[T]he fact that a witness is disbelieved does not prove the opposite of what he asserted.": per Gibb J. in *Steinberg v. Comr. of Taxation (Cwth)* (1875), 134 C.L.R. 640 at 695. Or as Scrutton L.J. observed in *Hobbs v. Tinling*, [1929] 2 K.B. 1 at 21:
>
> > If by cross-examination to credit you prove that a man's oath cannot be relied on, and he has sworn that he did not go to Rome on May 1, you do not, therefore, prove that he did go to Rome on May 1; there is simply no evidence on the subject.

[54] To conclude otherwise would engage in circular reasoning that is not permitted. Indeed, it is contrary to the principle that the burden of proof rests with the Crown throughout the case.

[55] In order to find that the accused was a party to a fabrication or concoction for the purpose of deceiving the trier of fact, there is an additional requirement that there be other evidence, independent from the evidence that contradicts or discredits the

accused's version of events: *O'Connor* at para. 21; *R. v. Hibbert*, 2002 SCC 39 at para. 59.

[56] In addition, as Justice Arbour explained in *Hibbert*, there must be independent evidence that links the accused to participation in the deceit if others have put forward a false alibi:

> [63] If the alibi witnesses were found to be deliberately untruthful, their attempt at deceiving the jury could not be visited upon the accused unless he or she participated in the deceit. If, on the other hand, there was evidence that the accused attempted to put forward a fabricated defence, that effort, akin to an effort to bribe or threaten a witness or a juror, could be tendered as evidence of consciousness of guilt.

[57] The principles applicable to using a fabricated alibi as after-the-fact conduct are found at para. 67 of Arbour J.'s reasons in *Hibbert*:

> – In the absence of evidence of concoction (deliberate fabrication) an alibi that is disbelieved has no evidentiary value.
>
> – A disbelieved alibi is insufficient to support an inference of concoction or deliberate fabrication. There must be other evidence from which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury. It is the attempt to deceive, and not the failed alibi, that supports an inference of consciousness of guilt.
>
> – In appropriate cases, for instance if there were multiple accused, the jury should be instructed that the fabricated alibi may be used to place the accused at the scene of the crime, but may fall short of directly implicating him in its commission.
>
> – When there is evidence that an alibi was fabricated, at the instigation or with the knowledge and approval of the accused, that evidence may be used by the jury to support an inference of consciousness of guilt.
>
> – In cases where such an inference is available, the jury should be instructed that it may, not must, be drawn.
>
> – A fabricated alibi is not conclusive evidence of guilt.

[58] In *Hibbert*, the Court concluded that evidence that the family members discussed the timing of the events and assisted in the reconstruction of the events was not independent evidence of concoction. As Arbour J. explained at paras. 64–65, there was no evidence that the accused had enlisted family members to falsely testify.

[59] In this case, the trial judge rejected Ms. J.'s evidence. He found that she would have told the RCMP immediately upon learning that Mr. H. was charged with sexual assault, despite her evidence that she mistrusted the police and was not asked. Mr. H. characterizes this as improperly finding late disclosure.

[60] The trial judge found that Ms. J. initially said that she had learned of the events approximately eight months after they are said to have occurred and then testified that it was four months later. The judge gave significant weight to this inconsistency.

[61] The judge also disbelieved Ms. J. because she recalled significant details, such as what Mr. H. was wearing, that she had made hamburger soup for supper, and that she recalled details of a telephone call with Mr. H. He found Ms. J. to be angry and argumentative when she testified.

[62] He summarized his reasons for not believing Ms. J.:

> [108] My reasons for disbelieving R.J. are due to:
>
> - The circumstances surrounding the late disclosure of the alibi evidence, including her comment in her statement that she had not heard the details of the incident for at least eight months, after when she heard them as early as April 2017;
> - The recollection of details that I find unusual given that there was no particular reason for her to have such a recollection on a day that was apparently unremarkable, such as what she made for dinner, the telephone conversation and the location of the red skidoo;
> - Her demeanour on the stand, in particular with respect to the manner in which she answered questions both in direct and in cross- examination; and
> - The evidence of the other witnesses, in particular that of L.D., which I found to be reliable and credible on the circumstances of M.J.H. coming back to her residence and sexually assaulting her.

[63] He then said the following:

> [109] This is not a case where my reasons for not believing the testimony of R.J. are due to her being imprecise, struggling with recalling important details, possibly being mistaken, or being inconclusive or vague. It is also not a case where I simply decided to believe the evidence of L.D. and moved from having done so to therefore finding the evidence of R.J. to be incapable of belief. I do not believe R.J.'s testimony because I believe her evidence to

> have been fabricated in order to assist M.J.H. in his defence for all the reasons stated above. As such, I find that her testimony was contrived.
>
> [110] I further am satisfied that her evidence was contrived in association with M.J.H., and that M.J.H. and R.J. together decided to have R.J. provide him with an alibi in order to avoid him being found guilty of having sexually assaulted L.D.
>
> [111] R.J. and M.J.H. discussed the circumstances of the sexual assault at a point or points prior to the alibi statement being made. Although not cross-examined on it, the timing of the break-up of the relationship proximate to the timing of the statement could lead to a common sense inference that the providing of the alibi was a source of contention between them. I will not, however, in the absence of any questioning on this point, place any particular weight on this.
>
> [112] There was opportunity for M.J.H. and R.J. to discuss: the timing and the details that would allow for an alibi to provide exculpatory evidence for M.J.H.; details like the red skidoo; the content of the phone call while M.J.H. was at L.D.'s residence; what time M.J.H. would have needed to be home; and that R.J. made supper for him after waking him up; all pointing to a discussion between them about the fabrication of an alibi.
>
> [113] None of these alone are of great significance. It is the entire body of the evidence that leads me to conclude that the alibi was fabricated with M.J.H.'s cooperation, if not at his request.
>
> [Emphasis added.]

[64] The judge then concluded that he was able to draw an inference of guilt with respect to Mr. H. He continued, at para. 116, to find that if he was wrong in finding that Mr. H. collaborated with Ms. J. to fabricate an alibi, he would reject the evidence of Mr. H. in any event. And then, despite repeated assertions that he was not disbelieving Mr. H. because he accepted the evidence of the Crown witnesses, he did exactly that:

> [117] After disregarding the evidence R.J., I do so [reject the evidence of Mr. H.] because of my findings with respect to the testimony of L.D., A.D. and that of C.S. to the extent that it is corroborative of L.D.'s testimony such as the comment made to him by M.J.H. of being chased L.D. with a poker.

[65] In my view, the trial judge erred in concluding that Mr. H. participated in the concoction of the alibi. There was not a scintilla of independent evidence, as it is defined in the law, to support that conclusion. The sole fact that Mr. H. and Ms. J. discussed the allegations is not evidence supporting a fabrication. If it was, every alibi put forward by a family member or friend would be seen to be concocted. As in

Hibbert, there is no independent evidence supporting concoction that was intended to deceive the trier of fact, and the trial judge erred in so finding. He therefore erred in drawing an inference of guilt against Mr. H.

[66] The trial judge went on to say that if he was wrong, he would still disbelieve Mr. H.'s evidence and would find him guilty. In my view, that additional finding cannot correct the grave error of law he made in incorrectly drawing an adverse inference against Mr. H. This is particularly so given that he gave no reasons for rejecting Mr. H.'s evidence other than that it was inconsistent with the Crown witnesses' evidence.

[67] The fresh evidence suggests that defence counsel was aware of the alibi upon first meeting with Mr. H. in April 2017. In addition, Ms. J. said she was to meet with defence counsel, but the meeting never occurred. I have concluded that there was a grave error in law without reliance on the fresh evidence; therefore, there is no need to admit that evidence: *Truscott (Re)*, 2007 ONCA 575 at paras. 99–100; *R. v. Stolar*, [1988] 1 S.C.R. 480 at 490–91.

Disposition

[68] For the reasons above, I would allow the appeal, set aside the conviction and the conditional stay, and order a new trial on both counts.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Cooper"

I AGREE:

"The Honourable Mr. Justice Hunter"