Her Majesty the Queen v. Edgar
[Indexed as: R. v. Edgar]

101 O.R. (3d) 161
2010 ONCA 529

Court of Appeal for Ontario,
Feldman, Sharpe and Gillese JJ.A.
July 23, 2010

Criminal law -- Abuse of process -- Accused charged with second degree murder -- After new trial ordered on appeal Crown offering before retrial to accept plea of guilty to manslaughter and not to seek permission to initiate dangerous offender proceedings if accused would agree that Crown would seek life imprisonment and that accused would seek a sentence of not less than six to eight years -- Accused rejecting offer -- Accused found guilty of manslaughter and Crown bringing successful dangerous offender application -- Dangerous offender application not constituting abuse of process.

Criminal law -- Evidence -- Prior consistent statements -- If accused first testifies and is subjected to cross-examination trial judge having discretion to admit spontaneous exculpatory statements made by accused upon or shortly after arrest for purpose of showing accused's reaction when first confronted with accusation and consistency -- Prior statements not admissible for the truth but relevant to accused's credibility and circumstantial evidence bearing on guilt or innocent.

Criminal law -- Trial -- Charge to jury -- Credibility -- Judge instructing jury that it could take fact that accused had stake in outcome of trial into account in assessing his evidence -- Jury not misled as to appropriate burden and standard of proof in light of entire charge.

The accused was convicted in 1996 of the second degree murder of his girlfriend. His appeal was allowed and a new trial was ordered. Before trial, the Crown offered to take a plea of guilty to manslaughter and to refrain from seeking permission from the Attorney General to initiate dangerous offender proceedings on the condition that it would ask the trial judge to impose a sentence of life imprisonment and the accused would seek a sentence of not less than six to eight years beyond time served. The accused rejected that offer. At trial, he sought to introduce in their entirety three statements which he made to the police shortly after his arrest. The trial judge refused to admit the entire statements and admitted only the edited versions of the statements which were found to be admissible by the Court of Appeal on appeal from the first trial. The accused was acquitted of second degree murder and convicted of manslaughter. On application by the Crown, the accused was designated a dangerous offender and sentenced to indeterminate custody. The accused appealed.

Held, the appeal should be dismissed.

Spontaneous exculpatory statements made by an accused person upon or shortly after arrest may be admitted as an exception to the general rule excluding prior consistent statements for the purpose of showing the accused's reaction when first confronted with the accusation, provided the accused first testifies and exposes himself or herself to cross-examination. An accused person's spontaneous reaction to an accusation may be relevant to the credibility of the accused and as circumstantial evidence that may have a bearing on guilt or innocence. If a statement has probative value, it should only be excluded

if there are sound reasons of law or policy to do so. The various rationales offered for exclusion do not warrant the imposition of a blanket exclusionary rule. The rule against oath-helping does no more than restate the need for evidence to have probative value. The hearsay rationale for exclusion of a prior consistent statement evaporates where the accused takes the stand and exposes himself o r herself to cross-examination. The risk of fabrication can be dealt with through cross- examination and by looking to the degree of spontaneity the proffered statement exhibits. Statements that are lacking in spontaneity may be either excluded or, in the case of doubt, made the subject of an instruction to the jury as to weight by the trial judge. Although not strictly admissible for their truth, such statements are relevant to the accused's credibility and may be circumstantial evidence bearing on guilt or innocence. In the circumstances of this case, the refusal to admit the complete statements did not give rise to a substantial wrong or miscarriage of justice.

The trial judge did not err in noting in his instruction to the jury that the accused had an interest in the result of the trial which they could fairly bear in mind in assessing his evidence. In light of the balance of the charge, the jury could not have been misled as to the appropriate burden and standard of proof by reason of that sentence.

The Crown's dangerous offender application did not amount to an abuse of process. There is nothing in the record to support the accused's assertion that the dangerous offender application was brought to "punish" the accused for refusing the Crown's offer or that the Crown's offer to resolve the case before the retrial was made in bad faith or was improperly motivated. The accused was fully aware that the plea resolution discussions had failed and that he had reached no agreement with the Crown concerning the sentence. He embarked upon the trial knowing full well that, if convicted, he could be faced with a dangerous offender application.

APPEAL by the accused from the conviction and from the dangerous offender designation imposed by Hockin J. of the Superior Court of Justice dated October 27, 2001 and July 15, 2003 respectively.

Cases referred to *R. v. B. (S.C.)* (1997), 1997 CanLII 6319 (ON CA), 36 O.R. (3d) 516, [1997] O.J. No. 4183, 104 O.A.C. 81, 119 C.C.C. (3d) 530, 10 C.R. (5th) 302, 36 W.C.B. (2d) 174 (C.A.); *R. v. Béland*, 1987 CanLII 27 (SCC), [1987] 2 S.C.R. 398, [1987] S.C.J. No. 60, 43 D.L.R. (4th) 641, 79 N.R. 263, J.E. 87-1124, 9 Q.A.C. 293, 36 C.C.C. (3d) 481, 60 C.R. (3d) 1, 3 W.C.B. (2d) 69; *R. v. Campbell* (1977), 1977 CanLII 1191 (ON CA), 17 O.R. (2d) 673, [1977] O.J. No. 1684, 38 C.C.C. (2d) 6, 1 C.R. (3d) 309, 1 W.C.B. 619 (C.A.); *R. v. Graham*, 1972 CanLII 172 (SCC), [1974] S.C.R. 206, [1972] S.C.J. No. 117, 26 D.L.R. (3d) 579, [1972] 4 W.W.R. 488, 7 C.C.C. (2d) 93, 19 C.R.N.S. 117; *R. v. Keeler*, 1977 ALTASCAD 126 (CanLII), [1977] A.J. No. 785, [1977] 5 W.W.R. 410, 4 A.R. 449, 36 C.C.C. (2d) 8 (C.A.); *R. v. Rojas*, [2008] 3 S.C.R. 111, [2008] S.C.J. No. 58, 2008 SCC 56, [2008] 12 W.W.R. 571, 60 C.R. (6th) 271, 298 D.L.R. (4th) 444, 79 W.C.B. (2d) 582, 260 B.C.A.C. 258, J.E. 2008-2040, EYB 2008-149204, 236 C.C.C. (3d) 153, 84 B.C.L.R. (4th) 25, 380 N.R. 211; R. *v. Rozich*, [1979] Q.J. No. 218, 10 C.R. (3d) 364, [1979] C.S. 152 (S.C.); *R. v. Seaboyer; R. v. Gayme*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62, 83 D.L.R. (4th) 193, 128 N.R. 81, J.E. 91-1312, 48 O.A.C. 81, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117, 6 C.R.R. (2d) 35, 13 W.C.B. (2d) 624; *R. v. Simpson*, 1988 CanLII 89 (SCC), [1988] 1 S.C.R. 3, [1988] S.C.J. No. 4, 46 D.L.R. (4th) 466, 81 N.R. 267, [1988] 2 W.W.R. 385, J.E. 88-256, 23 B.C.L.R. (2d) 145, 38 C.C.C. (3d) 481, 62 C.R. (3d) 137, 4 W.C.B. (2d) 36; *R. v. Small*, [1991] O.J. No. 3693 (Gen. Div.); *R. v. Stone*, 1999 CanLII 688 (SCC), [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27, 173 D.L.R. (4th) 66, 239 N.R. 201, J.E. 99-1128, REJB 1999-12568, 123 B.C.A.C. 1, 134 C.C.C. (3d) 353, 24 C.R. (5th) 1, 63 C.R.R. (2d) 43, 42 W.C.B. (2d) 232; *R. v. Terceira* (1999), 1999 CanLII 645 (SCC), 46 O.R.

(3d) 96, [1999] 3 S.C.R. 866, [1999] S.C.J. No. 74, 250 N.R. 101, 129 O.A.C. 283, 142 C.C.C. (3d) 95, 32 C.R. (5th) 77, 45 W.C.B. (2d) 12, affg (1998), 1998 CanLII 2174 (ON CA), 38 O.R. (3d) 175, [1998] O.J. No. 428, 107 O.A.C. 15, 123 C.C.C. (3d) 21, 15 C.R. (5th) 359, 37 W.C.B. (2d) 317 (C.A.); *R. v. Toten* (1993), 1993 CanLII 3427 (ON CA), 14 O.R. (3d) 225, [1993] O.J. No. 1495, 63 O.A.C. 321, 83 C.C.C. (3d) 5, 16 C.R.R. (2d) 49, 20 W.C.B. (2d) 234 (C.A.), consd

Other cases referred to *R. v. B. (L.)* (1993), 1993 CanLII 8508 (ON CA), 13 O.R. (3d) 796, [1993] O.J. No. 1245, 64 O.A.C. 15, 82 C.C.C. (3d) 189, 22 C.R. (4th) 209, 20 W.C.B. (2d) 52 (C.A.); *R. v. Burton*, [2000] O.J. No. 4044, 48 W.C.B. (2d) 23 (S.C.J.); R. v. Do, 2003 CanLII 24750 (ON CA), [2003] O.J. No. 1720, 171 O.A.C. 92, 175 C.C.C. (3d) 176, 57 W.C.B. (2d) 311 (C.A.); *R. v. Edgar*, 2000 CanLII 5162 (ON CA), [2000] O.J. No. 137, 128 O.A.C. 125, 142 C.C.C. (3d) 401, 45 W.C.B. (2d) 166 (C.A.); *R. v. Hardy* (1794), 24 St. Tr. 199 ; *R. v. Haroun*, 1997 CanLII 382 (SCC), [1997] 1 S.C.R. 593, [1997] S.C.J. No. 35, 147 D.L.R. (4th) 197, 209 N.R. 6, J.E. 97-665, 115 C.C.C. (3d) 261, 6 C.R. (5th) 392, 34 W.C.B. (2d) 47; *R. v. J. (T.J.)*, 1988 CanLII 7142 (ON CA), [1988] O.J. No. 1438, 29 O.A.C. 219, 44 C.C.C. (3d) 248, 66 C.R. (3d) 54, 5 W.C.B. (2d) 293 (C.A.); *R. v. Liu*, 2004 CanLII 34061 (ON CA), [2004] O.J. No. 4221, 190 C.C.C. (3d) 233, 64 W.C.B. (2d) 178 (C.A.), affg 2003 CanLII 64227 (ON SC), [2003] O.J. No. 74, [2003] O.T.C. 11, 172 C.C.C. (3d) 79, 56 W.C.B. (2d) 336 (S.C.J.); *R. v. Lucas*, 1962 CanLII 625 (SCC), [1962] S.C.J. No. 80, [1963] 1 C @@.C.C. 1, 39 C.R. 101; *R. v. McCarthy* (1980), 71 Cr. App. R. 142 (Eng. C.A.); *R. v. Newsome* (1980), 71 Cr. App. R. 325 (Eng. C.A.); R. v. P. (G.F.) (1994), 1994 CanLII 8721 (ON CA), 18 O.R. (3d) 1, [1994] O.J. No. 586, 70 O.A.C. 350, 89 C.C.C. (3d) 176, 29 C.R. (4th) 315, 23 W.C.B. (2d) 154 (C.A.); *R. v. Pearce* (1979), 69 Cr. App. R. 365 (Eng. C.A.); *R. v. Phillips*, 1999 CanLII 2449 (ON CA), [1999] O.J. No. 2848, 123 O.A.C. 304, 138 C.C.C. (3d) 297, 26 C.R. (5th) 390, 43 W.C.B. (2d) 251 (C.A.), affg [1995] O.J. No. 4152 (Gen. Div.); *R. v. Risby*, 1978 CanLII 184 (SCC), [1978] 2 S.C.R. 139, [1978] S.C.J. No. 4, 39 C.C.C. (2d) 567; *R. v. Storey and Anwar* (1968), 52 Cr. App. R. 334 (Eng. C.A.); *R. v. Suzack*, 2000 CanLII 5630 (ON CA), [2000] O.J. No. 100, 128 O.A.C. 140, 141 C.C.C. (3d) 449, 30 C.R. (5th) 346, 71 C.R.R. (2d) 1, 45 W.C.B. (2d) 157 (C.A.) [Leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 583, 80 C.R.R. (2d) 376]; *R. v. Tooke* (1990), 90 Cr. App. R. 417, 154 J.P. 318 (Eng. C.A.); *R. v. Trombley*, [1 @@.999] 1999 CanLII 681 (SCC), 1 S.C.R. 757, [1999] S.C.J. No. 20, 238 N.R. 95, 120 O.A.C. 302, 134 C.C.C. (3d) 576, 42 W.C.B. (2d) 340, affg (1998), 1998 CanLII 7128 (ON CA), 40 O.R. (3d) 382, [1998] O.J. No. 2680, 110 O.A.C. 329, 126 C.C.C. (3d) 495, 39 W.C.B. (2d) 115 (C.A.); *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26, 122 N.R. 277, J.E. 91-603, 46 O.A.C. 352, 63 C.C.C. (3d) 397, 3 C.R. (4th) 302, 12 W.C.B. (2d) 551, EYB 1991-67602; *R. v. Zurmati*, [1993] O.J. No. 1520 (C.A.) [Leave to appeal to S.C.C. refused [1994] 1 S.C.R. xii, [1993] S.C.C.A. No. 388, 169 N.R. 319n, 68 O.A.C. 399n]

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James Lockyer and Brian Snell, for appellant.

Shelley Maria Hallett, for respondent.

The judgment of the court was delivered by

[1] SHARPE J.A.: -- The appellant was convicted in 1996 of second degree murder in the stabbing death of his girlfriend, Tracey Kelsh. In January 2000, this court allowed his appeal from that conviction and ordered a new trial: 2000 CanLII 5162 (ON CA), [2000] O.J. No. 137, 142 C.C.C. (3d) 401 (C.A.). In October 2001, after a three-week jury trial, the appellant was acquitted of murder but convicted of manslaughter. The Crown initiated a dangerous offender proceeding and, after a lengthy hearing, the trial judge designated the appellant a dangerous offender and sentenced him to indeterminate custody.

[2] The appellant appeals both the conviction and the dangerous offender designation. The central issue on the appeal from conviction is whether the trial judge erred by refusing to admit, in their entirety, out-of-court statements made by the appellant shortly after his arrest. The appellant also contends that the trial judge's instructions to the jury failed to deal properly with the burden of proof and with the defence of automatism. Finally, the appellant submits that the trial judge erred by refusing to stay the dangerous offender proceeding as an abuse of process.

Factual Overview

[3] The appellant and the deceased were involved in a short- term romantic relationship. Both were heavy users of cocaine and alcohol. The deceased had a lengthy history of mental illness and a pattern of impulsive, violent behaviour.

[4] On October 8, 1994, and into the next day, the appellant and the deceased were partying and consuming cocaine and alcohol. After a violent struggle in the bathroom of the appellant's apartment, the deceased suffered multiple stab wounds and other injuries. The most serious and fatal wound she sustained was a deep cut slitting her throat.

[5] The appellant testified that the deceased came after him, wielding two kitchen knives. She backed him into the bathroom and shouted bizarre statements about bikers and levelled accusations against him. A violent struggle ensued in the bathroom. The appellant testified that it was pitch dark, he was terrified and he feared for his life. He attempted to take the knives from the deceased, managed to seize one and recalled stabbing her in the arm.

[6] Neighbours living immediately above the appellant's apartment heard the appellant yelling "shut up" several times and heard a female voice moaning in pain. They called the police, who arrived quickly. The appellant and the deceased were still in the bathroom when the policed arrived. The appellant resisted

their entrance into the bathroom. The police heard the appellant say "I'm going to stab/kill you", "I'm going to stab her", "I'm going to cut/slit her throat". The police heard no female voice. They eventually managed to force their way into the bathroom before proceeding to subdue and handcuff the appellant.

[7] Shortly after his arrest and later during the morning, the appellant made three statements to the police that are the subject of the main ground of appeal. The first two statements were made very shortly after the appellant's arrest. The third statement was made about four hours after his arrest. The first two statements were partially exculpatory, but largely aberrant and incoherent. The third statement was coherent and entirely exculpatory.

[8] Those same statements also constituted the principal ground of appeal against the appellant's 1996 conviction for second degree murder. At the first trial, the trial judge excluded all three statements. On the first trial and appeal, both the appellant's trial and appeal counsel (not the counsel appearing on this appeal) conceded that only portions of the appellant's statements were admissible. Referring to the position taken at the first trial, this court stated the following, at para. 19: "Counsel did not seek to introduce the other statements [those at issue on this appeal] made at the time, conceding that they were self-serving and inadmissible." At that time, the appellant took the position that edited versions of the first two statements containing aberrant utterances about bikers and police trying to kill him were relevant to the issue of his state of mind and capacity to form a criminal intent. Further, he argued that the third statement was admissible to rebut the Crown's allegation of recent fabrication. This court accepted the first submission and ordered a new trial on the basis that the trial judge at the 1996 trial had erred by excluding the statements in their entirety. This court ruled that edited portions of those statements bearing upon the appellant's state of mind were properly admissible as an exception to the rule against the admissibility of prior consistent statements. This court rejected the second argument on the ground that the Crown had not alleged recent fabrication.

[9] At the trial which is the subject of this appeal, the appellant urged the trial judge to admit all three of his post- arrest statements in their entirety. The trial judge refused to do so and admitted only the edited versions of the statements found to be admissible by this court on the appeal from the first trial.

[10] On the dangerous offender hearing, the trial judge found that there was compelling evidence to justify designating the appellant a dangerous offender. The appellant does not take issue with the trial judge's finding. However, he submits that the dangerous offender proceeding constituted an abuse of process and that the trial judge erred in refusing to stay it on that basis.

[11] Before trial, there were plea discussions between the Crown and the appellant. The Crown offered to take a plea of guilty to manslaughter on the following terms. The Crown would ask for a life sentence and the appellant could not ask for a sentence of less than six to eight years beyond time served. The appellant declined the proposal but did offer to plead guilty to manslaughter on condition that there be an open sentence hearing. The Crown did not accept that offer. The Crown subsequently indicated it would accept a guilty plea to manslaughter with life imprisonment, accompanied by a dangerous offender assessment. Following further discussions, the defence offered a plea of guilty to manslaughter on the understanding that, while it would seek a life sentence, the Crown would not pursue a dangerous offender proceeding, while the defence would ask for time served. None of these offers was accepted.

[12] When the appellant was found not guilty of murder but guilty of manslaughter, the trial Crown launched the dangerous offender proceeding. The appellant asked the trial judge to stay that proceeding on the ground that, in the light of the position taken by the Crown during plea discussions, launching a dangerous offender proceeding was oppressive and designed to punish the appellant for insisting upon a trial. The trial judge rejected that contention and refused to stay the dangerous offender proceeding.

Issues

[13] The appellant's principal ground of appeal is that all three of his out-of-court statements should have been admitted in their entirety. He argues that there has been a shift in the law towards a principled approach governing admissibility, based upon a weighing of both probative value and prejudice. He further contends that, under the principled approach, the exculpatory statements of an accused person given upon or shortly after arrest should be admitted where that individual testifies at trial.

[14] That question and the other issues raised on this appeal may be summarized as follows:

> (1) Did the trial judge err by refusing to admit the entirety of the appellant's out-of-court statements made shortly following his arrest?
>
> (2) Did the trial judge err by
>
> (a) refusing to give a W. (D.) [*R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26] instruction; and
>
> (b) emphasizing the appellant's interest in the result of the trial when considering the assessment of his credibility?
>
> (3) Did the trial judge err by failing to provide the jury with an adequate instruction on the defence of automatism?
>
> (4) Did the trial judge err by refusing to dismiss the dangerous offender application as an abuse of process?

Analysis 1

<u>Admissibility of the appellant's out-of-court statements</u>

[15] The appellant sought to introduce three statements he made to the police on the morning following his arrest. The first was made in the underground tunnel leading to the police station. The second was given some 30 minutes later, in a cell at the police station, while the third was made almost four hours later, in a hospital room where the appellant had been admitted for treatment of his injuries. The first two statements contained passages which were exculpatory, but also portions that were bizarre and incoherent. The third statement was exculpatory and did not contain the bizarre and incoherent elements present in the first two statements.

(a) The rulings of the trial judge and of this court on appeal in 2000

[16] These very statements were the subject of the detailed attention of this court on the appeal from the 1996 conviction. On that appeal, the appellant sought only to introduce portions of the contentious statements. At paras. 15-16 of this court's decision, Charron J.A. (Carthy and Sharpe JJ.A. concurring) summarized the tenor of the three statements as follows, italicizing the portions of the statements sought to be admitted:

> Upon arriving at the station, the appellant said "she had the knife. The bikers are going to kill me. I'm telling you." Shortly after, the appellant started yelling "the bikers are going to kill me. She had the knife. She was trying to kill me." He also yelled "she kissed me and tried to kill me. I took the knife out of her hands. I got one of the knives out of her hands. She was trying to kill me. Why would she try to kill me? She had two knives." At 8:17 a.m., the appellant further stated:
>
> > I will testify they are going to kill me. She tried to kill me. I'm done. I'm done. The police are going to cut my dick off. They're the ones who are going to kill me. The bikers want to kill me. You get the knife. You will have her prints all over it. I'm telling you right now I could tell you guys so fucking much. I'll tell you everything. They are killing me. They are stabbing me. The police will tell you everything. Why would they do this to me? Because they are bikers. They are trying to kill me I'll tell you something, I could tell you everything. Why would they want to kill me because they're bikers. The police are killing me. They're stabbing me. They are killing me. They are -- they were the bikers. I'll tell you everything. The police are stabbing me. They're killing me.
>
> Later that morning, while at the hospital, the appellant made a further statement to the two investigating officers, briefly stating his version of the events of the night. The defence also sought to introduce this statement in evidence. It is not necessary for our purposes to reproduce the whole statement. It is sufficient to note that, in contrast to the earlier utterances, the statement appeared to be coherent and was generally consistent with the appellant's testimony at trial, except that at trial the appellant testified that he stabbed the deceased just once. The description of the main events contained in the statement reads as follows:
>
> > Before you know she pulled out two knives and got me in the hand. Somehow we ended up in the bathroom. I smashed the mirror. She dropped the knife. I grabbed it. I started sticking her with the knife everywhere. The lights were out. Why are you doing it? I got paid to do it. It doesn't make sense to me. Someone was outside the door. They said "who is it?" I thought they were out to fuck her. She had one knife. I had the other. She wouldn't stop. She kept up picking up pieces of glass. She wouldn't stop. I can't believe it. (Emphasis added)

[17] Charron J.A. held that the trial judge had erred in refusing to admit the selected portions of the first two statements on the ground that they were not made at a time sufficiently proximate to be relevant to the appellant's state of mind during the perpetration of the offence. Charron J.A. concluded, at para. 24:

The probative value of the utterances did not lie in the fact that they were made contemporaneously with the event in circumstances where the appellant would have had no opportunity to reflect upon what was best for him to say. Clearly they were not. The probative value lay in the fact that the

utterances appeared to be irrational or delusional, and hence potentially supportive of the defence being advanced. The passage of time, or, for that matter, the fact that there may have been a rational explanation for the statements, were simply matters going to the weight of the evidence, not its admissibility.

[18] The appellant had sought to have the third statement made at the hospital admitted in order to rebut the Crown's implicit allegation of recent fabrication. Charron J.A. held that the trial judge did not err in refusing to admit the statement in question. In her view, the Crown had merely challenged the appellant's credibility and had not, either expressly or implicitly, alleged recent fabrication. In her ruling, at para. 33, Charron J.A. applied what she took to be the established rule against the admission of prior consistent statements in the following fashion:

Previous consistent statements of a witness, including an accused person, are generally inadmissible because they are considered to be superfluous and of no probative value. The rule is based on the rationale that the credibility of the witness is not enhanced simply because the same statement was made before. In some instances, the rule does not apply. One such instance occurs when a witness's testimony is challenged in cross-examination as being a recent fabrication. In such a case, it is not superfluous to lead evidence that the witness, on an earlier occasion, made a statement consistent with the challenged testimony because it serves to rebut the allegation of recent fabrication.

(b) Ruling at issue on this appeal

[19] At the trial that concerns us on this appeal, the issue of the admissibility of the appellant's three exculpatory statements was dealt with in a pre-trial ruling. The appellant's trial counsel urged the trial judge to depart from the traditional rule excluding prior consistent statements referred to by Charron J.A. in the above-quoted passage, and to admit the statements in their entirety. The appellant's trial counsel undertook to call the appellant to testify in his own defence to ensure that he could not advance his own evidence in defence without subjecting himself to cross-examination, although counsel conceded that the appellant had no recollection of making the post-arrest statements and that they would have to be introduced through Crown witnesses.

[20] The trial judge referred both to Charron J.A.'s judgment in the first appeal and to this court's decision in *R. v. Campbell* (1977), 1977 CanLII 1191 (ON CA), 17 O.R. (2d) 673, [1977] O.J. No. 1684 (C.A.), where Martin J.A. explained that an accused's prior consistent statements are, subject to certain exceptions, ordinarily excluded as hearsay and because they lack probative value. The trial judge rejected the submission that the rule had been attenuated by subsequent decisions and admitted only those portions of the statements that had been found admissible by this court in the 2000 appeal. As this was a pre-trial ruling, the trial judge only had counsel's assurance that the appellant would be called to the stand and subjected to cross- examination. However, as I read the ruling, the trial judge found that even if the appellant did take the stand, he could not introduce his prior statements because he had no recollection of making them and this would render the Crown's cross-examination "problematic or pointless".

(c) Should the traditional exclusionary rule have been applied?

[21] Mr. Lockyer, counsel for the appellant, submits that the time has come to reassess the general exclusion of an accused person's post-arrest exculpatory utterances as prior consistent statements and that, in the circumstances of this case, the appellant's statements made at the time of his arrest and very shortly thereafter should have been admitted. He submits that the traditional "black letter" exclusionary rule regarding the prior consistent statements of an accused is not consonant with two fundamental aspects of the modern law of evidence. First, such statements are excluded in part because they are hearsay and the law governing hearsay has been entirely recast in light of the principled approach, which now focuses upon necessity and reliability. Second, if there is a "black letter" rule routinely excluding the accused's prior consistent statements, it is out of step with the principle expressed in *R. v. Seaboyer; R. v. Gayme*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62, favouring the adm issibility of all probative evidence unless outweighed by prejudicial effect or some clear ground of law or policy. Mr. Lockyer submits that the generally held assumption that an accused's prior consistent statements lack probative value needs to be re-examined. He relies upon an established line of English case law that regards such statements as highly probative, finds support in some Canadian jurisprudence, and draws upon the findings and recommendations by the Honourable Fred Kaufman in the The Commission on Proceedings Involving Guy Paul Morin: Report (Toronto: Ontario Ministry of the Attorney General, 1998) and a growing body of scholarly opinion supporting admissibility. These authorities all suggest that under certain conditions, the prior consistent statements of an accused person do have probative value and therefore should not be excluded.

[22] I agree with the submission that the gradual abandonment of the traditional "black letter rule -- list of exceptions" approach to the law of evidence in favour of the principled approach invites reconsideration of the law relating to the admissibility of an accused's prior consistent statements. However, in recent decisions, the Supreme Court appears to have maintained the traditional approach to prior consistent statements: see *R. v. Rojas*, 2008 SCC 56 (CanLII), [2008] 3 S.C.R. 111, [2008] S.C.J. No. 58, at paras. 36-37. This is neither the right court nor the right case to reassess the broad issue of the treatment to be accorded prior consistent statements generally.

[23] On the other hand, I believe that it is open to this court, on the present state of the authorities and in the circumstances of this case, to consider the more specific issue of the treatment accorded prior consistent statements of an accused person immediately upon arrest or when first confronted with an accusation by the police.

[24] For the following reasons, I conclude that the spontaneous exculpatory statements made by an accused person upon or shortly after arrest may be admitted as an exception to the general rule excluding prior consistent statements for the purpose of showing the reaction of the accused when first confronted with the accusation, provided the accused testifies and thereby exposes himself or herself to cross-examination.

(d) Rationale for the traditional exclusionary rule

[25] An inculpatory statement of an accused person made outside of court is admissible against the accused as a confession (an admission against interest), provided that that it is compliant with the *Canadian Charter of Rights and Freedoms* and voluntary when made to a person in authority.

[26] Conversely, exculpatory out-of-court statements made by an accused person are generally considered inadmissible, although this rule is subject to many exceptions.

[27] The starting point in Canadian law for analysis of the exclusionary rule with respect to exculpatory out-of-court statements resides in Martin J.A.'s judgment in *Campbell*. In that case, the accused was charged with the murder of his wife. She died as a result of gunshot wounds and her body was set on fire. Shortly after he left the scene of her death, the accused made exculpatory statements to customs officials as he left Canada through a border crossing. The accused argued that these statements were admissible to rebut the Crown's allegation of recent fabrication. His counsel argued that, upon giving his undertaking to call the accused as a witness, he should be permitted to elicit the accused's prior exculpatory statements through cross-examination of Crown witnesses.

[28] Martin J.A. held that the trial judge had properly excluded the statements at issue. He explained the rationale for the exclusionary rule in the following terms, at p. 685 O.R.:

> The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:
>
> > I. The rule which precludes an accused from eliciting from witnesses self-serving statements which he has previously made.
> >
> > II. The rule which provides that a witness, whether a party or not, may not repeat his own previous statements concerning the matter before the Court, made to other persons out of Court, and may not call other persons to testify to those statements.

Statements made by an accused which infringe rule I are excluded as hearsay. The narration by a witness of earlier statements made to other persons out of Court appears to be excluded under rule II, because of the general lack of probative value of such evidence, save in certain circumstances, in support of the credibility of the witness. Each of the above rules is subject to well-recognized exceptions or qualifications, and there is some overlap, both in the rules and in the exceptions to them: see Phipson on Evidence, 12th ed. (1976), at pp. 650-3; Cross on Evidence, 4th ed., at pp. 207-20; Previous Consistent Statements, [1968] Camb. L.J. 64, by R. N. Gooderson.

[29] I will return below to the significance of the English authorities cited by Martin J.A.

[30] In rejecting the argument that the trial judge had erred by refusing to allow the accused to elicit the prior consistent statements through cross-examination of Crown witnesses, Martin J.A. identified a further rationale for the exclusionary rule:

> an accused person should not be permitted to advance his or her own evidence of a defence through out-of-court statements and avoid cross-examination. Martin J.A. added, at p. 686 O.R., that even where counsel for the accused undertakes to call the accused to the stand, the defence should not be allowed to elicit the prior consistent statements from third parties before the accused testifies
>
> > I am, however, unable to assent to the proposition that upon counsel giving an undertaking to call the accused as a witness, although given in the utmost good faith, counsel is then entitled to elicit from third persons statements made to them by the

> accused in order to rebut an implicit and anticipated allegation that his evidence, not yet given, will be a recent fabrication.
>
> The accused, of course, remains free to alter his instructions to counsel, or to change his mind with respect to testifying. Such an extension of the exception is unwarranted, would be destructive of an orderly trial and might be productive of mistrials if the accused did not testify after his self-serving statements had been introduced on the basis that such statements would become admissible under this exception.

[31] In *R. v. Simpson*, 1988 CanLII 89 (SCC), [1988] 1 S.C.R. 3, [1988] S.C.J. No. 4, at p. 22 S.C.R., the Supreme Court of Canada reiterated that the lack of cross-examination constitutes a rationale for excluding the exculpatory out-of-court statements of an accused:

> This rule is based on the sound proposition that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected, as well, to cross-examination.

See, also, *R. v. Graham*, 1972 CanLII 172 (SCC), [1974] S.C.R. 206, [1972] S.C.J. No. 117, at p. 214 S.C.R.; *Rojas*, at paras. 36-37.

[32] Another argument advanced in support of excluding the prior consistent statements of the accused, almost certainly inspired by the same thinking that produced the common law rule precluding an accused person from testifying, is the risk of fabrication. For instance, see *R. v. Béland*, 1987 CanLII 27 (SCC), [1987] 2 S.C.R. 398, [1987] S.C.J. No. 60, at p. 410 S.C.R., citing *R. v. Hardy* (1794), 24 St. Tr. 199, at pp. 1093-94, and putting forth the following proposition: ". . . the presumption . . . is that no man would declare anything against himself, unless it were true; but that every man, if he was in difficulty, or in the view of difficulty, would make declarations for himself".

[33] Trial efficiency is also advanced as a reason to limit the admissibility of prior consistent statements: see *Béland*, at p. 411 S.C.R., refusing to admit evidence that the accused had willingly agreed to take a polygraph as "[t]o do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence".

[34] Exclusion of the prior consistent statements of the accused is also viewed as a product of the rule against oath- helping or adducing evidence solely for the purpose of bolstering a witness's credibility: see *Béland*, at pp. 405-409 S.C.R.

(e) Exceptions to the traditional rule

[35] It is well recognized, however, that the prior consistent statements of an accused are not always excluded. Two established exceptions have already been mentioned. First, where an accused's prior consistent statement is relevant to his or her state of mind at the time the offence was committed, it may be admitted. Second, where the Crown alleges recent fabrication, the accused may adduce evidence of a prior consistent statement to rebut the allegation. A third exception is made for "mixed" statements that are partly inculpatory and partly exculpatory. Where the Crown seeks to adduce evidence of such a statement, the inculpatory portion is admissible as an admission against interest and,

as a matter of fairness to the accused, the Crown is required to tender the entire statement, with the exculpatory portion being substantively admissible in favour of the accused: Rojas, at para. 37. A fourth exception is that the prior statement will be admitted where it forms part of the res gestae, in other words, where the statement itself forms part of the incident that gives rise to the charge: see *Graham*; *R. v. Risby*, 1978 CanLII 184 (SCC), [1978] 2 S.C.R. 139, [1978] S.C.J. No. 4.

[36] This list of exceptions is not exhaustive. In *Simpson*, the Supreme Court of Canada stated, at p. 22 S.C.R., that general exclusion of the prior consistent statements of an accused person is "not an inflexible rule, and in proper circumstances such statements may be admissible".

[37] In view of what the Supreme Court stated in *Simpson*, I approach the issue of whether the law does or should recognize the admissibility exception being advocated in this case on the basis of both existing authority and the general propositions advanced in *Seaboyer*, at pp. 609-10 S.C.R. If the statements are relevant and probative, they should be admitted:

> "everything which is probative should be received, unless its exclusion can be justified on some other ground". Rules of evidence that prevent the trier of fact from getting at the truth "[run] afoul of our fundamental conceptions of justice and what constitutes a fair trial", unless they can be justified on "a clear ground of policy or law".

[38] This was the approach taken in *R. v. B. (S.C.)* (1997), 1997 CanLII 6319 (ON CA), 36 O.R. (3d) 516, [1997] O.J. No. 4183 (C.A.), at p. 525 O.R., where in a jointly written judgment, Doherty and Rosenberg JJ.A. referred to the general rule that an accused's prior consistent statement is inadmissible "because it has very limited, if any, probative value and serves to expand unnecessarily the ambit of the trial inquiry". However, they went on to hold, at p. 526 O.R., that

> [t]he admissibility of after-the-fact conduct by an accused to support an inference that the accused did not commit the crime alleged should be approached on a principled basis. If the evidence is relevant, its probative value is not substantially outweighed by its prejudicial effect and it is not excluded by some policy-driven exclusionary rule, the evidence should be received when proffered by the defence.

[39] Application of this principle led them to conclude that evidence should be admitted that upon arrest the accused had, before consulting counsel, done several things from which innocence might be inferred. Knowing he faced an allegation of sexual assault, the accused volunteered to take a polygraph test (an act explicitly held to be inadmissible into evidence, on its own), provided samples of his clothing and his blood, scalp hair and pubic hair, scrapings from his fingernails, all while knowing that these samples would be forensically tested. Doherty and Rosenberg JJ.A. concluded, at p. 527 O.R., that "[a]s a matter of logic and human experience, a trier of fact could conclude that the [accused's] conduct after his arrest was inconsistent with that of a person who had committed the crime alleged". They added the following, at p. 529 O.R.:

> Evidence that a person assisted the police when he was not obliged to do so and provided them with evidence which, if he committed the offence, could be used to convict him may, depending on the circumstances, be reasonably capable of supporting the inference that the accused had nothing to fear because he did not commit the crime.

[40] In my view, applying the *Seaboyer* and *B. (S.C.)* approach to the present case, the admissibility of the statements made by the appellant at the time of his arrest is supportable. It is also my view that, upon a fair reading, existing authorities support that result.

(f) Statements made by an accused when first confronted with an accusation

[41] The proposition that spontaneous exculpatory statements made by an accused person when first confronted by the police with an accusation, or upon arrest, are probative and should, therefore, be admitted enjoys considerable support in the case law.

[42] There is a long and well-established body of English jurisprudence buttressing this proposition.

[43] In *R. v. Storey and Anwar* (1968), 52 Cr. App. R. 334 (Eng. C.A.), Widgery J. held as follows, at pp. 337-38:

> A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part the general picture to be considered by the jury at the trial. (Emphasis added)

[44] Similarly, in *R. v. McCarthy* (1980), 71 Cr. App. R. 142 (Eng. C.A.), at p. 145, Lawton L.J. held that the trial judge erred by refusing to admit the statement made by an accused person upon being questioned by the police about a suspected crime:

> One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime. If he has been told, as the appellant was told, that he was suspected of having committed a particular crime at a particular time and place and he says at once, "That cannot be right, because I was elsewhere," and gives details of where he was, that is something which the jury can take into account. (Emphasis added)

[45] The court held that such statement should be admitted even where the accused does not testify but added, at p. 146, that in that event, the trial judge "is entitled to invite the jury's attention to the failure in direct terms, provided of course that he does not suggest that the failure amounts to any evidence upon which the prosecution can rely".

[46] The English courts have not limited this exception to statements made immediately upon arrest. For instance, it was held in *R. v. Pearce* (1979), 69 Cr. App. R. 365 (Eng. C.A.), at p. 369, that "[t]he longer the time that has elapsed after the first encounter the less the weight which will be attached to the denial", and that it is for the trial judge to direct the jury as to the weight or value to be attached to such statements. However, where an accused produces to the authorities a carefully prepared statement, the trial judge is entitled to exclude such a statement as lacking in probative value: see *R. v. Newsome* (1980), 71 Cr. App. R. 325 (Eng. C.A.). In R. v. Tooke (1990), 90 Cr. App. R. 417, 154 J.P. 318 (Eng. C.A.), at p. 420 Cr. App. R., the English Court of Appeal held that the test to be applied was "partly that of spontaneity, partly that of relevance and partly that of asking whether the statement which is sought to be admitted adds any weight to the other testimony which has been given in the case". Canadian courts

have taken a similar path. See, e.g., *R. v. Phillips*, 1999 CanLII 2449 (ON CA), [1999] O.J. No. 2848, 123 O.A.C. 304 (C.A.), affirming a trial judge's ruling excluding a statement made an hour after arrest and after the accused had spoken to his lawyer [[1995] O.J. No. 4152 (Gen. Div.)].

[47] As I have already noted, when stating the rationale for the general exclusion of an accused's out-of-court exculpatory statements and the exceptions to that rule in Campbell, Martin J.A. cited three English academic authorities, namely, Phipson, Cross and Gooderson. All three works recognize the existence of the exception for spontaneous exculpatory statements made by an accused person when first confronted by the police with an accusation.

[48] In Evidence, 4th ed. (London: Butterworths, 1974), at p. 218, Sir Rupert Cross explained the exception to the general exclusion of prior consistent statements in the following terms:

> Statements on arrest. -- Perhaps this exception would be better described as "statements made by the accused to the police when taxed with incriminating facts" for such statements are admissible whether or not there is an arrest. If they are adverse to the accused they are, when voluntary, admissible against him as confessions. If neutral, or favourable to the accused, they are admissible for the reason that
>
> > "A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with incriminating facts." (Citation omitted; quoting Storey)
>
> This means that such a statement is not, like a confession, received as evidence of the facts stated; accordingly a judge does not have to take those facts into account on the accused's submission that there is no case to answer. However, if the accused subsequently gives evidence of those facts, his previous statement, made at a time before he had time to "think things out", may be of the utmost importance as proof of consistency. (Citation omitted)

[49] The rule is stated in similar terms in the current edition of this work: see Colin Tapper, Cross and Tapper on Evidence, 11th ed. (Oxford: Oxford University Press, 2007), at pp. 328-29.

[50] In "Previous Consistent Statements" (1968), 26 Camb. L.J. 64, R.N. Gooderson supports the exception identified by Cross for statements made by the accused when arrested. Similarly, John Huxley Buzzard, Richard May and M.N. Howard, Phipson on Evidence, 12th ed. (London: Sweet & Maxwell, 1976), at pp. 650-53, also recognized the exception.

[51] As the three works cited by Martin J.A. in *Campbell*, namely, Cross, Gooderson and Phipson, all contained references to the exception covering statements made by an accused person when first taxed with an accusation, I cannot read his reasons in Campbell as lending authority to the proposition that such statements are inadmissible.

[52] Although it appears to be generally assumed that such statements are not admissible under Canadian law, there is considerable authority to the contrary. In *R. v. Lucas*, 1962 CanLII 625 (SCC), [1962] S.C.J. No. 80, [1963] 1 C.C.C. 1, at pp. 10-11 C.C.C., Kerwin C.J.C. stated [at para. 30] the following (albeit in obiter):

> "It was open to the defence to obtain evidence from the appellant to the effect that he had made a statement to the police, following his arrest, which was similar to the evidence which he

had given at the trial." In Graham, a case in which the accused did not testify, the Supreme Court excluded the written exculpatory statement handed to the police by that individual two days after his arrest. However, in his concurring opinion, Laskin J. stated the following, at p. 216 S.C.R.:

> The accused may, of course, give evidence at his trial, and if an explanation of his recent possession is part of his testimony, it simply goes into the record as part of his defence referable to the burden on the Crown to prove his guilt beyond a reasonable doubt. If he had made a pre-trial explanation, it may be brought out in his examination but only to show the consistency of his trial evidence, and for no other purpose.

[53] In *R. v. Toten* (1993), 1993 CanLII 3427 (ON CA), 14 O.R. (3d) 225, [1993] O.J. No. 1495 (C.A.), writing for a five-judge court, Doherty J.A. referred in obiter, at p. 267 O.R., to "the accused's right, should he or she testify, to adduce any prior consistent statement made by the accused which is relevant and capable of assisting the trier of fact in determining a fact in issue or the credibility of the accused". Doherty J.A. went on to explain that "an accused who testifies may be permitted to indicate that he or she made a similar exculpatory statement when first met with the allegation", citing the passage from John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada (Markham, Ont.: Butterworths, 1992), at p. 319, discussed below in the context of its current edition, at para. 60 of these reasons, as well as Sir Rupert Cross and Colin Tapper, Cross on Evidence, 7th ed. (London: Butterworths, 1990), at pp. 292-93. See, also, *R. v. J. (T.J.)*, 1988 CanLII 7142 (ON CA), [1988] O.J. No. 1438, 29 O.A.C. 219 (C.A.), at pp. 223-24 O.A.C., citing with apparent approval the passage from Cross listing the exceptions for statements made on arrest.

[54] In *R. v. Suzack*, 2000 CanLII 5630 (ON CA), [2000] O.J. No. 100, 141 C.C.C. (3d) 449 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 583, 80 C.R.R. (2d) 376, after referring to the general exclusionary rule applicable to prior consistent statements, Doherty J.A. suggested that where the accused testifies, the rationale for the rule is weakened [at para. 183]:

> Counsel for Pennett referred to authorities which would, in some circumstances, permit an accused to testify as to statements made by the accused after his arrest: e.g. *R. v. Toten* (1993), 1993 CanLII 3427 (ON CA), 83 C.C.C. (3d) 5 at 47-48 (Ont. C.A.); Ontario, Report of the Commission on Proceedings Involving Guy Paul Morin, Vol. II, by the Honourable F. Kaufman (Toronto, Ontario Ministry of the Attorney General 1998) at pp. 1151-57; *R. v. Lucas*, 1962 CanLII 625 (SCC), [1963] 1 C.C.C. 1 at 10-11 (S.C.C.). The admissibility of exculpatory post-arrest statements through the testimony of an accused raises different concerns than does the admissibility of those same statements through cross-examination of other witnesses. If an accused testifies, the dangers inherent in admitting a self-serving exculpatory statement are considerably reduced. The accused can be cross-examined on that prior statement. As I understand the appellant's submission, it is directed at the refusal of the trial judge to admit the post-arrest statements through cross-examination during the case for the Crown. Consequently, I need not explore the circumstances in which a trial judge could allow an accused to give evidence of his exculpatory statements made upon arrest during his testimony.

[55] I note that in *R. v. Terceira* (1998), 1998 CanLII 2174 (ON CA), 38 O.R., (3d) 175, [1998] O.J. No. 428 (C.A.), at pp. 205-206 O.R., affd (1999), 1999 CanLII 645 (SCC), 46 O.R. (3d) 96, [1999] 3 S.C.R. 866, [1999] S.C.J. No. 74, this court declined an invitation to adopt the English practise reflected in *Storey*.

However, nothing said in Terceira amounts to a rejection of the English practise. The court distinguished Storey on its facts and held that given other evidence in the case and the position taken by the accused at trial, it would be inappropriate to reconsider the issue of admissibility on the basis of the English cases.

[56] At least two trial courts have found such statements to be admissible. In *R. v. Small*, [1991] O.J. No. 3693 (Gen. Div.), Forestell J. found, at paras. 39-40, that an exculpatory statement made by the accused to the police shortly after the offence was "integral" to the defence and that respect for the right to make full answer and defence required its admission, provided the accused exposed himself to cross-examination. Thus, it would be for the trier of fact to determine the weight to be attributed to the statement in question. Forestell J. articulated the following rule, at para. 54:

> That any statement of an accused made to a person in authority is admissible at the instance of the accused provided the accused introduces the statement by giving evidence under oath in the presence of the jury.

[57] In *R. v. Rozich*, [1979] Q.J. No. 218, 10 C.R. (3d) 364 (S.C.), Hugessen A.C.J.S.C. held, at p. 370 C.R., that an accused charged with conspiracy to import drugs into Canada could lead evidence of her own exculpatory statement to the police within hours following her arrest. In that case, admissibility was established on the basis that it was likely that the Crown would allege recent fabrication, but also because the accused had taken the stand and exposed herself to cross-examination [at paras. 17-18]:

> . . . all the reasons which justify the exclusion of evidence of exculpatory statements made by the accused disappear when the accused himself takes to the box. At that moment, the accused is then subject to full and searching cross- examination. It may technically be hearsay to show that on a previous occasion the accused said something similar to what he now says. I think that modern juries are intelligent enough to be able to give due weight to statements made out of court and I think that they are intelligent enough to be able to reach their assessment on the credibility to be accorded to unsworn out-of-court statements on the basis of their seeing and hearing and judging the accused when he or she is in the witness box before them. . . .

If I have to balance the public interest served by prolonging, to some small degree, a trial through the tedious repetition of a statement and the public interest served by ensuring that an accused person has a full and fair defence and a full and fair opportunity to put before the jury every relevant fact on the issue of his or her guilt or innocence, I cannot hesitate as to which way my decision goes.

[58] In several other cases, judges have observed that, when the accused takes the stand, the rationale for exclusion is thereby weakened: see, e.g., *R. v. Liu*, 2003 CanLII 64227 (ON SC), [2003] O.J. No. 74, 172 C.C.C. (3d) 79 (S.C.J.), affd 2004 CanLII 34061 (ON CA), [2004] O.J. No. 4221, 190 C.C.C. (3d) 233 (C.A.); *R. v. Burton*, [2000] O.J. No. 4044, 48 W.C.B. (2d) 23 (S.C.J.). In *R. v. Keeler*, 1977 ALTASCAD 126 (CanLII), [1977] A.J. No. 785, 36 C.C.C. (2d) 8 (C.A.), the Alberta Court of Appeal refused to follow the English cases permitting the accused to adduce evidence of exculpatory statements made upon arrest through third parties. However, it appears to have left open the possibility that if the accused testified, he or she could testify that such a statement was made.

[59] Canadian text writers are divided on the point but most favour admissibility. David M. Paciocco and Lee Stuesser, The Law of Evidence, 5th ed. (Toronto: Irwin Law, 2008), at pp. 496-98, concede that the

question is unsettled, point to the authorities favouring it, but suggest that "the denial of guilt on arrest has only a modicum or relevance" and that other steps could be taken to ensure that juries do not infer guilt when left in the dark about what an accused did or said when arrested.

[60] However, the preponderance of opinion emanating from commentators favours admitting a prior consistent statement made by the accused at the time of arrest, especially where that individual takes the stand and is thus exposed to cross- examination. Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd ed. (Markham: LexisNexis, 2009) note that while the case law is not consistent, the Supreme Court's decision in *Lucas* stands for the proposition that an accused can offer such evidence. On this point, the authors provide the following rationale (which, as I have noted, at para. 53 of these reasons, was quoted with apparent approval by this court in *Toten*), at p. 409:

> In essence, the prior exculpatory statement is tendered to rebut any inference of [the accused's] guilt arising from any silence on his part at the time of arrest. Although such an inference cannot be drawn as a matter of law by reason of the right to remain silent, it might be drawn in fact. The accused can adduce the exculpatory statement as a matter of good tactics.

[61] S. Casey Hill, et al., in McWilliams' Canadian Criminal Evidence, vol. 1, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2003), provides an extended discussion of the issue that I have drawn upon liberally in the preparation of these reasons. The authors conclude, at para. 11:40.40, that "a close review of the case law reveals that there is no categorical prohibition against such evidence provided that its probative value outweighs any prejudicial effect" and strongly support the explicit recognition of an exception for statements made upon arrest.

[62] In The Commission on Proceedings Involving Guy Paul Morin: Report, vol. 2 (Toronto: Ontario Ministry of the Attorney General, 1998), at pp. 1151-57, the Honourable Fred Kaufman, a retired judge, criminal law expert and evidence author, reviews the law and concludes the following, at p. 1157:

> In my view, there are policy considerations that arguably support the exclusion of the accused's exculpatory statements tendered at the instance of the defence, where the accused does not testify. However, there are compelling policy considerations, outlined above, for a reconsideration of the rule in circumstances where the accused is prepared to testify.

[63] In this regard, the Kaufman Report found the following factors persuasive:

> -- juries are likely to draw an adverse inference from the absence of evidence about what an accused said upon arrest;
>
> -- an early exculpatory statement may be important to rebut the suggestion or potential inference that the accused tailored his or her evidence based upon pre-trial disclosure, or having heard the Crown's evidence in advance of testifying; and
>
> -- admitting such statements would encourage counsel to be more receptive to clients making statements upon arrest.

[64] Kaufman notes that recorded evidence may paint a compelling picture and, at p. 1156, agrees with the contention that "if the jury had heard [Guy Paul Morin's] repeated and emphatic protestations of

innocence throughout a long and tiring interrogation, it may have made the difference between conviction and acquittal".

[65] The English authorities make a persuasive case that such statements will very often have significant probative value. While probative value will depend upon the facts and circumstances of each case, I agree with the English authorities that an accused person's spontaneous reaction to an accusation may be of "vital relevance" and "one of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime"

[66] If a statement has probative value, it should only be excluded if there are sound reasons of law or policy to do so. In my view, the various rationales offered for exclusion simply do not warrant the imposition of a blanket exclusionary rule.

[67] The rule against oath-helping does no more than restate the need for evidence to have probative value. If evidence fails to add anything new, repetition is less than helpful. However, where an accused makes a spontaneous statement in the face of an accusation or arrest for a crime, something is added. The reaction of the accused in such circumstances may yield persuasive evidence of innocence, which has quite a different quality than the accused's testimony given months or years later in the formal proceedings of the courtroom.

[68] I find the cases cited above entirely persuasive on the point that the hearsay rationale for exclusion of a prior consistent statement evaporates where the accused takes the stand and exposes himself or herself to cross-examination.

[69] I am also of the opinion that too much is easily made of the risk of fabrication. To assert blindly that all statements made by an accused person upon arrest are fatally tainted with self-interest and the motivation to lie assumes guilt and runs counter to the presumption of innocence: see James H. Chadbourn, Wigmore on Evidence, vol. 2, rev. ed. (Toronto: Little, Brown & Co., 1979), at 293, cited in S. Casey Hill, et al., at paras. 11:40.40.30. As discussed below, at para. 97 of these reasons, this assertion is also contrary to the discouragement of jury directions counselling caution with respect to the evidence of an accused because of self-interest and motivation to say what it takes to secure an acquittal. The risk of fabrication can be dealt with more directly and precisely through cross-examination and by looking to the degree of spontaneity the proffered statement exhibits. Statements that are lacking in spontaneity may be either excluded or, in the case of doubt, made the subject of an instruction to the jury as to weight by the trial judge.

[70] Trial efficiency is an important factor generally but rarely, if ever, will it justify the exclusion of relevant, probative evidence that could lead the trier of fact to acquit.

[71] In my view, it is time to abandon what David Tanovich has described as the "myth" that exculpatory statements made upon arrest are inadmissible except to the extent that they bear upon state of mind or rebut an allegation of recent fabrication: "In the Name of Innocence: Using Supreme Court of Canada Evidence Jurisprudence to Protect Against Wrongful Convictions" (Paper presented to the Ontario Criminal Lawyers' Association Criminal Law in a Changing World Conference, Toronto, November 8, 2003) (unpublished).

[72] I conclude, therefore, that it is open to a trial judge to admit an accused's spontaneous out-of-court statements made upon arrest or when first confronted with an accusation as an exception to the

general rule excluding prior consistent statements as evidence of the reaction of the accused to the accusation and as proof of consistency, provided the accused takes the stand and exposes himself or herself to cross- examination. As the English cases cited above hold, the statement of the accused is not strictly evidence of the truth of what was said (subject to being admissible under the principled approach to hearsay evidence) but is evidence of the reaction of the accused, which is relevant to the credibility of the accused and as circumstantial evidence that may have a bearing on guilt or innocence.

[73] As a practical matter, once the accused has testified, he or she should be entitled to call in reply the police officer who heard and recorded the statement to verify to the jury the fact that it was made.

Application to the facts of this case

[74] On the first appeal, the appellant did not challenge the "myth" but only challenged the exclusion of portions of the statements under the state of mind and recent fabrication exceptions. This court accepted the concession, rejected the recent fabrication submission, agreed with the state of mind exception and ordered a new trial on that basis. At the new trial, as was his right, the appellant refused to make the concession that had been made on appeal and sought to have the three statements admitted in their entirety. The trial judge refused to reconsider the "myth" of the exclusionary rule. Given this court's decision on the first appeal in 2000, the trial judge's ruling was certainly understandable. However, on the basis of the analysis set out in these reasons, I conclude that as the decision on the 2000 appeal did not decide the issue that was presented at the subsequent trial, the 2000 decision did not preclude the trial judge, and does not preclude this court, from applying the correct legal te st to determine the admissibility of the entirety of the appellant's three prior consistent statements.

[75] I turn to the issue of the significance of the trial judge's error in the circumstances of this case. Would the excluded evidence have been admitted under the legal test I have set out in these reasons? Should this ground of appeal be rejected pursuant to *Criminal Code*, R.S.C. 1985, c. C-46 ("*Criminal Code*"), s. 686(1)(b)(iii), on the ground that the legal error did not cause any substantial wrong or miscarriage of justice?

[76] The first two statements were spontaneous and made within minutes of the appellant's arrest for murder. The appellant was in a highly agitated state and he had little time to think or to fabricate a story. While the third statement was made four hours after the arrest, it was made at a time when the appellant was in the hospital recovering from the injuries he had sustained in the altercation and the third statement was really a continuation of the first two statements. In my view, the appellant's three out-of-court statements may fairly be described as statements made by an accused person upon his arrest and upon being first confronted with the allegation of murder.

[77] I do not agree with the respondent's submission that the fact that the appellant could not recall making the three statements meant that he could not be effectively cross- examined on the facts depicted in those statements. It is common ground that there is no fact contained in the three statements that is not also found in the appellant's trial evidence. It follows that admitting the statements would not introduce any fact that could not be fully scrutinized on the appellant's cross-examination. Accordingly, to the extent that the trial judge based his ruling on the fact that the appellant could not be effectively cross-examined because he could not recall making the statements, I respectfully disagree.

[78] There are, however, two factors that lead me to conclude that the trial judge's legal error did not give rise to a substantial wrong or miscarriage of justice.

[79] First, the appellant asked the trial judge to rule that he should be allowed to adduce evidence of the prior consistent statements before taking the stand, on the basis of defence counsel's undertaking to call the appellant as a witness in his own defence. In my view, the trial judge did not err in refusing to so rule at that point in the trial. As Martin J.A. pointed out in *Campbell*, an accused person is free to alter his instructions to counsel or to change his mind with respect to testifying up to the point of actually taking the stand. Before this court, the appellant concedes that an accused should not be permitted to advance his own evidence before the trier of fact without exposing himself to cross-examination. He further concedes that it is only where an accused takes the stand and exposes himself to cross-examination that he should be able to adduce evidence of his out-of-court exculpatory statements.

[80] The issue of admissibility was not revisited by defence counsel after the appellant took the stand.

[81] The second factor is that in the particular circumstances of this case, the probative value of the excluded evidence was low. First, as I have already noted, there was nothing excluded that was not already contained in the appellant's evidence at trial. Second, the incoherent portions of the appellant's statements were admitted, thereby reducing if not eliminating the risk that without knowing anything about what the appellant said upon arrest, the jury might have drawn an adverse inference on account of the evidence being excluded. Third, the primary reason the appellant wanted the statements to be admitted was to show his confused and agitated state of mind to support his real defences to murder, namely, automatism and lack of intent. That evidence was admitted. To the extent his statements did show confusion and disorientation, those very factors would likely have led the jury to attach less weight to the exculpatory portions of the statements now relied on. Fourth, the excluded portions of the statements were relevant to the defence of self-defence and, in view of all the evidence and the injuries the appellant inflicted on the deceased, self-defence was tenuous at best.

[82] For these reasons, I conclude first that the trial judge's ruling would have been the same under the analysis set out in these reasons and, second, that even if the excluded evidence should have been admitted, there is no reasonable possibility that a different verdict would have ensued. It follows that the trial judge's legal error did not cause any substantial wrong or miscarriage of justice within the meaning of s. 686(1)(b)(iii) of the Criminal Code and, for that reason, I would not give effect to this ground of appeal.

2. Adequacy of the jury charge as to reasonable doubt

[83] The appellant submits that the trial judge erred by (a) refusing to give an instruction pursuant *to R. v. W. (D.)*, *supra*; and (b) emphasizing the appellant's interest in the result of the trial in the assessment of his credibility, and that as a result of these errors, the jury was not properly instructed on the burden of proof.

(a) Absence of a W. (D.) instruction

[84] The appellant's trial counsel asked for a W. (D.) instruction, placing special emphasis on the need for such instruction with respect to self-defence. For reasons that are not immediately apparent, the trial judge refused to give an instruction in terms of the precise W. (D.) formulation.

[85] It is well-established that the failure by a trial judge to use the specific language or formula set out in *W. (D.)* is not fatal if, when read as a whole, the charge clearly sets out the correct burden and standard of proof: *R. v. Haroun*, 1997 CanLII 382 (SCC), [1997] 1 S.C.R. 593, [1997] S.C.J. No. 35; *R. v. Do*, 2003 CanLII 24750 (ON CA), [2003] O.J. No. 1720, 175 C.C.C. (3d) 176 (C.A.).

[86] In my view, when read as a whole, the trial judge's instruction to the jury made clear all three elements of the W. (D.) instruction. The jury could have been under no misapprehension as to the appropriate allocation of both the burden and standard of proof.

[87] The trial judge gave a standard instruction on both the presumption of innocence and the burden on the Crown to prove the case beyond a reasonable doubt. The trial judge also repeatedly emphasized the requirement that the Crown prove its case beyond a reasonable doubt when discussing each element of the offence, along with the various defences that had been raised, with the exception of automatism, where the burden rests with the accused to make out the defence on a balance of probabilities.

[88] The first element of the W. (D.) formulation is that, if the jury believes the evidence of the accused, it must acquit. The appellant complains that the jury could have been misled into thinking that they retained an overriding discretion to convict even though they otherwise believed or had a reasonable doubt that the appellant was acting in lawful self-defence at the time of the killing.

[89] I am unable to accept that submission upon reading this charge as a whole. In addition to the standard instructions to which I have already referred, the trial judge carefully reviewed each element of the defence of self-defence and, at each point, emphasized the need for the Crown to prove its case beyond a reasonable doubt. The trial judge reviewed the appellant's position on self-defence and his explanation of the events leading up to Tracey Kelsh's death. The jury could have been left with no doubt that, if they accepted the appellant's version, they would have to acquit.

[90] The second element of the W. (D.) formulation specifies that, even if the jury does not believe the testimony of the accused but are left in a reasonable doubt by it, they must acquit. This element was met, as the jury were instructed that "there is no onus on the accused to prove anything whether he testifies or not. If you disbelieve every word spoken by the accused in the witness box, the onus remains on the Crown to prove its case beyond a reasonable doubt."

[91] The third element of the W. (D.) formulation provides that, even if the jury are not left in doubt by the evidence of the accused, they must ask themselves whether, on the basis of the evidence which they do accept, they are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[92] The trial judge instructed the jury that "you are not required to simply accept or reject evidence" and that "[e]vidence which is neither accepted nor rejected may give rise to a reasonable doubt".

[93] The jury was also instructed in the following terms:

> In arriving at your verdict, you should know that your obligation does not include having to make the stark choice of believing the Crown evidence or the defence evidence. And the reason for that is this. An either-or approach might exclude the possibility that you may not accept as true the defence evidence but, from that evidence, be left nonetheless with a reasonable doubt. . . . The issue is not which version is true but whether, on all the evidence, including the defence

> evidence, has the Crown proved guilt beyond a reasonable doubt. Immediately following that instruction came this:
>
> You will decide whether or not the evidence which you accept proves the essential elements of the crime alleged. The onus is on the Crown, as I have explained, to establish with proof those essential elements. If, on looking at all the evidence, you are left with a reasonable doubt on any of the essential elements, then the Crown has not proved its case beyond a reasonable doubt and you must find the accused not guilty.

[94] I am satisfied that this charge, when read as a whole, properly explained to the jury the burden and standard of proof and that, while the specific wording of the W. (D.) formulation was not reproduced, in substance, all three elements of the analysis mandated by W. (D.) were clearly explained to the jury

[95] Accordingly, I would not give effect to this ground of appeal.

(b) Emphasis on the appellant's interest when assessing his credibility

[96] The appellant complains of the italicized sentence in the following passage taken from the trial judge's instructions to the jury:

> Now, the accused, Mr. Edgar, gave evidence at this trial. But I tell you he was under no obligation to do so. The decision was his decision. Just because an accused takes an oath and testifies does not mean that you must accept that evidence. As with any witness, you can accept all, part or none of his evidence. He is like any other witness in that way. The accused of course has an interest in the result of the trial and you may fairly bear that in mind in assessing his evidence.
>
> I tell you, though, that there is no onus on the accused to prove anything whether he testifies or not. If you disbelieve every word spoken by the accused in the witness box, the onus remains on the Crown to prove its case beyond a reasonable doubt. (Emphasis added)

[97] Similar instructions have been criticized by this court on several occasions: see, e.g., *R. v. Zurmati*, [1993] O.J. No. 1520 (C.A.), at paras. 3-4, leave to appeal to S.C.C. refused [1993] 1 S.C.R. xii, [1993] S.C.C.A. No. 388; R. v. B. (L.) (1993), 1993 CanLII 8508 (ON CA), 13 O.R. (3d) 796, [1993] O.J. No. 1245 (C.A.), at pp. 798-99 O.R.; R. v. P. (G.F.) (1994), 1994 CanLII 8780 (ON CA), 18 O.R. (3d) 1, [1994] O.J. No. 586 (C.A.), at pp. 8-9 O.R. That said, it is also well-established that this instruction will only amount to reversible error where it isolates the accused and undermines both the burden of proof and the presumption of innocence: see *R. v. Trombley* (1998), 1998 CanLII 7128 (ON CA), 40 O.R. (3d) 382, [1998] O.J. No. 2680 (C.A.), at pp. 385-86 O.R., affd 1999 CanLII 681 (SCC), [1999] 1 S.C.R. 757, [1999] S.C.J. No. 20, where the relevant authorities are collected. Here, as in *Trombley*, the trial judge clearly and repeatedly instructed the jury on the presumption of innocence and on the burden of proof falling squarely upon the Crown. It would have been obvious to the jury that the appellant had a strong stake in the outcome of the trial, thereby making the impugned sentence unnecessary. However, give, I am entirely satisfied that the jury could not have been misled as to the appropriate burden and standard of proof by reason of this sentence.

[98] Accordingly, I would not give effect to this ground of appeal.

<u>3. Adequacy of the jury charge as to the defence of automatism</u>

[99] The appellant submits that the trial judge failed to put the defence position on automatism fairly before the jury by (a) telling the jury to be sceptical of the defence; (b) mischaracterizing the evidence of Dr. Hill; and (c) failing to instruct the jury that the absence of motive had a bearing on the defence of automatism.

[100] The trial judge told the jury that, because people ordinarily act voluntarily, they should approach the defence of automatism with caution as "there is a risk that an accused person may feign or make up such a version of events" and that "because all knowledge of its occurrence rests with the accused, the law in this single instance requires the accused to prove his involuntariness based on automatism".

[101] In my view, this passage, which is more or less a verbatim quotation from the Supreme Court's decision in *R. v. Stone*, 1999 CanLII 688 (SCC), [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27, at para. 180, simply explained to the jury why, in the exceptional case of the defence of automatism, the burden of proof rested with the accused. Indeed, the law does treat automatism differently from other defences because of its unusual and exceptional nature. In my view, the impugned passage did not mislead the jury or cause any prejudice to the appellant.

[102] The appellant complains of the following passage from the trial judge's charge relating to the evidence of Dr. Hill, a forensic psychiatrist who testified for the defence and upon whom the appellant relied to make out the defence of automatism:

> Now, there is some evidence from Dr. Hill that the sudden appearance of Miss Kelsh and the shock of that event may well have interfered with Mr. Edgar's ability for coherent thinking or to see the big picture, as he put it. And that may bear on the issue of whether in fact, at the time of the event and the killing of Tracey Lynn Kelsh, Mr. Edgar possessed the intention for murder.
>
> In considering Dr. Hill's evidence, you will remember Dr. Hill's qualification that, where there is evidence of memory or coherent thinking, that may negate an inference of disturbed thought. That was the effect of his evidence. He didn't quite say it in exactly that way, but that's the effect of it. (Emphasis added)

[103] The appellant submits that as his evidence was that he came in and out of consciousness, the jury could have understood the italicized portion of the quoted excerpt as excluding automatism if, at any time during the struggle, the appellant was conscious of what was going on.

[104] I do not accept that submission. Given the overall thrust of Dr. Hill's evidence, the way the defence presented its case to the jury and reading the charge as a whole, I see no realistic possibility that the jury could have misunderstood what Dr. Hill was saying, namely, that even if the appellant were in a state of automatism at the time he fatally wounded the deceased, he was not entitled to rely on that defence if he was conscious at any time during the struggle.

[105] Finally, relying on *Stone*, at para. 191, where Bastarache J. stated that a "motiveless act will generally lend plausibility to an accused's claim of involuntariness", the appellant submits that the trial judge erred by failing to explain to the jury that the absence of a motive in the present case was supportive of the defence of automatism.

[106] I disagree. *Stone* does not require such instruction but rather refers to motive, or the lack thereof, as a tool to be used by the trial judge in order to determine whether the threshold for advancing the

defence has been met. Here, the trial judge did give a general instruction as to the relevance of motive or the lack thereof, which, in my view, was sufficient to meet the circumstances of this case.

[107] Accordingly, I would not give effect to the appellant's contention that the trial judge failed to give an adequate charge in relation to the defence of automatism.

4. Abuse of process

[108] The appellant submits that in the light of the position taken by the Crown in the pre-trial plea discussions, the application to have him declared a dangerous offender amounted to an abuse of process. As I have explained, in those pre-trial plea discussions, the Crown offered to accept a plea of manslaughter and refrain from initiating dangerous offender proceedings on the condition that the Crown ask the trial judge to impose a sentence of life imprisonment, while the appellant would seek a sentence of not less than six to eight years beyond time served.

[109] We did not find it necessary to call on the respondent to deal with this issue which, in my view, is without merit. In his ruling dismissing the application, the trial judge found that the appellant was fully aware that the plea resolution discussions had failed and that he had reached no agreement with the Crown concerning the sentence. The appellant embarked upon the trial knowing full well that, if convicted, he could be faced with a dangerous offender application.

[110] I agree with the trial judge's reasoning. As the plea discussions had failed to produce agreement, there was nothing preventing the Crown from assessing the case once the verdict had been delivered and deciding what to ask for by way of sentence on the basis of what was then known about both the case and the appellant.

[111] There is nothing in the record to suggest that the Crown's efforts to resolve the case short of trial were not pursued in good faith or that they were improperly motivated. I do not agree that the Crown's dangerous offender application can be fairly characterized as an effort to "punish" the appellant for insisting upon a trial. From the perspective of both the Crown and the court imposing sentence, there may be many reasons to contemplate a more lenient sentence before trial than either the Crown or the court would be prepared to accept after trial and conviction. A guilty plea indicates an accused's acknowledgement of responsibility and may amount to an expression of remorse. A guilty plea also saves both the financial and, for the witnesses, the victim and the victim's family the emotional cost of a trial. A guilty plea also eliminates the uncertainties inherent in the trial process.

[112] In the end, the appellant rejected what, with the benefit of hindsight, now appears to have been a very generous offer. I see no basis in law that would allow the appellant at this point to, in effect, retract his plea of not guilty, undo the fact that he was convicted after a two-month trial and claim the benefit of the very offer he refused to accept in return for a guilty plea.

[113] Accordingly, I would reject this ground of appeal.

Disposition

[114] For these reasons, I would dismiss the appeal.

Appeal dismissed.