SUPREME COURT OF YUKON

Citation: *R. v. Lennie*, 2019 YKSC 51

Date: 20191003
S.C. No. 18-AP004
Registry: Whitehorse

BETWEEN

REGINA

RESPONDENT

AND

PETER JAMES LENNIE

APPELLANT

Restriction on publication: publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*

Before Madam Justice E.M. Campbell

Appearances:
Lauren Whyte — Counsel for the Respondent
Luke S. Faught — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Lennie appeals from his conviction, after trial, of one count of sexual interference (s. 151 of the *Criminal Code*) and one count of sexual assault (s. 271 of the *Criminal Code*). Prior to sentencing Mr. Lennie, the trial judge conditionally stayed the sexual interference conviction.

[2] The admissibility of the complainant's prior consistent statement and its permissible use are central issues in this appeal.

FACTS

[3] On or about November 11, 2016, R.A., who was twelve years old at the time, was babysitting the two young children of Mr. Lennie and his partner, Amber Aleekuk.

[4] After the couple left for the evening, R.A. watched television with the children before the three of them eventually fell asleep on a mattress in the living room. Mr. Lennie and Ms. Aleekuk arrived home in the early morning hours. Both had consumed alcohol. They asked R.A. to wake them up at 7 a.m. as Mr. Lennie had to get ready for work. She did as instructed, but was unable to rouse them, and as a result she went back to sleep on the mattress.

[5] She testified that some hours later, she awoke to Mr. Lennie touching her vaginal area. No one else was in the living room. She told him to stop but he would not. She started to cry and called Ms. Aleekuk's name. At that point, Mr. Lennie stopped touching her. Ms. Aleekuk entered the living room. She became angry and began striking Mr. Lennie. Mr. Lennie returned to the bedroom and began packing his personal effects. Ms. Aleekuk told R.A. to leave the residence. She followed this direction and walked home. I note that, at trial, Crown and defence counsel did not question R.A. with respect to what she said to Ms. Aleekuk when she called her name and complained to her.

[6] Mr. Lennie testified at trial. He agreed with the complainant in respect of much of what happened during the relevant time except for the sexual touching, which he denied.

[7] Mr. Lennie also testified that he never touched R.A. He said he was approximately 6 feet away from her, attending to the wood stove, when R.A. woke up and started accusing him of touching her, as Ms. Aleekuk was making her way into the

living room. He stated that, upon hearing the complaint, Ms. Aleekuk got mad at him and hit him. He also indicated that, as a result of Ms. Aleekuk's reaction, he went to the bedroom and started packing his personal effects. Mr. Lennie's denial was rejected by the trial judge.

ISSUE

[8] It is not disputed that R.A.'s complaint to Ms. Aleekuk constitutes a prior consistent statement. At trial, neither Crown counsel nor defence counsel specified the purpose for which R.A.'s complaint to Ms. Aleekuk was led into evidence. Defence counsel did not object to the complaint being referred to during R.A.'s testimony. Further, he asked Mr. Lennie specific questions at trial about the content and timing of R.A.'s complaint to Ms. Aleekuk. No *voir dire* was requested by the parties nor was one held to determine the admissibility of the prior consistent statement. The parties did not address the admissibility of R.A.'s prior consistent statement in their final submissions to the trial judge. The trial judge referred to this statement a number of times in his decision.

[9] This appeal first proceeded before Justice Gower, who sadly passed away shortly after hearing the appeal. Prior to this appeal being heard a second time before me, the appellant narrowed his grounds of appeal to focus on the trial judge's use of R.A.'s prior consistent statement in convicting him.

[10] Consequently, this appeal raises the following issues:

1. Did the trial judge err in failing to conduct a *voir dire* to determine the admissibility of R.A.'s prior consistent statement?

2. Did the trial judge err in using R.A.'s prior consistent statement for an impermissible purpose?

POSITION OF THE PARTIES

[11] The appellant submits that the trial judge erred in using the complainant's prior consistent statement, which is presumptively inadmissible, in assessing credibility, without holding a *voir dire* to determine its admissibility. Alternatively, the appellant submits that the trial judge erred, at least, in not putting the parties on notice that he intended to do so and in not giving the parties the opportunity to make submissions on that issue.

[12] According to the appellant, this error led to the trial judge using the prior consistent statement in an impermissible way, i.e. to assess his credibility. The appellant submits that the trial judge erroneously placed R.A.'s prior consistent statement on the scale when weighing the evidence, thus committing an error of law and a miscarriage of justice.

[13] The respondent acknowledged at the hearing that it would have been preferable to hold a *voir dire* at trial to determine the admissibility of R.A.'s prior consistent statement and to determine the purpose for which it could be used. However, the respondent submits that this procedural defect is cured by the fact that the prior consistent statement would have been found admissible at trial in any event, under the narrative as circumstantial evidence exception to the prior consistent statement rule and/or under the excited utterance exception to the hearsay rule.

[14] The respondent submits that the trial judge used R.A.'s prior consistent statement in a permissible way to assess her credibility. The respondent also submits

that the trial judge was entitled to use the complainant's testimony, including her prior consistent statement, to assess the credibility of the accused, because, by that point, the judge had already found the complainant credible and reliable.

[15] The respondent points out that it is defence counsel, not Crown counsel, who elicited the content of R.A.'s prior consistent statement through the testimony of Mr. Lennie. According to the respondent, this point should factor into the Court's analysis in determining whether the trial judge erred in not holding a *voir dire* and in the outcome of this appeal.

STANDARD OF REVIEW

[16] This appeal involves the application of a legal standard, the admissibility and permissible use of R.A.'s prior consistent statement, to the facts of the case. This is a question of law to which the standard of correctness applies (*R. v. Shepherd*, 2009 SCC 35, at para. 20; *R. v. S. (D.G.),* 2013 MBCA 69, at para. 10).

ANALYSIS

[17] Prior consistent statements are out of court declarations made by witnesses that are consistent with their testimony in court. Gestures or sounds that communicate a message may also qualify as prior consistent statements; for example a nod of the head in response to a question.

[18] Prior consistent statements are presumptively inadmissible, subject to a number of exceptions. The reasons invoked in the case law to explain this exclusionary rule are that prior consistent statements lack probative value, are self-serving, redundant and easily fabricated (The Honourable S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th Ed. (Toronto: Thomson Reuters, 2019),

page 11-2; *R. v. M.P.*, 2018 ONCA 608, at para. 77). They also constitute hearsay when adduced for the truth of their contents (*R. v. Dinardo*, 2008 SCC 24, at para. 36). Furthermore, the fact that a witness has said the same thing prior to testifying is not probative of them being truthful on the stand. Also, it would be self-serving to allow a prior consistent statement to be used to boost a witness' credibility (*R. v. Khan*, 2017 ONCA 114, at para. 25, application for leave to appeal dismissed in *R. v. Khan*, [2017] S.C.C.A No. 139; *R. v. Sterling*, 2008 SCC 10, at para. 5).

[19] As noted by Justice Paciocco in his often-cited article *The Perils and Potential of Prior Consistent Statements: Let's Get it Right* (2013) 17 Can. Crim. L.R. 181, at p. 184: "The prior consistent statement rules are entirely about the integrity of the trial itself. These rules exist ostensibly to protect the accuracy of factual findings and to keep the trial process efficient."

[20] The prior consistent statement rule and the hearsay rule work together to determine the admissibility of a prior consistent statement. As explained by Justice Paciocco, prior consistent statements have a dual component: a "declaration" component and a "hearsay" component. If the prior consistent statement is tendered for the truth of its contents (*Dinardo*, at para. 39; *R. v. D.L.D.*, 2014 ABCA 218, at paras. 11 and 14), then it constitutes hearsay and the hearsay rule applies. If the prior consistent statement is tendered to prove its "declaration" component, i.e. simply to prove that it was made and/or to provide context to the circumstances surrounding its making, then the prior consistent statement rule and its exceptions apply.

[21] There are a number of recognized exceptions to the prior consistent statement rule including, but not limited to, pure narrative, narrative as circumstantial evidence and

to rebut an allegation of recent fabrication. Each exception has a specific purpose and limited admissibility. For example, a prior consistent statement admissible under the "pure narrative" exception has no evidentiary value apart from helping the trier of fact understand the unfolding story of the case before them or, in other words, how the "complainant's story was initially disclosed" and made its way before the court. (*R. v. Dinardo*, at para. 37; *R. v. L.S.*, 2017 ONCA 685, at para. 32). Another exception to the rule is to rebut an allegation of recent fabrication. This exception permits the use of the prior consistent statement not for the proof of its contents, but only to counter an allegation that the complaint was concocted or was recently fabricated.

[22] The purpose for which a party seeks to adduce a prior consistent statement in evidence is therefore central to the Court's analysis. It determines which evidentiary rule (hearsay and/or prior consistent statement) and exceptions apply in a given case. It also delineates the specific extent of the statement's admissibility. When a statement is admissible under an exception to the rule, its permissible use is limited to the purpose of that exception.

[23] The prior consistent statement rule and its exceptions must therefore be applied with caution. As stated by Justice Paciocco, in *The Perils and Potential of Prior Consistent Statements: Let's Get it Right,* at p. 183:

> Restricted admissibility rules create difficulty because where, logically, evidence is capable of serving more than one purpose when reasoning through to a decision, rules of restricted admissibility operate by preventing one or more of those purposes. Since evidence cannot be used to draw conclusions it logically seems to support, the law operates counterintuitively. Rules of restricted admissibility are therefore something of a legal trap in which relying on logic rather than law can lead to error.

[24] With these principles and caution in mind, I now turn to the issues raised in this case.

Issue 1. Did the trial judge err in failing to conduct a *voir dire* to determine the admissibility of R.A.'s prior consistent statement?

[25] As previously indicated, R.A.'s complaint to Ms. Aleekuk constitutes a prior consistent statement. As such, it is presumptively inadmissible. Unfortunately, at trial, Crown and defence counsel did not raise the admissibility of the prior consistent statement as an issue. Nor did they state or clarify the purpose for which it was led into evidence through the testimony of the complainant and the accused. Due to the way the trial unfolded, the trial judge did not conduct a *voir dire* nor was he called upon by the parties to make a ruling on the admissibility of R.A.'s prior consistent statement.

[26] However, considering the accused's denial at trial that anything happened, I am unable to conclude, as argued by the respondent, that by eliciting the content of R.A.'s prior consistent statement during Mr. Lennie's examination in chief, defence counsel in effect dispensed with the need for the trial judge to assess the statement's admissibility and the purpose for which it could be used. While trial judges should be mindful not to interfere with the strategic decisions of counsel in a criminal trial, they must also ensure that they only consider admissible evidence in coming to a decision. In *R. v. D.L.D.*, defence counsel did not object to the Crown tendering in evidence numerous text messages sent by the complainant, some of them containing prior consistent statements that the trial judge admitted as *res gestae* (also referred to as excited or spontaneous utterance) without holding a *voir dire*. The Alberta Court of Appeal stated, at para. 14, that "the trial judge was only entitled to consider properly admissible

evidence in assessing the appellant's culpability, and only then to the extent of its permissible use." The Court of Appeal granted the appeal and returned the matter for trial because it could not determine, on the basis of the evidentiary record before the court, whether the texts could have been admitted as *res gest*ae, considering that a number of text messages were not necessarily consistent with the conclusion that the complainant was under stress or pressure when sending them.

[27] As such, I am of the view that the trial judge should have ruled on the admissibility of R.A.'s prior consistent statement prior to using it in making a determination with respect to the accused's guilt (see *R. v. Gill*, 2018 BCCA 275, at para. 4). This could have been achieved by clarifying with the parties the purpose for which it was led in evidence; by asking the parties whether they agreed on its permissible use and, in case of disagreement, by requesting submissions on the issue and/or holding a formal *voir dire* to determine its admissibility and permissible use. (See *R. v. Gill*, at para. 4; *R. v. Sylvain*, 2014 ABCA 153, at para. 39; R*. v. D.L.D*., at para. 20).

[28] However, the lack of a *voir dire* and/or of a ruling on admissibility is not fatal. A failure to hold a *voir dire* does not automatically warrant the granting of an appeal. If the trial record permits, an appeal court may be in a position to rule on the admissibility of a prior consistent statement and determine whether it was used in a permissible way by the trial judge (*R. v. Sylvain*). On the other hand, if the record does not allow for such a determination to be made, a new trial is required to address the issue (*R. v. D.L.D*. at paras. 20 - 21).

Issue 2. Did the trial judge err in using R.A.'s prior consistent statement for an impermissible purpose?

[29] In his factum, the appellant submits that the trial judge made impermissible use of R.A.'s prior consistent statement in two ways:

(1) as substantive proof that "something must have happened" in the room; and

(2) to justify rejecting the accused's version of events that he did not sexually assault or even touch R.A.

[30] However, at the hearing of the appeal, counsel for the appellant abandoned the argument that the trial judge used R.A's prior consistent statement for the truth of its contents. He submitted that the trial judge impermissibly used R.A.'s prior consistent statement to assess the credibility of the accused. According to the appellant, none of the exceptions to the inadmissibility of prior consistent statements allowed the trial judge to use the statement for that purpose. In the appellant's factum, two passages are identified in the trial judge's Reasons for Judgment to support his position that the trial judge used R.A.'s statement for an impermissible purpose.

[31] The first passage is found at para. 19 of the decision:

> Looking at her evidence as a whole, R.A had no motive to concoct. Indeed if she did, she did so there on the spot since the complaint was first made then and there in the accused's living room. Nor can there be any suggestion that she misconstrued some innocent action by the accused since, on his evidence, he never got closer than six feet away. The only remaining possibility is that she imagined or dreamed the assault, but to conclude that she did so would be sheer speculation unsupported by any evidence.

[32] The second passage is found at para. 23 of the decision:

> Finally, the accused's claim that he never got close enough to even touch the complainant must be weighed together with the likelihood that something, whether or not it was a sexual touching, must have occurred for R.A. to immediately accuse Mr. Lennie of doing so.

[33] The respondent, on the other hand, contends that the trial judge made permissible use of the complainant's prior consistent statement throughout his decision. The respondent submits that the trial judge first used the statement to provide a sequential structure to the evidence. The respondent also submits that, at para. 19, the trial judge used the timing of R.A.'s complaint to make a logical inference with respect to her credibility, as he was permitted to do pursuant to the narrative as circumstantial evidence exception. With regard to para. 23, the respondent submits that in light of the judge's finding that the complainant was credible and reliable, it was open to him to consider the accused's evidence against the conflicting credible evidence of the complainant. In its supplemental outline, the respondent added that the complainant's prior consistent statement could also have been admitted under the excited utterance exception to the hearsay rule.

Admissibility under the narrative as circumstantial evidence exception to the prior consistent statement rule

[34] The narrative as circumstantial evidence exception to the rule against the admissibility of prior consistent statements allows the trier of fact to use and consider the fact that a statement was made, as well as the context and circumstances in which it was made, to assist in assessing the credibility and the reliability of the witness' testimony before the court.

[35] In *R. v. Khan*, at para. 43, the Court of Appeal for Ontario explained the narrative as circumstantial evidence exception as follows:

> [43] …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. …

[36] It is important to reiterate that under that exception, the statement cannot be used for the truth of its contents; as corroboration of the witness' in-court testimony or for the prohibited inference that repetition enhances truthfulness. Instead, "[t]he probative value of the statement lies in the inferences that can be drawn from the timing and circumstances of the statement, rather than the simple fact that the [witness] has said the same thing before" (*R. v. Gill*, para. 76, citing *R. v. M.E-H*., 2015 BCCA 54, at para.46).

[37] I agree with the respondent that the trial judge's use of R.A.'s prior consistent statement at para. 19 was permissible under the narrative as circumstantial evidence exception to the rule.

[38] I find that it was open to the trial judge, in the course of his assessment of the complainant's credibility, to use the fact that R.A. made a complaint coupled with the uncontested timing and place of her complaint, "then and there while still in the accused's living room", to assist him in determining that R.A. had no motive to concoct her story, and, ultimately, as part of his assessment of her credibility and reliability.

Admissibility under the *res gestae* or *spontaneous utterance* exception to the hearsay rule.

[39] The *res gestae* exception to the hearsay rule is also referred to as the excited utterance or spontaneous utterance exception.

[40] In *R. v. Khan*, at para. 15, Hourigan J. summarized the *res gestae* exception to the hearsay rule as follow:

> [15] *Res gestae* statements are admissible as an exception to the hearsay rule: *R. v. Khan*, … Statements are admitted under this exception to the hearsay rule on the basis that the stress or pressure under which the statement is made can be said to safely discount the possibility of concoction: ... The statement should be reasonably contemporaneous with the alleged occurrence, although exact contemporaneity is not required:… (citations omitted) (my emphasis)

[41] Necessity is not a requirement when it comes to determining whether a prior consistent statement falls under the *res gestae* exception to the hearsay rule. As indicated by the majority of the Alberta Court of Appeal in *R. v. Sylvain*, at para. 33:

> [33] As for necessity, where, for some reason, the person making the 911 call is unable to testify, then the necessity branch of the test is clearly met: *R. v. Nicholas* (2004), 184 OAC 139 at paras 90-92, 70 OR (3d) 1 (CA). Where, as here, the caller did testify, the objection to hearsay statements arising from the absence of an opportunity to cross-examine is negated. More fundamentally though, the "excited utterances" exception to the hearsay rule does not arguably contain a necessity requirement. The policy underlying the necessity requirement is rooted in the "best evidence" proposition. Typically, that will be in-court testimony. But as pointed out by Justice David Paciocco in "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013) 17:2 Can Crim L Rev 181 [Paciocco] at 192-193:
>
> > ... [T]he "necessity" component performs a "best evidence" function. It exists to ensure that if it is possible to present "better evidence" in the form of in-

> court testimony, parties should not be permitted to resort to hearsay proof ...
>
> ...
>
> The *res gestae* exceptions do not have a necessity requirement ... In-court testimony may not be better evidence than "excited utterances" because in-court testimony is not uttered in the pressure of the moment before an opportunity to concoct has arisen. …

[42] However, as the caselaw currently stands, when the author of the prior consistent statement admissible under the *res gestae* exception to the hearsay rule testifies to the same effect in court, it appears that certain limitations applicable to the permissible use of prior consistent statements under the prior consistent statement rule continue to apply.

[43] As a result, a *res gestae* statement cannot be used for the impermissible purpose of corroborating the declarant's in-court testimony or to conclude that they are more likely to tell the truth on the stand because they made that prior consistent statement (see *R. v. Nault*, 2019 ABCA 37, at para. 20; *R. v. Sylvain*, at paras 40 – 43; *R. v. Gill*, at paras. 72 - 74; *R. v. Khan*, at para. 49).

[44] One of the reasons invoked for these limitations was stated in *R. v. Khan*, at para. 49, where the potential value of the context and circumstances of a *res gestae* statement was also recognized:

> …In my view, the cited passage stands for the correct principle that a prior consistent statement that is admitted under the *res gestae* hearsay exception will have limited permissible uses. <u>For example, there is no added value in the fact that the same statement was repeated; the value, if any, comes from the context and circumstances in which the admissible hearsay statement was made</u>: Paciocco, at pp. 192-194. … (my emphasis)

[45] In *R. v. Sylvain*, the majority of the Alberta Court of Appeal declined to determine whether a prior consistent statement, which also qualifies as a *res gestae* statement is subject to the same limitations in terms of admissibility that apply pursuant to the prior consistent statement rule. The majority was of the view that it was not necessary to make that determination in order to dispose of the appeal since the trial judge had used the context of the *res gestae* statement to assess the complainants' in-court testimony (para. 41; see also *R. v. Nault*, at para. 22).

[46] Nonetheless, the majority stated that a statement qualifying as *res gestae* "may be relevant to the time and place of the events, or to the emotional state of those involved". It went on to state that a *res gestae* statement is also relevant and admissible as evidence to the sequence of events (paras. 40 - 41).

[47] In so stating, the majority recognized that the existence, context and circumstances of the *res gestae* statement, may be used as circumstantial evidence.

[48] Justice Slater, who concurred with the result reached by the majority in *R. v. Sylvain*, but wrote separate reasons, stated, at para. 89:

> The 911 call is admissible as a *res gestae* statement for the truth of its contents (even though it is hearsay and a prior consistent statement) for some purposes, but not generally as corroboration (because as a prior consistent statement the evidence is not made more reliable by repetition). The 911 call was circumstantial evidence of the events surrounding the assault itself, and it was also evidence of the state of mind and the demeanour of the complainant, admissible under the *res gestae* exception. While the use of this prior consistent statement as corroboration of the complainant's evidence was unfortunate, at least without reflection on the weight it deserved for that purpose, the circumstances in which the 911 call was made discount any opportunity for concoction. As Paciocco notes, in the circumstances the 911 call does have probative value beyond mere repetition. Further, the suggestion that the 911

> call might also serve as corroboration was not an essential part of the trial judge's reasoning. In all the circumstances just summarized, any shortcomings in handling this evidence do not disclose any reviewable error. (my emphasis)

[49] The court went on to uphold the accused's conviction for sexual assault. As stated, in doing so, the court found that the complainant's 911 call qualified as *res gestae* or a spontaneous utterance and was therefore admissible. In that case, the accused agreed that he had had a sexual encounter with the complainant, but stated that it was consensual. His position was that the complainant made the 911 call after the sexual encounter took place because he refused to give her more money than agreed to for the sexual act. The court noted at para. 34 that: "In today's technology world, a 911 call in the middle of a crime is akin to a cry for help heard by someone nearby. In these circumstances, the someone nearby happens to be the 911 operator." I note that the Court of Appeal had access to the recording of the 911 call and, therefore, was able to make findings with respect to the timing of the call and the complainant's emotional state, based on the unfolding of the call and the complainant's voice. Furthermore, the court found that the independent evidence of the police officer responding to the call who found her walking back home not long after the events took place and heard her concerns regarding the injuries suffered as a result of the sexual encounter, assisted in establishing the existence of the "shocking events" and the "spontaneity of the statement" (para. 37).

[50] In the case at bar, while no *voir dire* was held, the trial judge made specific findings with respect to the contemporaneous and spontaneous nature of R.A.'s complaint. More specifically, at para. 19 of his decision, he found that: "If she did [concoct], she did so right on the spot since the complaint was first made then and there

in the accused's living room" (my emphasis). The trial judge's finding with respect to the timing of the complaint is supported by both the complainant's and the accused's evidence that the complaint was made at the time when both R.A. and the accused were in the living room that morning. R.A. and the accused also both testified that R.A. was sleeping when the accused entered the living room; that she had just woken up and was still on the mattress when she first complained to Ms. Aleekuk.

[51] The trial judge also specifically found at para. 19 that R. A. had no motive to concoct her statement. The trial judge was entitled to make that finding based on the evidence including the timing of R.A.'s complaint, and the way the events unfolded from the moment she arrived at the house up until the time she made the complaint.

[52] In this case, the uncontested evidence is that the accused entered the living room while R.A. was still asleep, R.A. complained to Ms. Aleekuk shortly after waking up, while she was still on the mattress and while she and the accused were both in the living room. R.A., who the trial judge found credible and reliable, testified to being upset and afraid when she called Ms. Aleekuk's name for help. I note that the trial judge's finding with respect to the complainant's credibility and reliability is not at issue in this appeal. Even the accused testified that R.A. was "all excited" at the time she accused him of touching her. This evidence of the complainant's emotional state at the time the complaint was made, shortly after waking up, and where it was made, while she was still on the mattress in the living room, is consistent with someone who is under stress or pressure.

[53] Ms. Aleekuk did not testify at trial. However, both the accused and the complainant agreed that she became quite upset as a result of R.A.'s complaint and of

finding the accused and the complainant in the living room. They both agreed that Ms. Aleekuk hit the accused and told R.A. to leave her house. The uncontested evidence is that the accused's reaction was to go in the bedroom to pack his personal effects.

[54] As a result, I find that the record is sufficient to allow me to make a determination with respect to the admissibility of R.A.'s complaint under the *res gestae* exception to the hearsay rule. In light of that record, I am of the view that R.A.'s complaint to Ms. Aleekuk is akin to a cry for help as described in *R. v. Sylvain*, in that it was made contemporaneously to an event that caused R.A.'s stress or pressure.

[55] I now turn to para. 23 of the trial judge's decision. First, I note that the assessment of credibility, including that of the accused, cannot be performed in a vacuum apart from the totality of the admissible evidence in a case. Of course, the assessment of the evidence is not about choosing who to believe, because if a trial judge does so, they will fail to determine, on the totality of the evidence, whether the guilt of the accused has been proven beyond a reasonable doubt. Nonetheless, a trial judge is entitled to reject an accused's version of events, including a complete denial, based on an acceptance beyond a reasonable doubt of a complainant's testimony (*R. v. D.B.S.*, 2017 YKSC 56, at paras. 112 – 115, citing *R. v. D.(R)*, 2016 ONCA 574 and *R. v. D.(J.J.R.)*, [2006] 218 O.A.C.37).

[56] At para. 23, the trial judge drew an inference of a general nature: "the likelihood that something, whether or not it was sexual touching, must have occurred…" from the existence of R.A.'s complaint, the context in which it was made and its spontaneous nature. As conceded by counsel for the appellant, in doing so, the trial judge did not use

the statement for the truth of its contents, i.e. to conclude that the accused sexually touched R.A. Also, the trial judge did not use the prior consistent statement for the prohibited purpose of corroborating R.A.'s in-court testimony or to conclude that she was more likely to tell the truth on the stand because she made that prior consistent statement (*R. v. Nault*, 2019 ABCA 37, at para. 20). The trial judge used the existence and context of R.A.'s *res gestae* statement as circumstantial evidence to assess the plausibility of the accused's version of events.

[57] Also, the trial judge's use of R.A.'s *res gestae* statement at para. 23 cannot be considered in isolation. It must be considered in light of the whole of the judge's reasons and of the stated facts that the accused's version of events coincided with that of the complainant on virtually everything happening that morning, except for the short period of time where the sexual touching was said to have taken place. Again, those facts include that: R.A. was sleeping on the mattress when the accused entered the living room; no one else was in the living room at that time, R.A. first complained to Ms. Aleekuk soon after waking up while she was still on the mattress and the accused was still in the living room; R.A. was "all excited" when she complained to Ms. Aleekuk; Ms. Aleekuk became upset and hit the accused; and the accused's reaction to this complaint and to his partner's subsequent actions.

[58] As a result, I find that the trial judge made permissible use of R.A.'s prior consistent statement in that he used the timing, context and circumstances of R.A.'s *res gestae* statement as circumstantial evidence to weigh the plausibility of the accused's complete denial that anything happened that morning, as part of his assessment of the accused's evidence.

[59] Prior to concluding, I would like to go back to the application of the narrative as circumstantial evidence exception in this case. As stated, that exception allows a trial judge to consider the fact that a statement was made, as well as the context and the circumstances surrounding that statement, to assist in determining the credibility and reliability of a witness' in court-testimony. All the cases filed in this matter with respect to the application of the narrative as circumstantial evidence exception, as well as the article of Justice Paciocco, recognize that the context of the prior consistent statement may be used in the assessment of the credibility of the declarant who testifies in court. Whether this exception may also be used in the assessment of the credibility of a witness who is not the declarant, including the accused, is a question I need not determine in this case considering my finding regarding the admissibility of the prior consistent statement under the *res gestae* exception to the hearsay rule.

CONCLUSION

[60] It is important to reiterate that a ruling on the admissibility of R.A.'s prior consistent statement should have been made at trial. However, despite the absence of a ruling, I find that the trial judge used R.A.'s prior consistent statement in a permissible manner.

[61] Therefore, the appeal is dismissed.

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CAMPBELL J.