COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Perkins, 2016 ONCA 588
DATE: 20160722
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Cronk, Juriansz and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Tyler Perkins

Appellant

Jennifer Penman, for the appellant

Brock Jones, for the respondent

Heard: February 12, 2016

On appeal from the convictions entered on August 23, 2011 and the sentence imposed on February 3, 2012 by Justice Lisa Cameron of the Ontario Court of Justice.

Roberts J.A.:

Overview

[1] The main focus of this appeal concerns the applicability of the *curative proviso* where exculpatory statements made by an accused are erroneously excluded at trial.

[2] Police attended the appellant's home after the complainant, the appellant's former domestic partner, called 911. The first officer to arrive located and spoke with the appellant, who was found a short distance away from the apartment he then shared with the complainant and their daughter. In response to one of the officer's questions, the appellant indicated that no

threats or assaults had occurred. The complainant subsequently told the officers that the appellant had assaulted her, and he was arrested.

[3] At trial, the Crown tendered the appellant's utterances through the testimony of the officer to whom he had spoken, and took the position that the whole of the statements was before the court for consideration. The trial judge, however, held that the utterances were inadmissible and could not be considered. She convicted the appellant of assault and two counts of failure to comply with a probation order, and imposed a sentence of eight months in custody plus three years' probation.

[4] The appellant appeals his three convictions, arguing that the trial judge erred in excluding his exculpatory statements and by misapprehending the evidence in several material respects. The Crown concedes that the trial judge erred by failing to consider the statements, but submits that the *curative proviso* under s. 686(1)(b)(iii) of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46, should apply. The appellant also appeals his sentence; however, he has now served that sentence and so his sentence appeal is moot.

[5] For the reasons that follow, I am of the view that the *curative proviso* cannot be applied in this case. I would therefore allow the appeal from the convictions on that basis.

Facts

[6] On May 10, 2011, the appellant and the complainant were living together in a basement apartment along with their daughter. At some point during the day, the two argued. The complainant advised the appellant that she was taking their daughter and leaving him.

[7] The complainant testified at trial that the appellant then pushed her twice, causing her to fall. Police photographs taken later of her knee showed what appeared to the trial judge to be a new scrape on top of an old bruise or scrape. She moved away from the appellant into their daughter's bedroom, putting her back against the door, and attempted to call 911 on the apartment telephone. The appellant, however, pushed his way into the room and took the telephone from her. She then retrieved her cell phone, went outside, and called 911.

[8] Officers Sejrup and Boynton responded to the 911 call. By the time that the first officer arrived on the scene, the appellant had left the apartment.

[9] Officer Sejrup arrived first at around 5:17 p.m. He located the appellant a short distance away from the apartment. He had a 30 to 40-minute conversation with the appellant. Officer Sejrup asked the appellant "right off the bat" if any threats or assaults had occurred. The appellant responded

that “none had happened”, although the appellant also advised that the complainant and he had “gotten into a verbal dispute earlier in that day”.

[10] Officer Boynton arrived a few minutes later at 5:23 p.m. and spoke with the complainant. He did not immediately speak with the appellant who was not present at the apartment. The complainant asked Officer Boynton to remain while she gathered her belongings out of the apartment. During their initial conversation, the complainant did not tell him that the appellant had assaulted her, nor make any complaint to Officer Boynton about the appellant.

[11] After having spoken with the appellant for a while, Officer Sejrup made a call to Officer Boynton. Officer Boynton told Officer Sejrup that no grounds to arrest existed in relation to the appellant for any threats or assault against the complainant. As a result, Officer Sejrup determined that there was no reason to detain the appellant further. Officer Sejrup and the appellant then spoke briefly and the appellant left.

[12] After the appellant’s departure, Officer Sejrup went to the apartment and spoke with the complainant about a safety plan. The complainant asked why the appellant had not been arrested. Officer Sejrup advised that the appellant had been sent on his way and would stay away for a while so that the complainant could gather up her belongings. The complainant then told the officer that the appellant had assaulted her. The appellant was subsequently arrested.

The Trial

[13] The appellant did not testify, but the defence sought to rely on his exculpatory statements given to Officer Sejrup as tendered by the Crown. The trial judge concluded that there was an insufficient evidentiary basis to determine the admissibility of the remarks as a spontaneous exculpatory statement as contemplated in *R. v. Edgar*, 2010 ONCA 529, 101 O.R. (3d) 161. She determined that the statements were inadmissible because they were exculpatory.

[14] The defence also argued that the complainant was not credible. Counsel pointed to inconsistencies in her testimony, most notably the difference in the complainant’s description in her statement made to the police the day of the incident of being pushed once in the bedroom, which was contrary to her trial evidence that she was pushed twice. Moreover, the delayed timing of her disclosure about the assault to police rendered the complainant’s evidence suspect. Counsel also argued that the complainant had a motive to fabricate the assault in that she wanted to use the criminal proceedings to extricate herself and her daughter from their relationship with the appellant.

[15] The trial judge noted that the inconsistencies in the complainant's evidence were one of many factors to be considered and was satisfied with the complainant's explanations for them. She found that the complainant's delay in reporting the assault to the officers on the scene did not reflect adversely on her credibility, as lay people would expect an arrest to occur when a crime had been reported. She explained that there was no evidence to support the alleged motive to fabricate, a motive denied by the complainant when put to her. Finally, she pointed to the corroboration of the complainant's evidence in the form of the photographs of her injured knee.

[16] On the whole of the evidence in front of her, the trial judge was satisfied beyond a reasonable doubt that the complainant was assaulted as she had described, and that this assaultive behaviour constituted a breach of the appellant's two probation orders. The trial judge added that, even absent a finding of guilt on the assault count, she would have found breaches of the probation orders as a result of the disruption caused by the appellant's pushing his way into the bedroom and grabbing the telephone from the complainant in the midst of their domestic dispute.

Issues

[17] The appellant advances the following two grounds of appeal:

> 1. The trial judge erred in failing to admit the appellant's exculpatory statements to the police that nothing had happened between the appellant and the complainant. This error cannot be remedied by the application of the *curative proviso*.
>
> 2. The trial judge misapprehended the evidence in several respects, including the timing of the complainant's disclosure to the police that the appellant had assaulted her, and, as a result, erred in her assessment of the complainant's credibility.

[18] For the reasons that follow, I would allow the appeal on the first ground. It is therefore unnecessary to deal with the second ground of appeal.

Analysis

[19] The trial judge concluded, applying this court's decision in *Edgar*, that the appellant's exculpatory statements to the police that nothing had happened between the complainant and him were inadmissible. This was an error. The appellant's statements, which were adduced by the Crown as part of its case and conceded by the appellant to be voluntary, were

admissible, regardless of whether they were inculpatory or exculpatory: *R. v. Lynch* (1988), 30 O.A.C. 49 (C.A.), at para. 7.

[20] The respondent concedes the trial judge's error. However, the respondent submits that the error was harmless, occasioned no prejudice to the appellant, and did not affect the outcome of the trial. The respondent argues that the trial judge would likely have given the statements no weight because of her findings that there was no context to the statements and that it was not clear whether the statements were spontaneous.

[21] I would not accept these submissions.

[22] In order to assess the impact of the error, it is helpful to review briefly a summary of the principles surrounding the application of the *curative proviso* in contexts such as this one where the case turns on findings of credibility and reliability of witnesses.

[23] As the Supreme Court of Canada and this court have explained in numerous cases, the use of the *curative proviso* under s. 686(1)(b)(iii) is reserved for rare and exceptional cases; its use is only appropriate (1) where the error is harmless or trivial and could not possibly have affected the verdict, or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53; *R. v. L.K.W.* (1999), 1999 CanLII 3791 (ON CA), 138 C.C.C. (3d) 449 (Ont. C.A.), at paras. 94-95.

[24] Under the first category of cases where the *proviso* may be applied, the determination of whether an error or its effect is minor requires the court to consider, "whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial" that the verdict would have been the same, absent the error: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 35.

[25] Errors may be characterized as having a minor effect "if they relate to an issue that was not central to the overall determination of guilt or innocence, or if they benefit the defence, such as by imposing a more onerous burden on the Crown (*Khan*, at para. 30)": *Van*, at para. 35.

[26] As this court observed in *R. v. Sarrazin*, 2010 ONCA 577, 259 C.C.C. (3d) 293, at para. 71, as tracing the effect of the error on the verdict is necessarily a somewhat speculative exercise, any doubt as to the impact of the error must be resolved against the Crown.

[27] The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial: *R. v. Van*, at para. 35.

[28] In the event of a serious, prejudicial error, an appellate court can uphold a conviction only where the high standard of an invariable or inevitable conviction is met: *Van*, at para. 36. Unlike the determination of whether the error is minor or trivial, where no weighing of the evidence is permitted, as this court concluded in *L.K.W.*, at para. 102, in considering whether the Crown's case was so overwhelming that a conviction was inevitable, an appellate court may examine and weigh the evidence to a limited extent:

> In coming to this conclusion, I have not ignored the appellant's evidence; nor have I ignored the fact that it is not the function of an appellate court to make findings of credibility. That said, in deciding whether the evidence is so overwhelming that a properly instructed jury would inevitably convict, a court of appeal is surely entitled to examine and to some extent, weigh and consider the effect of the evidence, just as it does when determining whether a verdict is unreasonable.… Were it otherwise, there would be no room to apply the *proviso* in cases of serious error where credibility is the central issue at trial.

[29] The appellate court faces "the difficult task of evaluating the strength of the Crown's case retroactively, without the benefit of hearing witnesses' testimony and experiencing the trial as it unfolded": *Van*, at para. 36. As a result, as also observed by the Supreme Court of Canada in *Van*, at para. 36: "It is thus necessary to afford any possible measure of doubt concerning the strength of the Crown's case to the benefit of the accused person".

[30] In both instances, the Crown bears the heavy burden of demonstrating that either the error was minor and could not possibly have affected the verdict, or that the more serious errors were committed in the face of an overwhelming case against the appellant where the conviction was inevitable: *Van*, at para. 34. The underlying question is the same: whether the verdict would have been the same if the error had not been committed: *Van*, at para. 36; *R. v. Bevan*, 1993 CanLII 101 (SCC), [1993] 2 S.C.R. 599, at pp. 616-17.

[31] As this court has stated, "the court must be cautious in applying the *proviso*, particularly if the error of law is the improper exclusion of evidence that might be exculpatory": *R. v. Perlett* (2006), 2006 CanLII 29983 (ON CA), 82 O.R. (3d) 89 (C.A.), at para. 155. In those circumstances, the provision has been applied where the Crown's case is

otherwise overwhelming and the trier of fact is not overwhelmed by credibility problems: see e.g. *R. v. Selvanayagam*, 2011 ONCA 602, at paras. 43-44. Where exculpatory evidence is wrongly excluded, any reasonable effect that excluded evidence could have had on the trial judge should enure to the benefit of the appellant: *R. v. Wildman*, 1984 CanLII 82 (SCC), [1984] 2 S.C.R. 311, at p. 329.

[32] Finally, while there is no rule excluding the *proviso* in cases turning upon credibility, as in the present case, the hurdle is a difficult one and caution should be exercised prior to its application: *R. v. Raghunauth* (2005), 2005 CanLII 37253 (ON CA), 203 O.A.C. 54 (C.A.), at para. 9; *L.K.W.*, at para. 97. Where credibility is the central issue at trial, the *curative proviso* has been applied where the Crown's case is otherwise "staggering": see e.g. *L.K.W.*, at para. 101.

[33] Having applied these principles to the present case, I cannot say that, without the error, the verdict in this case necessarily would have been the same.

[34] First, the error was not minor or trivial. The appellant's convictions turned on the trial judge's acceptance of the credibility and reliability of the complainant's evidence, which was left uncontested by other evidence because of the trial judge's error in excluding the appellant's exculpatory statements.

[35] The appellant and the Crown both relied on the appellant's statements. The appellant would reasonably have had the expectation that his exculpatory statements formed part of the evidence at trial and would be considered by the trial judge. The trial judge's error in excluding the exculpatory statements occurred after the completion of the evidence and the submissions of counsel. In my view, the error compromised the appellant's right to a fair trial to the extent that he was deprived of the benefit of the exculpatory statements and that his reasonable assumption that the statements would be before the trial judge may have influenced his decision not to testify at trial: *R. v. Humphrey* (2003), 2003 CanLII 6855 (ON CA), 169 O.A.C. 49 (C.A.), at paras. 23-24.

[36] A trial judge is required to apply the well-known principles set out in *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, not only in relation to an accused's testimony but also to all potentially exculpatory evidence: *R. v. D. (B.)*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at para. 114. Thus, had the trial judge considered the statements, she would have then needed to engage in a *W. (D.)* analysis in order to consider whether the statements left her with a reasonable doubt.

[37] It is not possible to speculate what weight the trial judge might have given to the appellant's statements considered together with the complainant's testimony and the rest of the Crown's case. As I have already noted, this court's determination of whether the error was harmless or trivial must be done without reference to the strength of the other evidence presented at trial.

[38] The appellant's exculpatory statements that nothing happened were clear and unequivocal and, at least initially, appeared to satisfy the police that there were no grounds for an arrest. In my view, it is not possible to say that the appellant's exculpatory statements could not have left a reasonable trier of fact with a reasonable doubt as to the appellant's guilt.

[39] Second, the Crown's case against the appellant was not overwhelming but, as I just noted, largely depended on the credibility and reliability of the complainant's evidence. Although the trial judge resolved them, there were serious issues with the complainant's evidence, not the least of which were the numerous inconsistencies in her evidence, even as to how the assault occurred, the question of her motive to fabricate her evidence, and the delay in her complaint about the appellant to the police.

[40] In my view, this is therefore not an appropriate case in which to apply the *curative proviso*. The trial judge's error was not harmless or trivial, and it resulted in significant trial unfairness to the appellant. The Crown's case was not overwhelming. I am not satisfied that the verdict on the assault would necessarily have been the same if the error had not occurred.

[41] The respondent submits that even if the *curative proviso* cannot be applied, the trial judge's error in erroneously excluding the appellant's exculpatory statements had no effect on the trial judge's conclusion that the disruptive actions of the appellant in pushing his way into the bedroom and grabbing the telephone from the complainant breached the two probation orders by which the appellant was bound.

[42] The appellant does not directly address this issue in his submissions but counsel argued orally that the trial judge's failure to properly assess the credibility issues at trial because of the error in excluding his exculpatory statements affected the verdicts on all convictions.[1]

[43] I would agree with the appellant's submissions. The trial judge's findings that the appellant disruptively pushed his way into the bedroom and grabbed the telephone from the complainant were not divorced from her findings about the appellant's assaultive behaviour. Rather, the trial judge expressly linked them to everything that had preceded these actions, including the assaultive behaviour that she found had occurred, by stating that they happened "in the midst of their domestic dispute".

[44] As a result, I cannot say that the trial judge's assessment of the appellant's credibility and her verdicts on the breach of probation convictions would have been the same but for her error in excluding the appellant's exculpatory statements.

Conclusion

[45] For these reasons, I would allow the appeal from the convictions. As the appellant has already served his sentence, it is not in the public interest to order a new trial. Accordingly, I would quash the convictions.

"L.B. Roberts J.A."

"I agree R.G. Juriansz J.A."

Cronk J.A. (Dissenting):

I. Introduction

[46] The appellant was convicted of one count of assault and two counts of breach of probation arising from an altercation with his girlfriend that occurred on May 10, 2011. He was sentenced to six months in jail on the assault conviction and two months' imprisonment on each of the breach of probation charges, concurrent to each other but consecutive to the sentence on the assault charge. After credit for pre-sentence custody, the appellant's net custodial sentence was 18 days. A three-year probation order was also imposed.

[47] The appellant appeals from his convictions and sentence. As he has served his sentence, his sentence appeal is moot.

[48] The appellant raises two main issues on his conviction appeal. He argues that the trial judge erred: i) by ruling that evidence of an out-of-court statement made by him to a police officer at the scene was inadmissible; and ii) by misapprehending evidence relevant to the assessment of the complainant's credibility.

[49] My colleague, Roberts J.A., concludes that the trial judge erred by excluding the appellant's out-of-court statement and that this is not an appropriate case for application of the *curative proviso* set out under s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. On this basis alone, she would allow the appeal.

[50] I agree that the trial judge erred by ruling that the appellant's statement was inadmissible. However, unlike my colleague, I conclude that it is appropriate to use the s. 686(1)(*b*)(iii) *curative proviso* in this case. With respect to the appellant's second ground of appeal – the trial judge's alleged misapprehension of the evidence – I see no reversible error in the trial judge's appreciation of the evidence. I would apply the *proviso* and dismiss the conviction appeal.

II. Factual Background in Brief

[51] Before turning to the issues on appeal, I find it useful to briefly set out the relevant background facts.

(1) Complainant's Account of Events

[52] The core features of the complainant's version of events may be summarized as follows.

[53] During an argument with the appellant at their apartment on May 10, 2011, the complainant told the appellant that she was moving out and taking their five-year-old daughter with her. At the time, the complainant was standing at the foot of the couple's bed, while the appellant was positioned on the bed. The appellant responded to the complainant's announcement by pushing her with his foot, causing her to fall. When she got up and reached for a cordless telephone in the bedroom, the appellant again pushed her. She fell a second time, injuring her knee in the process.

[54] The complainant got up again, retrieved the phone, and went to her daughter's bedroom to call the police. She said that she stood inside the bedroom with her back to the door, in an effort to prevent the appellant from entering. However, the appellant pushed his way inside the room and took the phone from her as she was trying to call 911. The complainant then retrieved her cell phone, went outdoors and succeeded in calling 911. The appellant, in the meantime, had left the apartment.

(2) Police Involvement

[55] Constable P. Sejrup testified that, at 5:15 p.m. on May 10th, he received a police dispatch requesting that he attend at the address of the appellant's apartment "for a domestic". He arrived at the scene, alone, two minutes later. He had been given a brief description of the male person he was to look for and located the man in a church parking lot, a short distance away from the apartment. He spoke with the man, who identified himself as the appellant. Constable Sejrup provided the following brief description of his ensuing conversation with the appellant:

> *I started speaking to [the appellant] and determined right off the bat by asking if any threats or assault had occurred and he*

> *indicated that none had happened*. I asked him about who his common-law was and who his daughter was and received that specific information and learned that he was on probation … he informed me of who his probation officer was … I had a very brief – well, I got a history of what his relationship was to the other person in this matter, which is [the complainant], and he gave me the date of birth … and the same address, and *advised that they had gotten into a verbal dispute earlier in that day. That he had left the residence for a while* and we had talked for a little bit while my partner, Constable Boynton, attended to the residence to speak with [the complainant]. [Emphasis added.]

[56] Constable B. Boynton testified that he arrived at the scene at approximately 5:23 p.m. He went directly to the apartment, and spoke with the complainant. She asked him to remain at the residence while she gathered up her property, in order to leave. She made no allegation of any assault by the appellant during this initial conversation with Constable Boynton.

[57] Constable Sejrup, meanwhile, was still engaged in discussion with the appellant in the church parking lot. He said that, after speaking with the appellant for a while, he telephoned Constable Boynton to determine whether the appellant was to be further detained, arrested or released. Constable Boynton told Constable Sejrup that no grounds of arrest for assault or threats existed.

[58] Constable Sejrup continued his conversation with the appellant "a little bit further", until the appellant left on foot. Constable Sejrup said that, in total, he spoke to the appellant at the scene for approximately 30 to 40 minutes.

[59] Constable Sejrup then walked to the apartment and stood by the area while the complainant continued to gather her belongings. After some time, he walked to the residence to ask the complainant how long it would be before her friend, who was to pick her up at the apartment, would arrive. Constable Sejrup said that, at this point, the complainant asked him whether the appellant had been arrested. When he told her that the appellant had not been arrested, she informed him that the appellant had assaulted her that day and on an earlier occasion.

[60] Later that day, the complainant attended at the police station and provided a videotaped statement detailing the assault of May 10th. Shortly thereafter, the appellant was contacted by police and informed that he was to be arrested. A day or so later, he surrendered into custody.

(3) Trial Judge's Decision

[61] At trial, the complainant and Constables Sejrup and Boynton testified for the Crown. The appellant did not testify or call any evidence in his defence.

[62] During his examination-in-chief, Constable Sejrup described his conversation with the appellant, quoted above. The defence conceded the voluntariness of the appellant's statement to Constable Sejrup and took the position that it was admissible. For her part, Crown counsel at trial maintained that the "whole of the statement" was properly before the court for consideration.

[63] Notwithstanding counsels' positions to the contrary, the trial judge ruled in her reasons that the appellant's statement was inadmissible. She stated:

> At trial the evidence gives me only the gist of the remarks made by [the appellant] as understood by the officer.There is very little evidence about the circumstances under which the remarks were made. For example, were they in response to questions? In response to being told something by the officer? Were they blurted out or comments in casual conversation?
>
> In my view there is simply an insufficient evidentiary basis to determine the possibility of the admissibility of those remarks as a spontaneous exculpatory statement as contemplated in [*R. v. Edgar*, 2010 ONCA 529, 101 O.R. (3d) 161]. The accused has not testified at trial. In my view, therefore, there is no reason to depart from the Supreme Court of Canada's position stated as recently as *R. v. Rojas*, 2008 SCC 56 (CanLII), [2008] 3 S.C.R. 111.
>
> Those utterances by [the appellant] to Constable Sejrup are not admissible evidence and cannot be considered by me in determining the outcome of this case.

[64] The trial judge went on to assess the complainant's credibility and the reliability of her testimony. For detailed reasons (five pages), she accepted the complainant's version of events and concluded that the assault alleged by her had occurred in the manner she described.

[65] The trial judge also held that the appellant's assaultive behaviour constituted a breach of the peace and, hence, a failure by him to obey the terms of the two probation orders to which he was bound on May 10, 2011. In the trial judge's view, the appellant's disruptive behaviour in pushing his way into his daughter's bedroom and grabbing the phone from

the complainant during their dispute constituted a breach of the appellant's probation orders even absent a finding of guilt on the assault charge.

III. Discussion

(1) Admissibility of Appellant's Statement

[66] As I have said, I agree with my colleague's conclusion that the trial judge erred by excluding the evidence of the appellant's out-of-court statement to Constable Sejrup. The statement contained both inculpatory and exculpatory parts and was tendered by the Crown as part of its case-in-chief, not by the defence. Accordingly, the entire statement was admissible and the exculpatory parts were substantively admissible in favour of the appellant. See *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111, at para. 37; *R. v. Selvanayagam*, 2011 ONCA 602, 281 C.C.C. (3d) 3, at para. 38; *R. v. Humphrey* (2003), 2003 CanLII 6855 (ON CA), 169 O.A.C. 49 (C.A.), at paras. 18-19.

(2) Alleged Misapprehension of the Evidence

[67] The appellant's second ground of appeal concerns the trial judge's appreciation of the evidence. The appellant argues that the trial judge misapprehended the evidence in several respects and, as a result, erred in her assessment of the complainant's credibility. Since credibility was the key issue at trial, the appellant asserts that these errors, both individually and cumulatively, necessarily impacted the result and therefore require a new trial.

[68] Specifically, the appellant argues that the trial judge misapprehended the evidence concerning: i) the timing of the complainant's assault complaint; ii) the manner in which the assault was carried out; and iii) family law issues between the complainant and the appellant that allegedly supported the defence theory at trial that the complainant fabricated her assault allegation against the appellant in order to gain advantage in a custody dispute.

[69] As held by this court in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514, at p. 541, a misapprehension of evidence will render a trial unfair and occasion a miscarriage of justice where the trial judge "is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction". For the reasons that follow, I am not persuaded that this high threshold is met in this case on any of the bases asserted by the appellant.

(a) *Timing of the Assault Complaint*

[70] The appellant maintains that the timing of the complainant's disclosure of the assault to the police supported the defence theory that the

complainant had fabricated her assault allegation in order to gain advantage in a custody dispute regarding the couple's daughter or to otherwise prevent the appellant from seeing their daughter.

[71] The trial judge considered and rejected this argument, as she was entitled to do. She noted:

> In considering the evidence about the timing of [the complainant's] disclosure of the assault to the police I note that there is an incomplete picture on this point. We only know that having called 911 [the complainant] spoke to the police when they arrived at her house, that she was told that [the appellant] had not been arrested and that she "told" the police or "clarified" to the police that she had been assaulted.
>
> Constable Sejrup's evidence on this point is helpful, he said that it was in response to [the complainant] asking if [the appellant] had been arrested that she was told that he had not been arrested and then she mentioned about being assaulted to question why there had been no arrest.
>
> It is fair to say, I think, that a lay person expects an arrest when a crime has been reported, her comment would reflect that expectation. It makes sense to me that [the complainant], having called 911, would have that expectation thus the excerpt of the crime reporting process that took place at the scene with the officers is not something that I find reflects adversely on [the complainant's] credibility.

[72] The appellant attacks these findings. Contrary to the trial judge's holding that there was "an incomplete picture" on the timing of the complainant's disclosure of the assault, he argues that the evidence at trial clearly indicated that the complainant delayed in reporting the assault and only did so once she discovered that the appellant had not been arrested. He further says that the trial judge erred by finding, in the absence of any supporting evidence, that the complainant had already disclosed the assault during her earlier 911 call.

[73] I would reject this argument. I see no material misapprehension of the evidence by the trial judge on this issue.

[74] First, there was some variance between the two police officers' accounts of how long they were in attendance before the complainant disclosed the assault. The complainant also testified that she did not recall certain details about this exchange with the officers. It was therefore open

to the trial judge, on this record, to find that the evidence of the precise timing of the disclosure was "incomplete" or not entirely clear.

[75] What was clear was that the complainant did not disclose the assault in her initial discussion with Constable Boynton, but that she did so later, when speaking with Constable Sejrup and after learning that the appellant had not been arrested. The trial judge expressly recognized this and provided reasons for finding that the timing of the complaint did not reflect adversely on the complainant's credibility.

[76] Second, with respect to the 911 call, it is undisputed that there was no direct evidence at trial as to the contents of the call. However, there was ample circumstantial evidence to allow the trial judge to logically infer that the complainant had disclosed some form of assaultive behaviour by the appellant to the 911 dispatcher.

[77] In particular, the following evidence supports such an inference: (i) Constable Sejrup testified that he was asked to attend at the appellant's apartment for a "domestic" in response to the complainant's 911 call, suggesting that he was dispatched because of a report of a domestic disturbance or alleged unlawful activity; (ii) Constable Sejrup was provided with the description of a male who was allegedly involved in the "domestic"; (iii) Constable Sejrup said that, upon locating the appellant, he asked "right off the bat" whether "any threats or assault" had occurred; and (iv) the complainant testified that, after she called 911, the appellant asked her why she was "doing this" and she informed him that he was going to "be arrested", suggesting that she assumed an arrest would occur as a result of her 911 call. These factors, in combination, afforded a basis for the reasonable inference that the complainant reported an assault or assaultive behaviour during the 911 call.

[78] Third, in assessing the complainant's credibility, the trial judge addressed directly the defence assertion that the complainant had fabricated her assault allegation in order to obtain leverage or support for her position in a custody dispute regarding the couple's daughter, or to otherwise prevent the appellant's future involvement in the child's life. For cogent reasons she explained, the trial judge rejected this assertion of a motive to fabricate. She was entitled to do so.

(b) *Circumstances Surrounding the Assault*

[79] In discussing the complainant's evidence about how the assault unfolded, the trial judge indicated: "[the complainant] said that [the appellant] … pushed her with his foot causing her to fall, she got up and went to get

the cordless phone … *[The appellant] pushed her with his foot again causing her to fall again*" (emphasis added).

[80] The appellant argues, in effect, that this finding is tainted by palpable and overriding error because the complainant testified that she did not recall certain details about the second pushing incident, including which body part the appellant used to push her. The appellant submits that this error indicates that the trial judge failed to properly consider frailties in the complainant's evidence, including that the complainant did not initially disclose the second push in her videotaped statement to police and that she admittedly did not recall the details of the second push, instead relying on erroneous factual findings to erect a credible foundation for the complainant's version of events.

[81] I disagree. The trial judge's reasons confirm that she did not ignore or attempt to minimize the inconsistencies or frailties in the complainant's evidence with respect to her memory of the appellant's conduct. On the contrary, the trial judge expressly considered and resolved these inconsistencies, before ultimately accepting the complainant's evidence.

[82] In particular, the trial judge addressed head-on the inconsistency between the complainant's statement to the police – in which she described only one push by the appellant in the bedroom – and her testimony at trial, during which she described two pushes. The trial judge concluded that the "totality of [the complainant's] evidence … [provided] a clear picture of what happened" and accepted her explanation for forgetting the second push at the time of her police statement. She also considered this inconsistency in light of any possible motive by the complainant to fabricate her assault allegation in order to gain advantage "in getting herself and her daughter away from [the appellant]", concluding that it was contrary to common sense to suggest that asserting two pushes, instead of one, would assist the complainant in achieving this objective. I agree.

[83] In the trial judge's view, the 'one push/two push' inconsistency was only one of many factors to be considered in the overall assessment of the complainant's credibility. As she put it, this inconsistency was not "a determinative indicator that [the complainant's] evidence, as a whole, cannot be trusted". Again, I agree.

[84] Moreover, even if the trial judge erred in finding that the appellant twice pushed the complainant with his foot, as opposed to only once or utilizing some other body part, I am not persuaded that this error played any significant part in her reasoning process regarding the key issue in this case – whether an assault by the appellant had actually occurred.

[85] I therefore see no basis on which to fault the trial judge for her consideration of this issue. Far from ignoring the inconsistency between the complainant's trial evidence and her police statement, the trial judge explicitly identified and addressed it, in the context of the complainant's evidence as a whole. She did not err in doing so.

(c) *Pending Family Law Issues*

[86] At trial, defence counsel cross-examined the complainant about the paternity of her child. The complainant testified that she became aware that the appellant was the father of her child in 2010 after taking a paternity test. She acknowledged that, to that point, she had been receiving child support payments from another man whom she believed might be the father. She continued receiving these payments until sometime in 2011, when she withdrew her claim for child support. She testified that she did not withdraw her claim earlier, as she believed she needed a lawyer to do so and could not afford one at the time.

[87] The defence relied on the fact that the complainant continued to accept child support payments for several months after learning that the payor was not the father as a negative reflection on her credibility.

[88] The trial judge found that the issue of the child support payments was "something of a red herring". She noted that there was not enough information before the court to assess the significance of this evidence. For example, the complainant was never asked directly whether she had informed the payor that there had been a mistake, after she learned that the payor was not the father of her child. Further, "[the appellant], who was proven to be the father and presumably the one who ought to have been paying support, appears to have been aware of and involved in the delay in setting the matter right with the Family Court and the Family Responsibility Office."

[89] The appellant argues that the trial judge misapprehended the evidence about the support payments. He submits that the trial judge erred by failing to consider this evidence as potentially undermining the complainant's credibility and, essentially, by making an adverse credibility finding against the appellant without the benefit of his testimony.

[90] I disagree. In my view, the trial judge did not err in her treatment of the evidence on this issue. She considered it expressly and fully. On the record before her, it was open to the trial judge to find that there was insufficient evidence to establish any motive on the part of the complainant to fabricate her assault allegation in order to gain an advantage in any dispute with the appellant about the custody of their daughter.

[91] Moreover, the trial judge found that the appellant, who, as a matter of law, would have been responsible for paying support for his child, was aware of the delay in "setting the matter right". This finding was open to the trial judge on the evidentiary record. In any event, the trial judge explicitly "set [the support payment] issue aside". It therefore played no part in her evaluation of the evidence on the offences charged.

[92] I would not give effect to this ground of appeal.

(3) Availability of the Section 686(1)(*b*)(iii) *Proviso*

[93] I now turn to the impact of the trial judge's failure to admit the evidence of the appellant's out-of-court statement to Constable Sejrup. In light of this error, the critical question is whether the *proviso* may be applied to sustain the appellant's assault conviction. It is here that I part company with my colleague's proposed disposition of this appeal.

[94] The general principles governing the appropriate use of the *proviso* under s. 686(1)(*b*)(iii) of the *Criminal Code* are well-established. As my colleague notes, the Supreme Court has repeatedly instructed that use of the *proviso* is appropriate in two situations: i) where the error is harmless or trivial; or ii) where the Crown's case against an accused is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict: see, for example, *R. v. Sekhon*, 2014 SCC 15, [2014] 1 SCR 272, at para. 53; *R. v. Van*, 2009 SCC 22, [2009] 1 SCR 716, at para. 34; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 28-31.

[95] I do not suggest, nor did I understand Crown counsel to argue at the appeal hearing, that the evidence of the appellant's guilt on the assault charge was so overwhelming that a trier of fact would inevitably convict. I do not think that this threshold is met in this case.

[96] However, for reasons I will explain, I agree with the Crown's submission that, on the facts of this case, the exculpatory part of the appellant's out-of-court statement was so lacking in probative value that, properly considered, it would have attracted minimal weight even if it had been considered by the trial judge as part of the requisite analysis under *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742. Accordingly, this is an appropriate case for use of the *proviso*.

[97] First, while the use of the *proviso* must be approached with caution in cases that turn solely on credibility, this court has confirmed that there is no rule excluding the *proviso* in such cases. Rather, "in every case, the applicability of the *proviso* must depend upon careful consideration of the particular facts and circumstances": *R. v. Raghunauth* (2005), 2005 CanLII 37253 (ON CA), 203 O.A.C. 54 (C.A.), at para. 9; *R. v. George*, 2016 ONCA

464, at paras. 65-67. The critical question is whether the verdict would have been the same if the error had not been committed: *R. v. Bevan*, 1993 CanLII 101 (SCC), [1993] 2 S.C.R. 599, at pp. 616-17; *George*, at para. 67.

[98] Second, while the determination of this question does not permit a weighing of the strengths or weaknesses of the other evidence adduced at trial (*Van*, at para. 35), this does not mean that an assessment of the probative value of the excluded evidence is precluded. To the contrary, examination of the probative value of the excluded statement is crucial.

[99] In this connection, it is essential to focus on the exact nature of the excluded statement. The remark relied upon by the defence consisted of the appellant's assertion to Constable Sejrup that no threats or assault had occurred. At its highest, this was a simple denial of the *actus reus* of the offence of assault. It was not an assertion of an affirmative defence that was inconsistent with the complainant's account, in the sense of advancing a different explanation for the events she described. For example, nothing in the appellant's exculpatory denial of an assault was inconsistent with the trial evidence of the bruising to the complainant's knee, which included 15 police photographs of the complainant's injury and Constable Boynton's testimony of his own observations of her injury.

[100] Third, as the trial judge observed, the evidence at trial did not disclose the full circumstances surrounding the making of the appellant's statement, further undermining its probative value. The record is silent, for example, on whether the appellant was confronted with an accusation of an assault, or whether Constable Sejrup provided any information to the appellant of what he was investigating or what had been said in the 911 call. There is simply no context on this record for what preceded Constable Sejrup's inquiry of the appellant "whether any threats or assault had occurred", or what he said to the appellant in that regard.

[101] Recall, in particular, that at the time of his conversation with the appellant, Constable Sejrup had not yet spoken to the complainant. Further, Constable Sejrup was not asked to detail, from his notes or independent recollection, the specifics of what he and the appellant said during their 30-40 minute discussion. He described the subject-matter of their conversation only in general terms. Finally, as the appellant did not testify, he was not cross-examined on the statement. It was, therefore, entirely untested.

[102] Fourth, and importantly, parts of the appellant's statement confirm aspects of the complainant's testimony (for example, that there was – at least – a verbal argument between the couple, following which the appellant left the apartment) and the observations of the police officers. Thus, had the trial judge considered the entirety of the appellant's statement, the

inculpatory parts of it would have actually bolstered the strength of the Crown's case, rather than that of the defence.

[103] Fifth, the appellant does not contend that his decision not to testify was influenced in any way by the issue of the admission of his out-of-court statement to Constable Sejrup, or that he would have conducted his defence any differently had he known that the statement would be excluded. Nor has the appellant sought to tender any fresh evidence on appeal to support such contentions. Further, I see nothing in the record before this court to ground any suggestion that trial fairness was compromised by the trial judge's error in excluding the out-of-court statement. I again emphasize that parts of the appellant's statement supported, rather than undermined, the Crown's case against the appellant.

[104] Sixth, I acknowledge that because credibility was the central issue at trial, the principles set out in *W.(D.)* were engaged. However, they were of limited application in this case. The appellant neither testified nor called any evidence in his defence. See *R. v. Didone*, 2015 ONCA 636, at para. 9. I also note that the trial judge was alert to the presumption of innocence and the Crown's burden to establish the appellant's guilt beyond a reasonable doubt. She explicitly adverted to both in her reasons and directed herself that she "must be satisfied beyond a reasonable doubt by the Crown's case before I can make a finding of guilt". She then noted, "In this particular case that means being satisfied on [the complainant's] evidence. There is some corroboration of her evidence by the injuries that have been put into evidence before this Court."

[105] Finally, the trial judge undertook a detailed evaluation of the complainant's testimony, including of the inconsistencies in her evidence and the defence theory of her alleged motive to fabricate. Having done so, she accepted the complainant's version of events on its own merits. She found the complainant to be credible and her testimony to be reliable. She was convinced, beyond a reasonable doubt, that there was "an argument [between the complainant and the appellant] and that [the complainant] was pushed by [the appellant] using his foot causing her to fall".

[106] Accordingly, I am not persuaded that the excluded evidence – a bare denial of any assault – reasonably would have affected the trial judge's ultimate conclusion. To the contrary, given the nature and scope of the credibility analysis undertaken by the trial judge, it is apparent in my view that she would have assigned little weight to the appellant's simple denial of any assault, had his out-of-court statement been admitted and considered.

[107] In all these circumstances, I conclude that no substantial wrong or miscarriage of justice occurred in this case. On the facts here, the trial judge's error in excluding the statement was inconsequential.

[108] I would therefore apply the *proviso* in respect of the appellant's assault conviction. As I have indicated, the trial judge held that the breach of probation charges were made out regardless of the outcome of the prosecution on the assault charge, based on other conduct by the appellant that breached the peace. I agree. As a result, I would also uphold the appellant's convictions on these charges.

IV. Disposition

[109] For the reasons given, I would dismiss the appeal.

Released: July 22, 2016

"E.A. Cronk J.A."

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[1] The appellant did not argue that the second ground of appeal that the trial judge misapprehended the complainant's evidence affected the verdicts on the breach of probation counts.