



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Hanrahan*, 2024 NLCA 9

Date: March 7, 2024

Docket Number: 202101H0065

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AND:

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BETWEEN:

HIS MAJESTY THE KING

APPELLANT

AND:

LUCAS HANRAHAN

RESPONDENT

Coram: W.H. Goodridge, F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 202001G0712

Appeal Heard: October 17, 2023

Judgment Rendered: March 7, 2024

Reasons for Judgment by: K.J. O'Brien J.A.

Concurred in by: W.H. Goodridge J.A.

Dissenting Reasons by: F.J. Knickle J.A.

Counsel for the Appellant: Kathleen O'Reilly

Counsel for the Respondent: Robert R. Escott

Authorities Cited:

CASES CITED:

K.J. O'Brien J.A. (W.H. Goodridge J.A. concurring):

R. v. Tso, 2020 BCCA 358; *R. v. Lapierre*, 2022 NSCA 12; *R. v. Nwoko*, 2019 ONSC 2430; *R. v. Samaniego*, 2022 SCC 9; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. J.J.*, 2022 SCC 28; *R. v. Harris*, 1997 CanLII 6317 (ONCA); *R. v. Lee*, 2010 SCC 52, [2010] 3 S.C.R. 99; *R. v. Nelson*, 2021 NSCA 11; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. M.T.*, 2012 ONCA 511; *R. v. Ravelo-Corvo*, 2022 BCCA 19; *R. v. Zachariou*, 2015 ONCA 527; *R. v. Sandhu*, 2024 ABCA 47; *R. v. Evans*, [1993] 2 S.C.R. 629; *R. v. Phillips*, 2021 NLCA 51; *R. v. J.A.*, 2023 SKCA 119.

F.J. Knickle J.A. (dissenting):

R. v. Angel, 2019 BCCA 449, leave to appeal to SCC refused, 38957 (23 April 2020); *R. v. Langan*, 2019 BCCA 467, aff'd 2020 SCC 33, [2020] 3 S.C.R. 499; *R. v. Robinson*, 2014 ONCA 63; *R. v. Tanasichuk*, 2007 NBCA 76, leave to appeal to SCC refused, 33015 (23 February 2009); *R. v. Wentworth*, 2023 ONSC 1165; *R. v. SKM*, 2021 ABCA 246; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Samaniego*, 2022 SCC 9; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Harris*, 1997 CanLII 6317 (ONCA); *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Phillips*, 2021 NLCA 51.

STATUTES CONSIDERED:

K.J. O'Brien J.A. (W.H. Goodridge J.A. concurring):

Criminal Code, sections 271, 276, 278.93(4), 278.97, 278.94(2), 278.94(3); *Canada Evidence Act*, R.S.C. 1985, c. C-5, sections 10, 11.

F.J. Knickle J.A. (dissenting):

Criminal Code, section 276.

K.J. O'Brien J.A.:

[1] The Crown appeals Lucas Hanrahan's acquittal of sexual assault (s. 271 of the *Criminal Code*) following a jury trial. The Crown submits that the judge erred in law by restricting Crown counsel's examination of the complainant on her prior statements (text messages) and erred in law in rulings related to the admission of evidence about the complainant's prior sexual history (s. 276 of the *Criminal Code*).

OVERVIEW

[2] The only witnesses at trial were the complainant and Mr. Hanrahan. The two were friends who had gotten together at Mr. Hanrahan's home to talk, drink wine, and watch movies. The complainant slept over at Mr. Hanrahan's home, in the same bed with him, and the offence was alleged to have occurred during that sleepover. The complainant testified that after going to sleep in her pajamas, she woke during the night to discover her pajamas removed and Mr. Hanrahan "on top of me [sexually] assaulting me" (Transcript, Vol. IV, p. 36). Mr. Hanrahan testified that the complainant initiated the foreplay and eventually "touched my penis and guided it into her vagina" (Transcript, Vol. VIII, p. 23). Consent was the central trial issue.

[3] A key piece of evidence for the Crown's case was a series of text messages that were exchanged between the complainant and Mr. Hanrahan after the sleepover. The complete text conversation is attached as an appendix to my colleague's dissenting reasons. In the text messages, Mr. Hanrahan indicated that "I really don't think it happened like [you say]", but he also made incriminating admissions, such as, "I penetrated you and I stopped before you woke up, it doesn't make it any better

at all, but I know what I was doing was wrong and didn't continue. I am so sorry." Overall, the text messages were highly damaging to Mr. Hanrahan.

[4] The judge restricted Crown counsel's use of the text messages during her direct examination of the complainant. These restrictions were aimed at reducing the likelihood that the jury would improperly use the complainant's text messages for the truth of their contents or to enhance her credibility. The judge did not restrict Crown counsel's use of the text messages in cross-examination of Mr. Hanrahan. Nor did he restrict defence counsel's use of the text messages with respect to either witness.

[5] Although the complainant and Mr. Hanrahan had previously been in a sexual relationship, they were not at the time of the alleged offence. At the start of the trial, it was accepted that their prior sexual history was not relevant so the jury would not hear evidence about it.

[6] The situation changed during defence counsel's cross-examination of the complainant. In responding to a question, the complainant said that before the day of the sleepover "this was the closest encounter we had had" (Transcript, Vol. V, p. 3).

[7] Mr. Hanrahan viewed this statement as inconsistent with an earlier statement that the complainant had given to police, in which she acknowledged a prior sexual relationship with him. He considered the inconsistency to be relevant to the complainant's credibility. In the absence of the jury, Mr. Hanrahan applied under s. 276(2) of the *Criminal Code* to cross-examine the complainant on the existence of the prior sexual relationship.

[8] The judge agreed that there was an inconsistency and allowed the s. 276(2) application. However, he constrained the permitted cross-examination to:

1. Reminding the complainant of the testimony she had given on cross-examination;
2. Asking the complainant if she remembered making the earlier statement to the police in which she talked about the prior sexual relationship; and
3. Suggesting to the complainant that her testimony on cross-examination was not true.

[9] The trial resumed and defence counsel cross-examined the complainant as directed by the judge. The complainant gave her answers. The judge did not permit Crown counsel to re-examine the complainant with respect to those answers.

[10] At the end of the trial, the jury returned a verdict of not guilty.

ISSUES

[11] The issues on appeal are:

1. Did the judge err in law by improperly restricting Crown counsel's examination of the complainant about the text messages?
2. Did the trial judge err in law in relation to the prior sexual history evidence by:
 - a) Finding an inconsistency, which rendered evidence of prior sexual history capable of being admissible;
 - b) Admitting evidence of prior sexual history to address the inconsistency; or
 - c) Refusing to allow Crown counsel to re-examine the complainant following her questioning by defence counsel about the prior sexual history?

[12] For the reasons that follow, I would dismiss the appeal.

ISSUE 1: Did the judge err when he restricted Crown counsel's examination of the complainant on the text messages?

[13] The text messages were discussed at three pre-trial conferences. At the first pre-trial conference, the lawyers discussed with the judge the use they wanted to make of the text messages. Crown counsel wanted to use them to incriminate Mr. Hanrahan because, in the Crown's view, the text conversation contained admissions by him consistent with him having committed the sexual assault. Defence counsel

wanted to use them to cross-examine the complainant with respect to consent (Transcript, Vol. I, pp. 5-6).

[14] At the second pre-trial conference, the law surrounding the use of text messages was discussed. In particular, the parties discussed the concern that the complainant's text messages could not be used for the truth of their contents or as a form of self-corroboration for the complainant because they included prior consistent statements.

[15] At the third pre-trial conference, it was agreed that the text messages would be entered as a consent exhibit, that the exhibit would show the dates and times the texts were sent, and that the judge would give the jury a mid-trial instruction as to the permitted uses of the texts. The judge reserved his decision on defence counsel's request that the jury not be allowed to have a copy of the text messages during their deliberations.

[16] The matter proceeded to trial. The judge ruled that he would allow the jury to have the text messages during deliberations.

[17] Prior to the complainant being called to testify, and absent the jury, the judge discussed the permissible uses of the text messages with counsel again. He reiterated that the text messages were to be used in relation to the complainant for the purpose of the narrative exception to the hearsay rule, and that they were to be used in relation to Mr. Hanrahan as expressions against interest. The judge further directed that the complainant not read the text messages on direct examination because he considered that this would increase the risk that the jury might impermissibly use the repetition of her prior consistent statements to enhance her credibility (Transcript, Vol. IV, pp. 27-30). He continued:

What she should be doing is explaining under what circumstances did this arise. You know, did you have a discussion, why did you have a discussion, when did you have the discussion, what was your mental state at the time that you had the discussion. All those kinds of things are fair game. But I don't want her to read what she said, what he said, what she said, what he said because that's just compounding the problem in my view.

[18] Crown counsel began examining the complainant about the text messages. After a few questions, Crown counsel indicated that she wanted to introduce the exhibit. At that point, the judge excused the witness and gave a mid-trial instruction to the jury about the permissible uses of the text messages.

[19] The Crown does not allege any error with the judge's instructions to the jury. However, it is relevant to his first intervention in Crown counsel's direct examination that he opened his instruction by telling the jury that the text messages were being entered by the consent of the parties, so that they didn't "need to know how did these things happen, whose phone were they on or who called who first or whatever. You will have all of that in front of you when you go to deliberate."

The judge's first intervention

[20] When the complainant returned, Crown counsel recommenced questioning by asking about the circumstances of the complainant providing her phone to the police and the extraction of the text messages. Crown counsel entered the text message exhibit and continued (Transcript, Vol. IV, pp. 47-48):

[CROWN COUNSEL]: [...] So, one of these messages you seem to recall almost verbatim. I'll get you to refer to that one in particular. Would you -

[21] At this point, the judge intervened. Once the jury had exited, he addressed Crown counsel (Transcript, Vol. IV, pp. 48-49):

THE COURT: Okay. So, what I don't want to have happen is you asking the witness what did she say in the text message because that's just – she said what she said, it's there. She's already said on the stand what she said to him and no need to go over that again.

[...]

The document is in by consent. It will be given to the jury when they deliberate. But, I think having her repeat what she said from that document only enhances her story. That's not what you should be doing.

[...]

There's no need to do a direct examination on the document.

[22] Crown counsel then explained that she did not intend to have the complainant read out the texts but that she was just going to confirm that these were the text messages the complainant sent. In response, the judge said the document was in by consent, noting that the parties had agreed that these were the text messages that flowed between the complainant and Mr. Hanrahan. After hearing from defence

counsel, the trial judge reiterated that he did not want any “oath helping”. The dialogue continued (Transcript, Vol. IV, p. 50):

[CROWN COUNSEL]: Okay. Then perhaps I should just take that back from her for now, and we’ll just kind of continue the conversation without having her refer to those. At least for now.

THE COURT: Yeah. Just leave the statement alone. It’s, it’s in evidence. You don’t have to worry about it. And you don’t have to worry about did she give her phone to the police and did the police check it and, you know, none of that. That’s all, it’s all admitted. [...] Right?

[CROWN COUNSEL]: Okay. Thank you.

[23] When the jury returned, the judge reminded the jury of his mid-trial instruction and Crown counsel continued to examine the complainant.

The judge’s second intervention

[24] After a period of questioning, Crown counsel returned to the topic of the text messages by asking the complainant to give a timeline of events. This led to a dozen or so questions about the dates of the alleged assault, the text messages, and the complainant’s reporting to police. The questioning continued (Transcript, Vol. IV, pp. 58-59):

[CROWN COUNSEL]: So, the texts that you received on the 25th, were they received – any and all texts received that day or were they several dates?

[COMPLAINANT]: I’m not confident, but I don’t believe so because I didn’t want to respond. So, I think I left it. But I can’t remember how long I left it for.

THE COURT: Consent No. 1 [the text message exhibit] has the times and dates, correct?

[DEFENCE COUNSEL]: yes

THE COURT: We don’t need to go there.

[25] This was the judge’s second intervention. Crown counsel then continued (Transcript, Vol. IV, p. 59):

[CROWN COUNSEL]: Okay. And just to clarify, I don't want to get back into the texts. As Justice just said, we – those are included in the exchange. But what you meant by you're not confident?

[COMPLAINANT]: I'm not confident if I responded later that night or perhaps the next day.

[26] Crown counsel then completed her direct examination.

Positions of the parties

[27] The Crown, represented in this Court by counsel who was not counsel at trial, submits that the judge improperly restricted Crown counsel's examination of the complainant on the text messages and the judge's interventions were improper. The Crown concedes that the judge had considerable discretion to manage the trial but submits that the judge exercised his discretion unfairly such that the jury did not have a balanced presentation of the evidence and the truth-seeking function of the trial was distorted.

[28] Mr. Hanrahan submits that there was no error in the judge's exercise of his discretion. He submits that Crown counsel was not prohibited from asking questions about the timing and circumstances of the text messages in either direct examination or re-examination of the complainant. He also notes that Crown counsel did not object or suggest that she wanted to ask additional questions other than a question to confirm that the complainant had sent the messages.

Analysis

[29] In *R. v. Tso*, 2020 BCCA 358, the British Columbia Court of Appeal discussed proper use of text conversations occurring after an alleged criminal incident, and what proper use may be made of the complainant's prior consistent statements:

[39] It is uncontroversial that a trial judge may not use a prior consistent statement to support the prohibited inference that a witness's testimony is more likely to be true because it has been repeated more than once. It is also clear that permissible uses include: (1) text messages sent by the accused as admissions against interest; (2) text messages sent by a complainant to provide context to the answers given by the accused; (3) text messages to rebut an allegation of recent fabrication; and (4) text messages used to show that they were exchanged, and the timing and circumstances of the exchange, used by the trier of fact in assessing the credibility and reliability of the witness's in-court testimony (the "narrative as circumstantial use" exception). The

latest word on the proper use of text messages is the judgment of Chief Justice Bauman in *R. v. Langan*, 2019 BCCA 467 (approved 2020 SCC 33). Useful commentary is also found, for example, in *R. v. C.M.M.*, 2020 BCCA 56 where Justice DeWitt-Van Oosten explained:

[152] The more controversial issue is whether the trial judge used B.P.'s prior statement for an improper purpose. The fact that a prior consistent statement has been properly admitted does not insulate that statement from review. The trial judge must also ensure its proper use: *R. v. Langan*, 2019 BCCA 467 at para. 53.

[153] *Ellard* makes clear that statements admitted to rebut an allegation of recent fabrication must be used for that purpose and “not to support the fact at issue or the general reliability of the witness” (at para. 42). See also *Stirling* at para. 7. This same limitation governs the narrative as circumstantial evidence exception. The prior statement may not be relied on to infer that a witness is more likely to be telling the truth because they said the same thing more than once: *Langan* at para. 42; *R. v. Gill*, 2018 BCCA 275 at para. 68.

[30] Because text message evidence can have multiple uses engaging different evidentiary rules, lawyers should clearly articulate the purpose for which they intend to use the evidence (*Tso*, at para. 40; *R. v. Lapierre*, 2022 NSCA 12, at para 110; *R. v. Nwoko*, 2019 ONSC 2430, at para. 49, citing D.M. Paciocco, “The Perils and Potential of Prior Consistent Statements: Let’s Get It Right” (2013), 17 Can. Crim. L. Rev. 181, at 215).

[31] In this case, Crown counsel wanted to use the text messages as admissions against Mr. Hanrahan’s interest, thus engaging the first two uses described above in *Tso*. For this use, the complainant’s text messages were important to provide context to Mr. Hanrahan’s answers. Defence counsel wanted to use the text messages for the fourth use described in *Tso*, referred to as the “narrative as circumstantial use” exception.

[32] I have had the opportunity to read my colleague’s dissenting reasons. We agree as to the law applicable to this issue. Our views differ with respect to the judge’s treatment of the text messages.

[33] My colleague would find the judge in error for segregating the two sides of the text conversation into silos of evidentiary use. I share her concern about certain statements the judge made, such as, “there’s no need to do a direct examination on the document” (para. 21 above) and “just leave the statement alone” (para. 22 above). In isolation these statements are troublesome, however, when the judge’s instructions to the jury are viewed in their entirety, I am satisfied that the judge

understood, and communicated to the jury, the permissible ways in which the text messages could be used.

[34] For example, the judge was clear in both his mid-trial and final instructions that Mr. Hanrahan's statements in the text messages could be used for their truth as admissions by him. The judge advised the jury as to how they could use the complainant's texts to interpret what Mr. Hanrahan texted (Transcript, Vol. X, p. 39):

[The complainant's texts] provide context for what Mr. Hanrahan said. Without knowing what [the complainant] texted to Mr. Hanrahan, you would be unable to determine how his words should be interpreted.

[35] The judge also advised the jury as to the narrative as circumstantial use exception. For example, in his mid-trial instruction he stated (Transcript, Vol. IV, p. 46):

The statements made by [the complainant] in the exchange of text messages are not to be used by you to determine the truth of what she said. [The complainant]'s prior consistent statements are not admitted for the truth of their contents or to corroborate what she says in the trial. You must not infer that the repetition enhances the truthfulness. Rather, the probative value of the statement lies in the inferences that can be drawn from the timing and circumstances of the statement, rather than the simple fact that [the complainant] said the same thing before. You must decide whether the fact that [the complainant] made these statements, the timing of them, the circumstances in which they were made yield inferences supporting the truthfulness and the reliability of her in-court testimony.

[36] This instruction was consistent with the judge's direction to Crown counsel. He stated that Crown counsel could ask the complainant questions about the timing and circumstances of the texts. He even suggested questions she could ask: "did you have a discussion?", "why did you have a discussion?", "when did you have the discussion?", and "what was your mental state at the time that you had the discussion?".

[37] The errors alleged by the Crown involve the judge's trial management power. The Supreme Court of Canada recently addressed the scope of this power in *R. v. Samaniego*, 2022 SCC 9. The trial management power allows trial judges to control the process of their court and ensure that trials proceed in an effective and orderly fashion (*Samaniego*, at para. 20). The power has three interrelated purposes: ensuring that trials proceed fairly, effectively, and efficiently (*Samaniego*, at para.

21). Although it is an essential and versatile tool, the trial management power must be exercised carefully and it is not a license to exclude otherwise relevant material evidence in the name of efficiency (*Samaniego*, at paras. 22, 25). The Supreme Court’s consideration of how the power overlaps with the rules of evidence is relevant in this case:

[26] Sometimes trial management decisions will overlap with the rules of evidence. For example, where counsel tries to revive a line of inquiry that the trial judge has previously barred in an evidentiary ruling, the rules of evidence and trial management overlap. Drawing on the previous evidentiary ruling — that the line of questioning is barred by an evidentiary rule — the judge exercises their trial management power to curtail irrelevant and repetitive questioning. As this example illustrates, it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents. Trial management decisions, as the one in this example, engage the judge’s discretion. Absent error in principle or unreasonable exercise, these discretionary decisions deserve deference (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44).

[38] Because the Crown alleges that the two interventions by the judge were improper, I will consider them each in turn.

[39] The first intervention was to preempt a line of questioning that the judge had disallowed: reading the texts or otherwise using them to “oath help”. Crown counsel remarked that the complainant recalled a message “almost verbatim” and was taking the complainant to that message when the judge intervened. In my view, it was a reasonable exercise of the judge’s discretion to intervene before the message was either read out or otherwise highlighted in front of the jury.

[40] Trials are dynamic and improper lines of questioning often develop over time. Trial judges must regularly consider whether a given moment is the right moment to intervene or whether it is better to wait to see how the questioning progresses. This is a judgment call for the trial judge, to be made in the context of the case. Here the trial judge had some basis for concern about Crown counsel following his direction. Just before the interrupted question, Crown counsel had asked the complainant about providing her phone to the police and the extraction of the text messages. The judge did not interrupt these questions, even though he had instructed the jury moments before that they did need to know how the text message exhibit came to be or whose phone the texts were on. In this context, I would not consider his first intervention to be unreasonable.

[41] I acknowledge that my colleague considers that there was no need to prevent the complainant from reading her text messages because the jury instruction was sufficient to prevent the impermissible use of prior consistent statements. Although I do not consider it necessary for the judge to have prevented the complainant from reading her text messages, I view this as a reasonable exercise of his trial management power. The judge had a duty to ensure a fair trial. To do that he had to instruct the jury as to the proper and improper uses of the text messages. I do not view his decision to take the additional measure of not having the complainant read her texts to the jury as being unreasonable in the circumstances.

[42] The judge's basis for the second intervention is less clear because he did not articulate it. Following Crown counsel asking the complainant several questions about the dates of the texts, the judge confirmed that the exhibit included dates and times, and simply stated "we don't need to go there". The jury was present, which may explain why the judge did not elaborate further.

[43] Even without explicit reasons from the judge, his intervention must be considered in context. That context was one in which the dates and times of texts were not in dispute. Although defence counsel submitted in final argument that the complainant had mislead the jury on the timing of the apologies, the allegation did not center on the precise times of the texts. Rather, defence counsel submitted that the complainant had "tried to create the impression that there was a barrage of unprompted apologies" when the evidence showed there was just one the next day and the others were sent in response to the complainant's replying to him some time later. In cross-examining the complainant, defence counsel reviewed the timing of the texts and noted that they confirmed what the complainant had said about timing in her direct examination (Transcript, Vol. V, p. 19). Given that the times of the texts were undisputed, the line of questioning the Crown was embarking upon when the judge intervened was not particularly relevant.

[44] Additionally, Crown counsel did question the complainant about the timing of the texts both before and after the second intervention from the judge. In these circumstances, I would not find the judge's second intervention to be unreasonable either.

[45] This issue cannot be resolved, however, by considering the judge's two interventions in isolation. To determine if there has been unfairness or an unbalanced presentation of the evidence, it is necessary to consider the judge's treatment of the text messages holistically.

[46] Taking a holistic view, I am satisfied that the judge placed restrictions on the text message exhibit during direct examination of the complainant in excess of what was necessary to prevent the jury from improperly using the texts. For example, I would not view it as necessary to prevent the complainant from reading the exhibit or to prevent the jury from having a copy of the exhibit before they deliberated. Yet, I would not find that his treatment of the text messages amounted to a reviewable error. To set aside an acquittal, this Court must be satisfied that the judge's errors "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at paras. 13-14). I do not find that the judge's unnecessary restrictions on the text messages reach that high bar. I will explain why.

[47] First, the text messages were highly damaging for Mr. Hanrahan's case. They were important from the Crown's perspective because, to the extent that they contained admissions by Mr. Hanrahan, those admissions could be used for the truth of their contents. From this perspective the complainant's text messages were important to give context to what Mr. Hanrahan said. That context did not depend upon the complainant's view of what her messages meant, it depended on how Mr. Hanrahan interpreted her messages and the objective reasonableness of his stated interpretation. The judge placed no limits on Crown counsel's use of the text messages in her cross-examination of Mr. Hanrahan or her submissions to the jury.

[48] Second, the jury had the text messages with them when they deliberated. I acknowledge my colleague's concern that the jury did not have a copy of the text messages during examination of the witnesses and that defence counsel misquoted one text in her examination of Mr. Hanrahan. However, Crown counsel cross-examined Mr. Hanrahan on that text message, "I penetrated you and I stopped before you woke up". Crown counsel quoted the text twice, correctly, in doing so (Transcript, Vol. VIII, p. 40). She also highlighted the text, quoting it correctly, in her final argument to the jury (Transcript, Vol. X, p. 22). Although it is unfortunate that defence counsel misquoted the text, I am satisfied that any confusion caused by the misquotation was clarified by Crown counsel. Additionally, the jury could read the text messages for themselves during deliberations. While it is true that they only had one copy, they had it for as long as they needed. It is not uncommon for juries to have single copies of exhibits.

[49] Finally, with respect to the permissible "narrative as circumstantial use" of the texts, this is not a case where the Crown was seeking to use the texts to show how the complainant's story was initially disclosed, or any other identified allowable use of the texts in relation to the complainant. The defence wanted to use the

circumstances of the complainant sending the texts primarily to suggest that the complainant had colluded with her friend, who was with her when she was texting Mr. Hanrahan, to try to “entrap” Mr. Hanrahan with the text conversation. The judge did nothing to restrict Crown counsel’s examination or re-examination of the complainant with respect to these circumstances.

[50] In short, I would not find that the judge improperly intervened in Crown counsel’s examination of the complainant on the text messages. I would find that his interventions and his prohibition on having the complainant read her prior consistent statements to the jury to be within the reasonable exercise of his trial management power. Additionally, I am satisfied that the judge understood, and communicated to the jury, the permissible ways in which the text messages could be used. Although I would find that he placed unnecessary restrictions on the use of the text messages, I would not find that they could reasonably be viewed as having had a material bearing on the acquittal.

ISSUE 2a: Did the judge err at the threshold stage of s. 276 because he found an inconsistency?

[51] Mr. Hanrahan’s s. 276 application was founded on the following exchange during the complainant’s cross-examination (Transcript, Vol. V, pp. 2-3):

Q. So I just want to clarify that prior to this event, you and Lucas were pretty good friends? A. We were friends.

Q. Yes. You know, you were friends for a couple of years? A. Um-hm.

Q. You, I mean, you would consider him a good friend? A. I would consider him an acquaintance at the time.

Q. An acquaintance? A. We had been good friends previously.

Q. Right. I mean, this is a person that you chose on that day to confide in because you were having, as you said, a bad day about something completely unrelated. He is the person you chose to go to, right? A. Yes.

Q. So you weren’t acquaintances, you trusted him. You thought he was a good person, right? A. I ran in to him when I needed to have a rant. **Before that, this was the closest encounter we had had. Before that it was strictly quick drives.**

[Emphasis added.]

[52] Mr. Hanrahan alleged that the complainant's statement, bolded above, was false and inconsistent with her statement to the police:

Cst. Piercey: Did you have any sexual relationship with him prior to this incident?

[Complainant]: Yes, when me and him first met each other it's like two years ago I think for like two months we tried to date and it just didn't work out. ...

Cst. Piercey: So since that time that would be close to two years, I guess, was there any consensual sexual relations after that. Even if you weren't technically I guess dating or trying to date each other were there any sexual relationship ongoing?

[Complainant]: I think we might've, not within the past year, maybe once or twice after we stopped dating...

[53] Mr. Hanrahan submitted that this inconsistency was relevant to the complainant's credibility, had significant probative value without engaging prohibited myth-based reasoning, and otherwise met the conditions for admissibility of evidence of other sexual activity set out in s. 276(2) of the *Criminal Code*.

The judge's decision at the Stage One inquiry

[54] Section 276(2) of the *Criminal Code* sets out four conditions for the admissibility of evidence of a complainant's sexual activity, other than that forming the subject of the charge, when such evidence is sought to be adduced by the defence in cases involving sexual offences. The conditions are:

- a. The evidence is not being adduced for the purpose of the "twin myths" - namely, that having engaged in other sexual activity makes a complainant more likely to consent or less worthy of belief.
- b. The evidence is relevant to an issue at trial.
- c. The evidence is of specific instances of sexual activity, which can be evidence of a relationship that implies sexual activity, not necessarily specific dates and locations (*R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paras. 53-54); *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at paras. 47-48).

- d. The evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[55] The *Criminal Code* establishes a regime for determining whether evidence should be admitted under s. 276(2). The regime includes an initial screening stage, referred to in *R. v. J.J.*, 2022 SCC 28, as a “Stage One inquiry”, and often referred to as the threshold stage. At the Stage One inquiry, a judge must decide whether the proposed evidence “is capable of being admissible” under s. 276(2) (*Criminal Code*, s. 278.93(4)).

[56] The judge found that the Stage One threshold was met (Appeal Book, Tab 7, the “s. 276 decision”). His decision rested on his finding that there was a material inconsistency between the complainant’s testimony under cross-examination and her statement to police (s. 276 decision, at paras. 7, 13).

[57] The judge also relied on *Goldfinch* (s. 276 decision, at para. 17). In *Goldfinch*, the Supreme Court of Canada stated that evidence of a sexual relationship may be relevant when a complainant has offered inconsistent statements regarding the very existence of a sexual relationship with the accused, citing *R. v. Harris*, 1997 CanLII 6317 (ONCA) as an example. In support of his decision, the judge cited the following passage from *Harris* (s. 276 decision, at para. 12):

By testifying as she did, the complainant placed the nature of her relationship with the appellant in issue. Accordingly, in order to be able to make full answer and defence, the appellant was entitled to lead evidence designed to rebut the complainant’s testimony.

Positions of the parties

[58] The Crown submits that the judge misapprehended the evidence when he found that there was an inconsistency and, as a result, he erred in his determination at the Stage One inquiry. The Crown submits that, if looked at contextually, there was no inconsistency and that during cross-examination, the complainant was speaking “temporally” about the status of her relationship with Mr. Hanrahan at the point in time just preceding the incident. The Crown notes that the complainant had testified on direct examination that she had been at Mr. Hanrahan’s residence “many

times, dozens” before and that later in cross-examination she testified that she had been in Mr. Hanrahan’s bedroom before.

[59] Even if there was an inconsistency, the Crown submits that the past sexual history evidence was not relevant to an issue at trial, as required by s. 276(2). The Crown submits that the fact that the complainant had been to Mr. Hanrahan’s house before and the fact that they had texted each other previously could have been put to the complainant to challenge what the defence perceived as an inconsistency, without having to admit the sexual history evidence.

[60] Mr. Hanrahan submits that the judge’s finding of an inconsistency was a factual determination, to which this Court should defer, and that he did not err at the Stage One inquiry.

Analysis

[61] The complainant and Mr. Hanrahan had previously had a sexual relationship, as the complainant acknowledged in her police statement. If she communicated to the jury that she and Mr. Hanrahan had not had a prior sexual relationship, then there was an inconsistency.

[62] This Court is presented with two different interpretations of the complainant’s evidence. The judge found the complainant’s cross-examination evidence to be in “stark contrast” with her statement to police. Crown counsel submits that it is “clear” that the complainant was not denying a prior sexual relationship with Mr. Hanrahan. Ultimately, it is what the jury would have understood upon hearing the complainant’s testimony, in the context of the other evidence that they heard, that bears on the question of whether the complainant’s response was misleading.

[63] The determination of whether sexual activity evidence is admissible under s. 276 raises a question of law (*Criminal Code*, s. 278.97; *Goldfinch*, at para. 101), which is reviewable on a standard of correctness. Yet, a judge’s interpretation of the evidence is typically due deference because sometimes evidence may reasonably support more than one interpretation, none of them being incorrect (see e.g. *R. v. Lee*, 2010 SCC 52, [2010] 3 S.C.R. 99, at para. 4). Where more than one interpretation is reasonably possible, an appellate court will not usually interfere with a trial judge’s interpretation if there was some evidence to support their finding (see *R. v. Nelson*, 2021 NSCA 11, at para. 26).

[64] My colleague, writing in dissent, would find that the judge erred because there was no inconsistency. She and I disagree on this point because I would find that the judge reasonably interpreted the evidence and would defer to his interpretation. The Crown's interpretation that the complainant was only referring to the period *after* she and Mr. Hanrahan had ended their sexual relationship, requires reading further explanation into her testimony that this was "the closest encounter we had had". The judge's interpretation focused on the words the complainant used (s. 276 decision, at para. 13):

Whether the complainant's style of speech supports an alternative inference or not, the actual words that she used could be construed as limiting, severely, the nature of the relationship that she had with the accused. Had she limited her remarks to the fact that they had been good friends, but, at the time of the alleged offence were merely acquaintances, we would not have had need for this application. However, the complainant went beyond that characterization and implied that the closest encounters she had ever had with the accused were quick drives.

[65] Allowing that the evidence may be capable of supporting more than one reasonable interpretation, I would defer to the judge's interpretation. He heard and saw the complainant testify at the same time as the jury and is better placed than this Court to interpret her evidence. In the result, I would not find that the judge erred by misapprehending the evidence and finding an inconsistency.

[66] Nor would I find that the judge erred by finding at the threshold stage that the prior sexual evidence was capable of being admissible because it was relevant to an issue at trial, namely the complainant's credibility. At issue was whether the complainant had misled the jury by implying that her prior relationship with Mr. Hanrahan was not sexual. She did not deny that she and Mr. Hanrahan had previously been good friends, so there was no inconsistency on that point. Consequently, cross-examining the complainant about sending text messages and visiting Mr. Hanrahan's home, as suggested by the Crown, would not have addressed an inconsistency in her evidence because those activities are consistent with friendship.

[67] Evidence of a sexual relationship may be relevant when a complainant has offered inconsistent statements regarding the very existence of a sexual relationship with the accused. This point is acknowledged in *Goldfinch* and *Harris*. In *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, the Supreme Court used the specific illustration of a complainant making a statement to the police that prior sexual activity occurred but then later contradicting that evidence in her testimony at trial,

as an example of when a judge may reconsider a prior s. 276(2) ruling mid-trial (para. 65).

[68] The s. 276 regime protects the integrity of the trial by excluding irrelevant and misleading evidence, protects the accused's right to a fair trial, and encourages the reporting of sexual offences by protecting the security and privacy of complainants (*Barton*, at para. 58). In particular, the s. 276 regime seeks to eliminate the twin myths. These myths, which are based on false logic, have no place in a fair trial. However, the regime does not impose a "blanket exclusion" on all evidence of the complainant's other sexual activity. If evidence of sexual activity is proffered for its non-sexual features, such as to show a prior inconsistent statement, it may be permitted (*R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paras. 32, 35).

[69] I would find no error by the judge in finding that the prior sexual history evidence was capable of being admissible under s. 276(2) at the Stage One inquiry.

ISSUE 2b: Did the judge err by admitting the prior sexual history evidence?

[70] Having allowed the application at the Stage One inquiry, the judge was required to proceed to a hearing to determine whether the evidence was admissible (s. 278.93(4)). The evidence was not admissible simply because the judge had found the complainant gave a prior inconsistent statement about the sexual nature of her relationship with Mr. Hanrahan. The admissibility of prior sexual history evidence must be carefully assessed in the context of each case, following a hearing during which the complainant has the right to make submissions and be represented by counsel (s. 278.94(2),(3)). In *J.J.*, the Supreme Court of Canada termed this hearing "the Stage Two hearing".

[71] At the Stage Two hearing, a judge must decide admissibility based on the four conditions of s. 276(2), reviewed above, informed by a series of factors set out in s. 276(3):

276(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant.

[72] These factors are particularly relevant to the balancing exercise required by the fourth condition of s. 276(2): the evidence must have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[73] Here, the judge found that the prior sexual history evidence contained in the complainant's police statement was admissible, and he allowed Mr. Hanrahan's application to cross-examine the complainant with respect to it. His reasons included a consideration of the factors listed in s. 276(3).

Positions of the parties

[74] The Crown submits the judge erred in law by admitting the prior sexual history evidence. The Crown disagrees with the judge's consideration of many of the s. 276(3) factors, including his finding that society's interest in encouraging the reporting of sexual assault offences was a neutral factor in this case. Overall, the Crown submits that Mr. Hanrahan could have made full answer and defence by cross-examining the complainant with respect to her suggestion that she and Mr. Hanrahan were only acquaintances who went on quick drives, without introducing their sexual history.

[75] Mr. Hanrahan submits that the judge appropriately weighed the factors and did not err in his ruling. He submits that the evidence of the prior sexual history was minimal, cross-examination was limited, and appropriate directions were given to the jury cautioning them against the twin myths. Overall, Mr. Hanrahan submits that

trial fairness was best maintained by allowing evidence that might have assisted the jury in determining the existence of reasonable doubt.

Analysis

[76] A determination of the admissibility of evidence under s. 276 is reviewed on a correctness standard (*Goldfinch*, at para. 101). However, this determination relies on the trial judge's balancing of the probative value and prejudicial effect of relevant evidence, taking into account the factors outlined in s. 276(3) (*Goldfinch*, at para. 5). This fact-sensitive analysis is due deference on appeal (*Darrach*, at para. 71; *R.V.*, at para. 60; *R. v. M.T.*, 2012 ONCA 511, at para. 54; *R. v. Ravelo-Corvo*, 2022 BCCA 19, at para. 29; *R. v. Zachariou*, 2015 ONCA 527, at para. 9; *R. v. Sandhu*, 2024 ABCA 47, at para. 14).

[77] In *Goldfinch*, Justice Karakatsanis wrote:

[69] The final step in the s. 276 analysis requires judges to balance the probative value of proposed evidence against the danger of prejudice to the proper administration of justice, taking into account the factors set out in s. 276(3). Both considerations must receive heightened attention as “[the test] . . . serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties” (*Darrach*, at para. 40). Balancing the s. 276(3) factors ultimately depends on the nature of the evidence being adduced and the factual matrix of the case. It will depend, in part, on how important the evidence is to the accused's right to make full answer and defence. For example, the relative value of sexual history evidence will be significantly reduced if the accused can advance a particular theory *without* referring to that history. In contrast, where that evidence directly implicates the accused's ability to raise a reasonable doubt, the evidence is obviously fundamental to full answer and defence (*Mills*, at paras. 71 and 94).

[78] The judge considered the evidence to be of significant importance to Mr. Hanrahan's ability to make full answer and defence. He wrote (s. 276 decision, at para. 20):

It is imperative, in our system of justice, that persons accused with a crime be allowed to bring to bear, during the trial process, such evidence as might assist them in convincing a trier of fact of the existence of a reasonable doubt. It is imperative that accused persons not be denied that ability for, to do so, could result in wrongful convictions – a most undesirable outcome. The interests of justice demand that the accused not be impeded in bringing forward such relevant evidence as might assist the Court in arriving at a just outcome.

[79] The judge identified the complainant's credibility as a relevant trial issue and considered that evidence of her inconsistent statements would assist the jury with arriving at a just determination in the case (s. 276 decision, at para. 25):

...The jury has the right to know that the complainant made these contradictory statements. How much weight the jury will give to the contradictions is within their discretion to decide. The evidence will be beneficial to them in assessing the complainant's credibility. The jury might give ample weight to the inconsistency, or they might give it no weight at all. They do, however, have the right to know that an inconsistency exists and to render their judgment as to whether or not it is material.

[80] Consistent with the balancing exercise, the judge also considered the potential prejudice to the complainant (s. 276 decision, at para. 28):

Anytime a complainant testifies in Court in a trial involving allegations of sexual misconduct there is, by implication, an affront to the complainant's personal dignity and right to privacy. No complainant wants to testify in open Court before a number of strangers about intimate matters such as these. ...

[81] The judge found that the negative impact to the complainant's personal dignity and right of privacy could be mitigated by limiting the cross-examination to what was "essential for the jury to do justice" (s. 276 decision, at para. 29). He also considered that the nature of the evidence, namely that a sexual relationship once existed, was of "marginal import" insofar as its ability to arouse sentiments of prejudice, sympathy or hostility in the jury (s. 276 decision, at para. 27). He considered the risk of the jury using the evidence to engage in discriminatory "twin myths" reasoning, but found that this could be managed by giving the jury instructions cautioning them against such use (s. 276 decision, at para. 26).

[82] Given the different accounts about whether the sexual activity was consensual, credibility was the key issue. Mr. Hanrahan's defence centered on his position that the complainant was not credible. As such, evidence that might establish that the complainant had attempted to mislead the jury about whether their relationship had always been platonic before the night in question, was important to his ability to raise a reasonable doubt. Simply stated, if the jury agreed with Mr. Hanrahan that the complainant had attempted to mislead them on this point, they might have assessed her as being less credible and, in turn, this might have raised a reasonable doubt about Mr. Hanrahan's guilt.

[83] Mr. Hanrahan was not seeking to introduce details of the past sexual relationship other than that there had previously been one. Although any evidence

of prior sexual history engages a person's dignity and right of privacy, the proposed evidence did not include intimate details, private communications, or personal images.

[84] I acknowledge the Crown's concern that the judge assessed society's interest in encouraging the reporting of sexual assault offences as being a neutral factor in this case. Any additional intrusion into the private and intimate lives of complainants would discourage reporting. However, the judge's reasoning on this point must be considered in light of his focus on the inconsistency, as opposed to the sexual nature of the evidence (s. 276 decision, at para. 21):

...The issue here is one of inconsistent statements. While one of the statements has a sexual dimension, it is the fact that two quite different things were said by the complainant that is at the heart of this application – not the fact that one of the statements made reference to a sexual relationship.

[85] Overall, the judge considered all the s. 276(3) factors, he assessed their importance in the case, and he found that the evidence had significant probative value that was not substantially outweighed by the danger of prejudice to the proper administration of justice. I would not find his decision to admit the prior sexual history evidence to be in error.

ISSUE 2c: Did the judge err by refusing to allow Crown counsel to question the complainant about the inconsistency on re-examination?

[86] The judge limited defence counsel's cross-examination about the inconsistency to a series of questions that closely mirrored the procedure typically followed to impeach a witness's credibility using a prior inconsistent statement under ss. 10 and 11 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. He ruled as follows (s. 276 decision, paras. 32-37):

[32] The accused shall have the right to cross-examine the complainant with respect to her previous inconsistent statement to Cst. Piercey. Cross-examination shall be conducted as follows:

[33] Counsel for the accused shall remind the complainant of the testimony that she gave in cross-examination, namely:

[Complainant's testimony on cross-examination, transcribed in para. [51], above]

[34] Counsel for the accused shall ask the complainant whether she remembers making a statement to Cst. Piercey and, in particular, whether she recalls giving the following answers to the questions that Cst. Piercey posed:

[Excerpt from police statement, transcribed in para. 52, above]

[35] Counsel for the accused shall then ask:

I suggest to you that it is not true that the closest encounter you had had with Mr. Hanrahan was strictly drives before you decided to engage him in your rant?

[36] There shall be no further questioning by defence counsel concerning this issue without leave of the Court.

[37] There shall be no re-direct examination by the Crown in respect of this issue.

[87] Although the judge initially ruled that there would be no re-examination by the Crown with respect to the prior inconsistent statement, he later amended that ruling. The Crown was permitted to ask the complainant, by way of re-examination, to explain the apparent inconsistency (Transcript, Vol. VIII, p. 2).

[88] The complainant returned to the stand and defence counsel proceeded to ask the questions as directed by the judge. The complainant confirmed that she remembered the testimony she gave in cross-examination. She also confirmed that she remembered her statement to police. The questioning then continued (Transcript, Vol. VIII, p. 7):

[Defence counsel]: Okay. I would suggest to you that it is not true that the closest encounter you had had with Mr. Hanrahan was strictly drives before you decided to engage him in your rant, correct?

[Complainant]: When I said that, what I meant was since we had previously been good friends. So it has been the closest encounter we have had since that period of time.

[Defence counsel]: Okay. So I would suggest to you that it is not true that the closest encounter you had had with Mr. Hanrahan was strictly drives before you decided to engage him in a rant, correct?

[Complainant]: Not in our entire time of knowing each other. But I was upright with the police and the lawyers. But since that time it was.

[89] That ended defence counsel's cross-examination of the complainant. The judge asked Crown counsel if she had any re-examination and Crown counsel requested a break before she began. The judge granted her request.

[90] After the break, but before the jury and the complainant returned, defence counsel objected that the complainant had elaborated on her answer in cross-examination and defence counsel felt that she (defence counsel) "should be able to go further" with her questioning as a result (Transcript, Vol. VIII, p. 9). The judge refused her request. He pointed out that the complainant's explanation would have come out in re-examination, although he acknowledged that the complainant had "answered more than she was asked to answer" on cross-examination (Transcript, Vol. VIII, pp. 9-10). As a result, he decided that there was no longer a need for Crown counsel to re-examine with respect to the inconsistency.

[91] Crown counsel was concerned that complainant's answer was unclear and asked to have the testimony played back, which was done. The judge decided that the complainant's answer was clear and that there was nothing to clarify in re-examination (Transcript, Vol. VIII, p. 11). He determined that the complainant "said what she is going to say" and he did not "think she can say it any other way or any differently" (Transcript, Vol. VIII, p. 12). Consequently, Crown counsel was not permitted to question the complainant further about the inconsistency in re-examination.

Positions of the parties

[92] The Crown alleges that the judge erred by denying re-examination with respect to the prior inconsistent statement. The Crown submits that considering the type of information being elicited, the fact that it so deeply affected the privacy and dignity of the complainant, as well as her credibility, trial fairness demanded that Crown counsel be allowed to ask the complainant to clarify her remarks. The Crown further submits that there was ultimately a distorted narrative because Mr. Hanrahan was able to testify about his prior dating relationship with the complainant.

[93] Mr. Hanrahan submits that the judge's decision with respect to re-examination is discretionary and not properly subject to appeal on a question of law alone. He notes that the judge restricted questioning to limit evidence about the prior sexual history and that allowing re-examination would have, or could have, led to further sexual history evidence being admitted. Finally, Mr. Hanrahan submits that the

complainant explained the inconsistency to the jury and the judge reasonably concluded that she was unlikely to say it any other way.

Analysis

[94] Re-examination must relate to new matters arising out of cross-examination or with matters raised in direct examination that require clarification or explanation as to questions put and answers given in cross-examination (*R. v. Evans*, [1993] 2 S.C.R. 629, at 644; *R. v. Phillips*, 2021 NLCA 51, at para. 33).

[95] Trial judges may limit re-examination as part of their trial management power (*R. v. J.A.*, 2023 SKCA 119, at para. 26). As already stated, the trial management power does not give trial judges a license to exclude otherwise relevant material in the name of efficiency, and, on appellate review, a trial judge's decision to curtail questioning must be assessed in the context of the whole trial.

[96] Here, the judge's decision to disallow re-examination by Crown counsel must be considered in the context of the s. 276 application. The evidence that might have been elicited on re-examination was evidence that was not admissible but for the s. 276 decision. In his reasons for allowing the s. 276 application, the judge stated that he wanted to limit the cross-examination on the matter of the sexual relationship to what was "essential for the jury to do justice" to "limit any prejudice to the complainant's personal dignity and right of privacy" (s. 276 decision, at para. 29). As a result, the judge took a strict approach as to whether to allow re-examination.

[97] The judge found re-examination was not necessary because the complainant had answered the question about the inconsistency and her answer was clear. He found that there was nothing further for the complainant to explain or clarify.

[98] I would not find that the judge erred in this finding. The complainant was asked the question twice by defence counsel and her answers were coherent. She clarified that on cross-examination she had been referring to the period after she and Mr. Hanrahan had been good friends, not their entire time of knowing each other. She also stated that she had been "upright" with the police and the lawyers, which one would reasonably understand to mean that she had been up front or truthful about the matter. There was no indication during the questioning that the complainant was cut off or had more to say but was prevented from doing so. After rehearing the testimony, Crown counsel did not raise any further concern about the complainant's answer being unclear.

[99] That said, trial fairness demands that a witness whose credibility is being impeached by a prior inconsistent statement be given a full opportunity to explain themselves. As a result, if I was satisfied that the complainant's answer was unclear or that she had more to say, but did not have chance to say it, I would be receptive to the Crown's position. However, there is nothing to suggest that the complainant's answer was incomplete or unclear.

[100] The Crown submits that there was a distorted narrative because Mr. Hanrahan was able to testify about the prior sexual history in his direct examination. However, I cannot agree. Mr. Hanrahan's testimony about the past sexual relationship was the following (Transcript, Vol. VIII, p. 18):

Q. How would you describe your relationship?

A. Well, when we first met, we were in a relationship for two months. We remained friends for a couple of more months after that. We tried dating again afterwards, but basically for the full two years that we knew year other, like, we were friends. We went for lunch. We went for a coffee. We talked consistently.

[101] He did not give any more detail about the sexual nature of the relationship than the complainant had given in her statement to the police. His testimony did not create a distorted narrative.

CONCLUSION

[102] With respect to the first issue, I would not find that the judge improperly intervened in Crown counsel's examination of the complainant on the text messages. I would find that his interventions and his prohibition on having the complainant read her prior consistent statements to the jury to be within the reasonable exercise of his trial management power. Additionally, I am satisfied that the judge understood, and communicated to the jury, the permissible ways in which the text messages could be used. Although I would find that he placed unnecessary restrictions on the use of the text messages, I would not find that they could reasonably be viewed as having had a material bearing on the acquittal.

[103] With respect to the second issue, I would not find error with the judge's finding of an inconsistency between the complainant's evidence on cross-examination and her prior statement to the police. Nor would I find his decision to admit the prior sexual history evidence to be in error. The trial judge found that the complainant gave inconsistent descriptions of the nature of her prior relationship

with the accused, and because of this inconsistency, he found that evidence of the prior sexual nature of the relationship was relevant. In so doing, he conducted an appropriate balancing of the factors relevant to the probative value and the prejudicial effect of the evidence in coming to his decision. Finally, because the complainant had the opportunity to explain the apparent inconsistency on cross-examination, and did so clearly, I would find no error in the judge's decision to refuse re-examination by Crown counsel on the prior sexual history evidence.

DISPOSITION

[104] For these reasons, I would dismiss the Crown's appeal.

K.J. O'Brien J.A.

I concur: _____
W.H. Goodridge J.A.

F.J. KNICKLE, J.A.:

INTRODUCTION

[105] Lucas Hanrahan was acquitted, after a jury trial, of sexually assaulting the complainant. The Crown appeals that acquittal.

[106] The complainant and Mr. Hanrahan were the only witnesses at trial. The complainant testified that she and Mr. Hanrahan were friends and worked in the same shopping mall. The two had arranged to meet and have a sleepover at Mr. Hanrahan's house. After watching some movies, drinking wine and talking about an issue that the complainant wanted to discuss, the complainant stated she went to sleep in her pajamas in Mr. Hanrahan's bed as they had previously agreed. The complainant stated that after going to sleep, she awoke to find her pajamas removed and Mr. Hanrahan having vaginal intercourse with her. The complainant testified she had not consented to any sexual contact with Mr. Hanrahan. Mr. Hanrahan stopped immediately after her protestations and apologized either afterwards or the

next morning before the complainant left (Transcript, Vol. IV, at pages 42-43). At trial, Mr. Hanrahan agreed that there had been intercourse between the two, but testified that the intercourse was consensual.

[107] There are two issues on appeal.

[108] Firstly, the Crown argues that the trial judge erred in restricting the Crown's use of evidence of a text message conversation between the complainant and Mr. Hanrahan. The Crown argues that it was unfairly restricted in how the complainant could refer to the exhibit.

[109] Secondly, the Crown argues that the trial judge erred in ruling that evidence of the complainant's previous sexual history was admissible and that she could be cross-examined on it. The Crown maintains that the proposed evidence was not relevant to an issue at trial and its probative value did not substantially outweigh the prejudicial effect on the proper administration of justice. Related to this error, the Crown argues that after admitting the evidence, the trial judge then erred by denying the Crown's request to re-examine the complainant after she was cross-examined on her previous sexual history.

[110] For the reasons that follow, I would allow the appeal. In my view, the trial judge made the legal errors as alleged by the Crown. I am also of the view that these errors had a material bearing on the verdict of acquittal rendered by the jury.

ISSUE 1: The trial judge's treatment of the text message conversation

[111] After the alleged sexual assault, several text messages were exchanged between the complainant and Mr. Hanrahan. Mr. Hanrahan sent the initial text message the evening after the alleged assault. In this initial text message, he apologized to the complainant:

I am so sorry again, there is no excuse. I just feel like a piece of shit.

[112] The complainant did not respond to this text for several hours. When she did respond, the complainant stated:

I literally don't understand how you went from concerned and trying to console me to putting your penis in me while I was passed out.

[113] Over the next 25 to 30 minutes, a series of exchanges between the two followed. The complete text conversation is attached as an appendix to this judgment.

[114] Some of the statements by Mr. Hanrahan in the text conversation were highly incriminating to Mr. Hanrahan. In addition to the initial unprompted apology, Mr. Hanrahan stated “I penetrated you and I stopped before you woke up it doesn’t make it any better at all”. Mr. Hanrahan also stated that he “knew” what he was doing “was wrong” and that he would “own it” if the complainant “wanted to call the police”, that he “deserve[d] it”. Mr. Hanrahan also responded to some of the complainant’s statements with responses such as “it wasn’t so simple like that”.

[115] The Crown sought to tender the text conversation as probative of Mr. Hanrahan’s guilt. The Crown alleged that the text conversation contained admissions by Mr. Hanrahan that were consistent with him having committed the sexual assault as alleged by the complainant.

[116] Although the text messages were admitted by consent, the Crown argues that the trial judge erroneously and unfairly restricted the manner in which Crown counsel was permitted to present this evidence to the jury, particularly as it related to the complainant’s side of the conversation. The Crown argues that because of the trial judge’s erroneous restrictions, Crown counsel was prevented from accurately presenting this evidence to the jury. I agree with the Crown’s submission.

[117] In order to understand how the trial judge erred, it is necessary to review how the evidence was characterized at trial. It is the characterization of the evidence that influenced the trial judge’s decisions as to how the evidence was to be presented to the jury. In particular, counsel for Mr. Hanrahan submitted, without objection from the Crown, that the complainant’s texts were to be treated as “prior consistent statements”. The trial judge agreed with this characterization.

[118] Satisfied that the complainant’s texts in the text message conversation were prior consistent statements, when a copy of the text conversation was tendered at trial, the trial judge instructed the jury by way of a mid-trial instruction, on the impermissible use of the statements. The focus of the instructions was that the fact of having made repeated statements did not mean that the statements were true and did not enhance the credibility of the complainant (Transcript, Vol. IV, at pages 44-46).

[119] The trial judge then advised the jury of the permissible uses of the statements, in keeping with instructions often given when the relevance of a prior consistent statement has arisen: the statements could be considered as part of the narrative, to establish the fact that the statement was made, or to rebut an allegation of recent fabrication. As explained in *R. v. Angel*, 2019 BCCA 449 (leave to appeal to SCC refused, 38957 (23 April 2020)), at paragraphs 71 to 72:

71 The law carves out exceptions to the general exclusionary rule to enable triers of fact to consider prior consistent statements with probative value beyond mere repetition of a witness' in-court testimony: *Gill* at para. 75; *Khan* at para. 39. The truth-seeking function of the trial may, in some circumstances, be enhanced by permitting the trier of fact to consider both inconsistencies and consistencies between out-of-court statements and the versions of events related at trial: *R. v. Untinen*, 2017 BCCA 320 at para. 74.

72 The exception that applies in this case is the narrative as circumstantial evidence exception, which recognizes that prior statements can assist the trier of fact in assessing the truthfulness or reliability of the declarant's in-court testimony. A statement admitted under this exception is not received as evidence of the truth of its contents, but rather, for the fact it was made. The circumstances in which it was made, its timing, or the context it provides may assist the trier of fact in assessing the truth of the declarant's in-court testimony: *M.C.* at paras. 63, 66; *Gill* at para. 76; *Dinardo* at paras. 37-38.

[120] However, because the trial judge was concerned that the repetition of the statements might impermissibly enhance the complainant's credibility, he not only instructed the jury on the permissible and impermissible uses, but also prohibited the Crown from having the complainant read the texts, or physically refer to them in any way while she was testifying.

[121] The trial judge also prohibited the jury from seeing the text messages until they retired to the jury room. This meant that the jury had no idea of the entirety of the text conversation until after they retired to deliberate.

[122] The trial judge also considered defence counsel's submission on whether copies of the text conversation ought to have gone to the jury room with the jury; however, he ultimately permitted a single copy to go to the jury room.

[123] Notwithstanding the trial judge's directions as to the limited use of the text messages, he stated the Crown would be permitted to put certain questions to the complainant about the texts such as the timing, why she sent them, and the

circumstances. However, when the Crown tried on two separate occasions to put such questions to the complainant or have her refer to the exhibit, the trial judge intervened and prevented Crown counsel from so doing (Transcript, Vol. IV, at pages 47-50, 59).

[124] The first intervention by the trial judge was when Crown counsel attempted to draw the complainant's attention to the texts after they were marked as an exhibit and the trial judge had given his mid-trial instructions on prior consistent statements. At that point, the complainant had confirmed that there had been a text message conversation but had not yet provided details of the timing or circumstances. In drawing the complainant's attention back to the texts, Crown counsel stated:

Q. Yes, okay. Thank you. So, one of these messages you seem to recall almost verbatim. I'll get you to refer to that one in particular.

[125] The trial judge intervened and excused the jury. The trial judge reminded Crown counsel that he did not want the complainant to repeat what she stated in the text messages, saying:

There's no need to do a direct examination on the document.

[126] Crown counsel explained that it was not her intention to have the witness read the texts (as ordered by the trial judge), but to confirm them (Transcript, Vol. IV, at page 49). The trial judge directed Crown counsel to not have the witness refer to the exhibit.

[127] After defence counsel added that she was concerned about Crown counsel's reference to the complainant's recall as oath helping, the trial judge stated:

Yeah. And that's what, that's what we don't – you don't need to do that. You don't need to do that because the statement is, the statements are in. They are evidence. She said what she said on the stand. Leave that alone. And, don't ask her to say, what did you say in the statement and is it true and, you know, that's not what you don't want to do. Right? You don't want to say is this exactly the same as what you said on the stand today. That's oath helping. That's not... necessary.

[128] Crown counsel asked no further questions about the texts at that point. When Crown counsel attempted to bring the texts to the attention of the complainant a second time, the trial judge again intervened and specifically directed Crown counsel

to not ask the very questions he had initially permitted (Transcript, Vol. IV, at pages 58-59):

Crown counsel: So the texts you received on the 25th, were they received – any and all texts received that day or were they several dates.

A: I'm not confident, but I don't believe so because I didn't want to respond. So, I think I left it. But I can't remember how long I left it for.

THE COURT: Consent No. 1 has the times and dates, correct?

Defence counsel: Yes

THE COURT: We don't need to go there.

Crown counsel: Okay. And just to clarify, I don't want to get back into the texts. As Justice just said, we—those are included in the exchange. But what you meant by you're not confident?

A. I'm not confident if I responded later that night or perhaps the next day.

[129] After the second intervention by the trial judge, the Crown asked no further questions of the complainant on the text conversation.

[130] In contrast, defence counsel was permitted to freely question both Mr. Hanrahan and the complainant on the text conversation exhibit.

Analysis of Issue 1

[131] The trial judge erred in his treatment of the text conversation evidence. Because of this error, the trial judge improperly restricted the Crown's direct examination of the complainant. This restriction resulted in an unbalanced and distorted presentation of her evidence.

[132] The trial judge's error in restricting how the text conversation could be used flows from his mischaracterization of its evidential value. While in isolation, the complainant's side of the text conversation could be prior consistent statements as

described in *Angel*, their probative value was not limited to permissible uses of prior consistent statements.

[133] What was important about the complainant's texts in these circumstances was their assistance in interpreting Mr. Hanrahan's texts. That is, they were relevant to whether, and to what extent, Mr. Hanrahan had admitted guilt.

[134] This point was made in *R. v. Langan*, 2019 BCCA 467, by the dissent, which was adopted in its entirety by the Supreme Court (*R. v. Langan*, 2020 SCC 33, [2020] 3 S.C.R. 499). In *Langan*, then Chief Justice Bauman explained the principles behind prior consistent statements (paragraphs 89-105) and how such statements in the context of text messages between the complainant and Mr. Langan after the alleged sexual assault might be admissible. In relation to what he described as the "conversational" aspect of those particular texts, he stated at paragraph 97:

The messages can also be seen to have probative value based on their conversational nature. *This distinguishes them from the statements typically excluded under the rule against prior consistent statements.* Unlike a police statement, the complainant's texts were interacting with the accused's texts and could thus be assessed for credibility in that context. For example, had Mr. Langan responded with bewilderment or confusion to the complainant's texts about the assault, rather than admissions, this would have presented a much different picture for the trier of fact.

[Emphasis added.]

[135] Because the trial judge mischaracterized the evidentiary scope of the complainant's texts, he erroneously segregated the text conversation into two silos of evidentiary use. In one silo were the complainant's texts as prior consistent statements whose relevance was the fact that they were made, and their timing. In the other silo were Mr. Hanrahan's texts that could be considered as admissions.

[136] This mischaracterization of the text conversation is evident in both his mid-trial and final jury instructions. While in his final instructions the trial judge advised the jury, briefly, that the complainant's texts "provide context" and that her texts were relevant to understanding Mr. Hanrahan's texts (Transcript, Vol. X, at page 39), his instructions emphasized the two sides of the text conversation as unrelated and the complainant's texts primarily as prior consistent statements (Transcript, Vol. X, at pages 38-40).

[137] This was an error. Neither set of text messages could be assessed in isolation of each other. While some of Mr. Hanrahan's texts on their own were potentially admissions, other of Mr. Hanrahan's texts could only be understood as admissions by reference to and by considering content of the complainant's texts. It was not just Mr. Hanrahan's texts that were potentially indicative of Mr. Hanrahan's guilt, but the conversation in its entirety.

[138] For example, many hours after Mr. Hanrahan sent his initial apology, the complainant responded with a statement alleging the circumstances of the assault: that she was asleep and he had intercourse with her while she was "passed out". Mr. Hanrahan initially responded with statements that "it wasn't so simple like that" and suggested that they had both been "feeling around" and the complainant had helped in getting herself undressed from her pajamas, while at the same time stating that "it is still 100% my fault" and the "worst thing I've ever done". The complainant then sent a series of texts refuting his response and, again, describing her view of what happened. Mr. Hanrahan then replied: "I really don't know how I got myself to that point"... "I don't have an excuse at all" and "I know I was in [and] out of sleep, at some point I made those decisions and I have thought about it and regretting every second since. I am so unbelievably sorry...".

[139] Without considering what the complainant had texted him, it is unclear what Mr. Hanrahan meant by such statements as "it's the worst thing I have ever done", or "that point" or "I made those decisions".

[140] As per *Langan*, the complainant's text messages had to be assessed as part of a conversation with Mr. Hanrahan.

[141] Further, to the extent that the accused adopted the statements of the complainant, by his words and responses to her texts, the complainant's texts were admissible as adoptive admissions: *R. v. Robinson*, 2014 ONCA 63, at paragraphs 48, 90. In *R. v. Tanasichuk*, 2007 NBCA 76 (leave to appeal to SCC refused, 33015 (23 February 2009)), Richard, J.A. (as he then was) explained the evidentiary rule on adoptive admissions this way:

102 It has long been a recognized principle in the law of evidence that "[a]n accused can adopt the statement of another either explicitly by words indicating [his or] her agreement, or implicitly by [his or] her silence in a situation where one could have expected [him or] her to have made some protest to a statement made within [his or] her hearing": See S.C. Hill et al., *McWilliams' Canadian Criminal Evidence*, (4th ed. (loose-leaf), vol. 1 at 7:160.50).

...

110 In summary, the law requires that before an allegedly adopted statement can be put to a jury, the trial judge must find that there is sufficient evidence from which the jury might reasonably infer that the conduct of the accused amounted to an adoption of the statement.

[See also *R. v. Wentworth*, 2023 ONSC 1165, at paragraph 47.]

[142] Through the lens of adoptive admissions, the complainant's texts were not inadmissible hearsay, but accusations made in the presence of, and specifically put to Mr. Hanrahan. If, by his responses, the jury concluded Mr. Hanrahan accepted the complainant's statements, they could be taken for their truth.

[143] Further, not all of what the complainant said in the text messages could be characterized as prior consistent statements. Some of the complainant's texts were direct responses to what Mr. Hanrahan stated. For example, in her final text, she stated "How would I know about it if you stopped before I woke up". This particular text was not a prior consistent statement, but her expression of disagreement with Mr. Hanrahan's explanation that he stopped having intercourse with her before she awoke. There was no justification to prevent the complainant from referring to this text, or to ask her why she responded in the manner she did on the basis that it was a prior consistent statement.

[144] The trial judge's erroneous treatment of this evidence caused him to improperly restrict Crown counsel's examination of the complainant and the presentation of this evidence. While it was correct to instruct the jury on the impermissible uses of prior consistent statements: *Angel*, at paragraphs 64-68, *R. v. SKM*, 2021 ABCA 246, at paragraphs 28-29, 31, the evidentiary scope of the entire text conversation warranted that the complainant be permitted to refer to any of the text message conversation, as necessary, to assist the jury in determining whether, and to what extent, Mr. Hanrahan had made admissions.

[145] Once it was explained to the jury that the complainant's texts did not enhance her credibility by virtue of having been a repeated statement, concerns as to the jury impermissibly using the repetition as credibility enhancing were ameliorated. There was no need to avoid having the complainant read a particular text. The instruction to the jury was straightforward: just because you say something more than once does not make it true. It is a common sense idea that is easily understood.

[146] While it appears the trial judge initially intervened in Crown counsel's questioning to address the Crown's reference to the veracity of the complainant's memory (the "oath helping" concern), there was no reason for the trial judge to then prevent the complainant from otherwise answering questions about or referring to the exhibit. Given the break in her testimony, it was logical to bring the witness back to where she had left off.

[147] Similarly, the trial judge's second intervention improperly denied the complainant the opportunity to refresh her memory on the chronology of the text messages. The fact that the "dates and times" were admitted, as referenced by the trial judge, did not mean it was irrelevant to the complainant's overall credibility as to what she did and did not remember. This second intervention unfairly prevented the Crown from asking the witness about the very things he had initially permitted.

[148] Further, it was important to have the complainant review the exhibit, in the very least, to confirm that these were the text messages that the two had exchanged. That the text messages were admitted by consent did not render their authentication irrelevant. It would be routine to have a witness confirm an exhibit to ensure that everyone is talking about the correct piece of evidence. It is absurd to tender an exhibit that was relevant to a witness' testimony, but never permit them to refer to it. Yet the trial judge's interventions and directions as to the treatment of the text messages prevented such routine questioning or any reference to the exhibit by the complainant. At no point in her direct examination was the complainant permitted to physically refer to the exhibit.

[149] These restrictions prevented legitimate questioning that could be relevant to the complainant's overall credibility. The restrictions also resulted in an unbalanced and distorted presentation of the texts. Mr. Hanrahan was permitted to refer to any of the texts, whether his or the complainant's, whereas the complainant had to rely solely on memory. Even under cross-examination, she was not allowed at times to refer to the exhibit, in spite of asking to so do.

[150] Because of the misplaced concern that the jury might impermissibly rely on the complainant's texts to enhance her credibility, despite having been instructed otherwise, the trial judge then erred by preventing the jury from even seeing a copy of the text conversation until they retired to the jury room.

[151] The trial judge's refusal to permit the jury to have access to the text messages during the testimony of both witnesses impeded their ability to assess the veracity of

this testimony. Without the benefit of seeing the text messages during the testimony, the jury was left to imagine what the texts actually stated as referenced by either witness.

[152] This is not a hypothetical concern. At one point, defence counsel reviewed with Mr. Hanrahan the highly incriminating statement made by Mr. Hanrahan, “I penetrated you and I stopped before you woke up” and in so doing, misquoted the text, stating (Transcript, Vol. VIII, at page 32):

Q. Okay. And then you say: “I penetrated you and you stopped before you woke up”.

[153] The misquoted version implied that the complainant stopped the intercourse, before she woke up. This is very different than what the actual text stated: that Mr. Hanrahan had intercourse with the complainant while she was asleep and that he was the one who stopped intercourse before the complainant awoke. Yet, the jury had no way of knowing that the text had been misquoted until they retired to the jury room with the one copy they were allowed to have. If they had been in possession of copies of the text messages at the time the testimony occurred, they would have known immediately of the error. My colleague has fairly pointed out that Crown counsel in her cross-examination of Mr. Hanrahan properly quoted that particular text, but without access to the actual messages, the jury would still have no way of knowing whether this was the misquoted text being corrected or another text.

[154] While it is true that a single copy of the exhibit was sent to the jury room in their deliberations, this could not undo the damage that had been done and the unbalanced picture of the evidence that had been drawn by the manner in which the complainant and Mr. Hanrahan were permitted to be examined on the text messages.

[155] For the above reasons, I agree with the Crown’s submission that the trial judge erred in his restrictive approach in handling the text message evidence. It was an error to dissect the evidentiary value of the text conversation into unrelated silos of Mr. Hanrahan’s texts and the complainant’s texts. The error flowed from his mischaracterization of the proper use of this evidence and his erroneous concern that, despite having instructed the jury otherwise, the jury would impermissibly reason that the credibility of the complainant was enhanced by virtue of her having made repeated statements. The trial judge’s erroneous view of the text conversation resulted in him unfairly preventing the Crown from referring the complainant to the exhibit, and an unbalanced and distorted presentation of this evidence before the jury.

[156] In a he said-she said sexual assault trial, the credibility of the witnesses is paramount and includes assessing the testimony as it is given. As stated by Moldaver, J., in his concurring judgment in *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paragraph 123:

... A jury's determination of which witnesses to find credible is a holistic exercise that involves assessing the plausibility and coherence of a given witness's testimony throughout the course of the trial...

[157] The trial judge's mischaracterization of the nature of the text conversation and the emphasis on the complainant's texts as prior consistent statements resulted in him making decisions that impeded the jury's ability to fairly assess the testimony of either witness in relation to important evidence and the truth seeking function of the trial. This is an error relating to evidence. It is owed no deference on the basis that it was an exercise of trial management power. As stated in *R. v. Samaniego*, 2022 SCC 9, at paragraph 4, erroneous evidentiary rulings cannot "be justified under the guise of trial management."

[158] This was a serious error that had a material bearing on the verdict of acquittal. I would allow this ground of appeal.

ISSUE 2: The application to admit evidence of the complainant's previous sexual history under section 276 of the *Criminal Code*

[159] As has been codified in the *Criminal Code*, evidence of a complainant's previous sexual history is presumptively inadmissible. Such evidence poses a substantial risk of impermissible reasoning by a trier of fact: (1) that because of this previous sexual history, the complainant was more likely to have consented to the activity that forms the offence, or (2) that a complainant is less worthy of belief. Such evidence is never admissible for these identified purposes (the "twin myth" reasoning).

[160] Further, as explained in *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paragraph 58, the circumstances in which a complainant's previous sexual history will be relevant to consent, as was the only issue in this case, will be rare.

[161] However, there are exceptions. Such evidence may be properly admitted where the strict requirements under section 276 of the *Criminal Code* are met. The proposed evidence must be specific, must be relevant to an issue at trial, and must

have significant probative value that is not outweighed by the danger to the proper administration of justice.

[162] One situation where such evidence may become relevant to an issue at trial is where a complainant testifies about a previous sexual history in a manner that is inconsistent with how it has been described on another occasion. In such circumstances, it may be appropriate to admit evidence of the previous statement about the previous sexual history to impeach the witness. The alleged inconsistency may be relevant to the complainant's credibility (*Darrach*, at para. 36). As stated in *Goldfinch*, at paragraph 63:

Evidence of a sexual relationship may also be relevant when complainants have offered inconsistent statements regarding the very existence of a sexual relationship with the accused (see, e.g., *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.); *R. v. Temertzoglou* (2002), 11 C.R. (6th) 179 (Ont. S.C.J.)).

[163] Relying on *Goldfinch* and *R. v. Harris*, 1997 CanLII 6317 (ONCA), the trial judge concluded that the complainant testified in a manner that was inconsistent with her previous statement to police. The trial judge concluded that her testimony implied that she had never had as close an encounter with Mr. Hanrahan as when the alleged sexual assault occurred. In the trial judge's view, this implied inference from her testimony was inconsistent with a statement she made previously to the police in which she candidly stated that the two had had a previous sexual history together. That perceived inconsistency, in the trial judge's view, could affect the complainant's overall credibility.

[164] The testimony of which the trial judge was satisfied was inconsistent with what she told the police occurred at the beginning of the cross-examination of the complainant (Transcript, Vol. V, at pages 2-3):

Q. So I just want to clarify that prior to this event, you and Lucas were pretty good friends?

A. We were friends.

Q. Yes. You know, you were friends for a couple of years?

A. Um-hm.

Q. You, I mean, you would consider him a good friend?

- A. I would consider him an acquaintance at the time.
- Q. An acquaintance?
- A. We had been good friends previously.
- Q. Right. I mean, this is a person that you chose on that day to confide in because you were having, as you said, a bad day about something completely unrelated. He is the person you chose to go to, right?
- A. Yes.
- Q. So you weren't acquaintances, you trusted him. You thought he was a good person, right?
- A. I ran in to him when I needed to have a rant. Before that, this was the closest encounter we had had. Before that it was strictly quick drives.

[165] When defence counsel raised with the trial judge that the complainant had testified under cross-examination in a manner that was inconsistent with her statement to the police, counsel misquoted the testimony. Defence counsel asserted that the complainant testified that the “closest encounter” the two had “ever” had was the evening of the alleged sexual assault.

[166] Although the complainant's actual testimony, “this was the closest encounter we had, had” came to light during the course of addressing the application to admit her sexual history, the trial judge nonetheless concluded her actual testimony was inconsistent with what she told police. The trial judge concluded there was a clear inconsistency and the testimony was in “stark” contrast to what she said to the police. The trial judge stated at paragraph 7 of his written decision on the section 276 application (Appeal Book, Tab 7, “*Voir Dire* Decision”):

It is clear that there is an inconsistency between the complainant's testimony under cross-examination and the statement given to Cst. Piercey. She indicated in cross-examination unbidden that her relationship with the accused was platonic-her closest encounters with him, prior to the incident, being quick drives. This statement stands in stark contrast to the statement to Constable Piercey that she had an intimate, sexual relationship with the accused in the past.

[167] At paragraph 13 of his written decision, the trial judge further stated:

Whether the complainant's style of speech supports an alternative inference or not, the actual words that she used could be construed as limiting, severely, the nature of the relationship that she had with the accused. Had she limited her remarks to the fact that they had been good friends but, at the time of the alleged offence were merely acquaintances, we would not have had need for this application. However, the complainant went beyond that characterization and implied that the closest encounters she had ever had with the accused were quick drives.

[168] Having concluded that the complainant had given testimony inconsistent with her statement to police, the trial judge was satisfied that evidence respecting the complainant's previous sexual history was admissible. He permitted defence counsel to cross-examine the complainant with a specific question to impeach the complainant's credibility by suggesting to the complainant that her testimony was untrue.

[169] Defence counsel posed the question (Transcript, Vol. VIII, at page 7):

- Q. Okay. And I would suggest to you that it is not true that the closest encounter you had had with Mr. Hanrahan was strictly drives before you decided to engage him in you rant, correct?
- A. When I said that, what I meant was since we had previously been good friends. So it has been the closest encounter we have had since that period of time.

[170] The question was permitted to be asked a second time:

- Q. Okay. So I would suggest that it is not true that the closest encounter you had with Mr. Hanrahan was strictly quick drives before you decided to engage him in a rant, correct?
- A. Not in our entire time of knowing each other. But I was upright with the police and lawyers. But since that time it was.

Analysis of Issue 2

[171] The trial judge erred in admitting evidence of the complainant's previous sexual history. The complainant's testimony was not inconsistent with what she had stated to police and she had not put her previous sexual history with Mr. Hanrahan in issue.

The trial judge misapprehended the evidence

[172] In concluding that the complainant had given testimony inconsistent with a previous statement, the trial judge misapprehended the complainant's testimony.

[173] If the complainant had testified that the closest she had *ever* been with Mr. Hanrahan was the alleged sexual assault, I would agree that she would have appeared to have given testimony that was inconsistent with how she had described the relationship with Mr. Hanrahan to the police. But that is not what she stated. The complainant did not state that the closest encounter they "ever" had prior to the alleged assault was "quick drives" but that it was the closest encounter they "had, had" prior to the alleged assault.

[174] Contrary to the view of the trial judge, in the context of the testimony and the issues at this trial, the distinction between "ever had" and "had had" was significant.

[175] Firstly, the impugned testimony had to be assessed in light of the fact that the existence of the previous sexual history was *never* at issue. To the contrary, there had been several discussions in the absence of the jury about how to manage the fact of their previous relationship during the testimony before the jury. The Crown referred to their previous friendship in her opening address (Transcript, Vol. IV, at page 59). This background was critical to making sense of the complainant's responses on cross-examination. It supported that the complainant did not deny the previous sexual history, but tried to respond to the questions from defence counsel about the status of the relationship at the time of the alleged assault compared to what it had been previously.

[176] Secondly, in response to defence counsel's initial questions, immediately prior to the complainant's impugned testimony, the complainant described the relationship as having occurred in two periods: the two *had* been good friends previously, but were only acquaintances at the time of the alleged assault. The "had had" reference in the complainant's impugned testimony has to be understood in this context: that there were two periods in the relationship. The "had had" reference was consistent with her description of the status of the relationship at the time of the alleged assault. That is, at the time of the alleged assault, the closest they "had" been, that is, in the period in which they were now only acquaintances, not "had ever" been, was "quick drives".

[177] The trial judge’s conclusion that the complainant’s testimony was in “stark” contrast to what she told the police ignored this context. Instead, the trial judge equated her correct testimony with the misquoted version and wrongly concluded that the accurate testimony “implied” a denial of the previous relationship. As he stated at paragraph 13 of his decision:

... However, the complainant went beyond that characterization and *implied* that the closest encounters she had *ever* had with the accused were quick drives.

[Emphasis added.]

[178] The trial judge also misapprehended the complainant’s evidence as “unbidden” as referenced earlier in my decision at paragraph 166. The complainant’s testimony was not unbidden, but elicited by defence counsel on cross-examination, who pressed the complainant to distinguish the relationship at the time of the alleged assault from what it had been previously.

[179] This was a significant misapprehension of the complainant’s testimony because it facilitated the trial judge’s reliance on *Harris*, where the complainant, during chief examination, explicitly put the nature of the relationship with that accused in issue. In *Harris*, the complainant testified, under direct examination, that there was no sexual history between the accused and her, and importantly, unlike the present circumstances, was why she was surprised that Mr. Harris had raised the subject of a sexual encounter. As observed by Moldaver, J.A.:

[41] It will be recalled that in her evidence in-chief, the complainant testified that prior to the March 4th weekend, her relationship with the appellant was a platonic one. Apart from his attempts to kiss her on the way to Pettawawa and at Sassy’s Pub, she testified that there had been nothing of a sexual nature between them and that she had made it known to the appellant that she was not interested in a sexual relationship. That is why, according to the complainant, she was shocked when the appellant broached the subject of sex upon their return to the motel room.

[42] By testifying as she did, the complainant placed the nature of her relationship with the appellant in issue. Accordingly, in order to be able to make full answer and defence, the appellant was entitled to lead evidence designed to rebut the complainant’s testimony.

[180] The circumstances in *Harris* are distinguishable from the circumstances here. The complainant in these circumstances made no such assertion. While there was a factual dispute on some of the details as to how the two came to spend the evening

together, there was absolutely no dispute that whatever the status of their relationship previously, at the time of the alleged offence, the relationship between the two was platonic.

[181] This lack of a dispute about the status of their relationship at the time of the assault, unlike in *Harris*, did not support construing the complainant's testimony as "implying" that the closest the two had "ever" been was the alleged encounter. To the contrary, her actual testimony, that it was the closest the two "had" been was entirely consistent with the non-contentious fact that they had become platonic friends and were no longer romantically engaged. The complainant's responses to the questioning on her previous sexual history supported that the previous relationship was uncontentious; not something that she denied.

[182] Further, the trial judge's conclusion that the complainant's testimony was in "stark" contrast to what she told police, ignored the general prohibition of any reference to a complainant's previous sexual history by either party in the absence of a *voir dire*, (see *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at paras. 78-82; *Goldfinch*, at para. 75; and *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 80). Given this prohibition, the trial judge should have recognized that the repeated questioning by defence on the status of the relationship put the complainant in a difficult position.

[183] To answer truthfully about the relationship as it had been as compared to what it was at the time of the alleged assault, as pressed by defence counsel, could have resulted in the complainant offending section 276 or the common law approach to such evidence. It is perverse that a witness might be alleged to have been inconsistent about their previous sexual history, when they would in all likelihood have been advised to avoid testifying to such details in the absence of the necessary *voir dire*. Prior to trial, counsel and the trial judge specifically agreed that the complainant should be so instructed (Transcript, Vol. 1, at pages 7-8).

[184] This catch-22 in the available responses to questioning by defence counsel seems to have been lost on the trial judge, who ignored this context and instead wrongly referred to her impugned answers as "unbidden".

[185] For these reasons, the trial judge's conclusion that there was an inconsistency cannot be sustained, and it is owed no deference.

[186] Taking the complainant's actual testimony in its proper context with her earlier testimony, and in light of the issues at trial, does not support that there was a "clear" inconsistency or that the testimony stood in "stark contrast" to what she had stated to the police. Her testimony pointed in the opposite direction. Indeed, the conclusion that there was an inconsistency required an inference, and the trial judge himself recognized that the complainant's testimony might be open to an "alternative inference". This kind of evidence is hardly a "clear" inconsistency.

[187] Without the adequate evidentiary basis to support that the complainant had given inconsistent testimony, there was no basis to admit any questioning of the complainant on her previous sexual history with Mr. Hanrahan. The evidence fell well below the threshold under section 276. It was not evidence of "significant probative value" relevant to an issue at trial.

[188] In contrast, the risk of prejudice to the proper administration of justice if the evidence was admitted was real.

[189] Based on his erroneous conclusion that the complainant had implied that the closest encounter the two had ever had was the sexual assault, defence counsel was permitted to insinuate to the complainant that she had lied.

[190] Not only was defence counsel permitted (twice) to put to the complainant that she had lied, inexplicably, defence counsel was also permitted to lead Mr. Hanrahan in direct examination with the very same question. This leading question was the first question asked of Mr. Hanrahan regarding the previous sexual history (Transcript, Vol. VIII, at page 18):

Q. Okay. And is it accurate to describe your relationship as before this night in question, that you were strictly – that you were friends that strictly went for quick drives?

A. No, that is incorrect.

[191] Permitting the complainant to be accused of being inconsistent by lying about her previous sexual history with Mr. Hanrahan, evoked the first of the twin myths: that the complainant was more likely to have consented, because she had a sexual history with Mr. Hanrahan. Upon hearing the questions put to the complainant that she had testified untruthfully about her previous sexual history with Mr. Hanrahan, the jury would logically wonder *why* the complainant would have lied. The obvious reason would be to avoid the jury inferring that because she had had sexual relations

with Mr. Hanrahan on a previous occasion, it was more likely than not that she consented on this occasion. As stated in *Goldfinch* at paragraph 47:

In this case, the obvious implication of the evidence of an ongoing sexual relationship was that because the complainant had consented to sex with Goldfinch in the past, in similar circumstances, it was more likely she had consented on the night in question. As I set out in the sections that follow, the difficulty here was not that Goldfinch and the complainant had a relationship, but that Goldfinch could point to no relevant use for evidence of the *sexual* nature of the relationship. Such an approach misapprehends the nature of consent and is barred by s. 276(1).

[192] Given the danger of improperly reasoning that the complainant was more likely to have consented because she had had sexual relations with Mr. Hanrahan previously, it was critical that the proffered evidence that she had lied, be more than a “tenuous” inference drawn from defence counsel’s initial misquote of her testimony. As stated by Moldaver, J., in his concurring judgment in *Goldfinch* at paragraph 96:

Furthermore, the requirement that the evidence be “integral” to the accused’s ability to make full answer and defence means that even if the evidence can be linked to specific facts or issues relating to the accused’s defence, admission is not guaranteed. There may be cases in which the evidence, while relevant to specific facts or issues relating to the accused’s defence, bears only marginally on it. In such cases, the trial judge may, in his or her discretion, exclude the evidence on the basis that countervailing considerations, such as the need to protect the privacy rights and dignity of the complainant, outweigh the tenuous connection the evidence has to the accused’s ability to make full answer and defence

[193] The marginal and tenuous relevance of this evidence did not outweigh the very real risk of improper reasoning or the potential prejudice to the proper administration of justice. The evidence did not meet the requirements for admissibility under section 276.

[194] Finally, the error in allowing such questioning when the necessary evidentiary threshold had not been established had a significant bearing on the verdict of acquittal.

[195] The misapprehension of the complainant’s testimony as inconsistent and misleading was central to how the jury was instructed to assess her credibility. As is typical, the trial judge gave detailed instructions about assessing inconsistencies as part of the overall assessment of the witnesses:

... Did the witness' testimony seem reasonable and consistent? Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different or because he or she failed to mention something? Is there any explanation for it? Does the explanation make sense? What was the witness' manner when he or she testified?

[196] However, the word "inconsistent" was used solely in reference to the complainant's evidence. Mr. Hanrahan's testimony was never described as inconsistent; despite that there were explicit contradictions between Mr. Hanrahan's testimony and what he stated in the text messages. In particular, Mr. Hanrahan testified repeatedly that the complainant was "awake" and initiated the sexual contact. In contrast, as referred to earlier, in one of the text messages, he explicitly stated that he penetrated the complainant while she was asleep.

[197] This distinction in the trial judge's characterization of the complainant's evidence with Mr. Hanrahan's evidence illustrates the significant role the alleged inconsistency about the status of their relationship played in how the complainant's credibility was to be assessed. In the trial judge's final instructions, the first evidence reviewed for the jury was the alleged inconsistent testimony about the complainant's previous sexual relationship with Mr. Hanrahan.

[198] For this reason, I am satisfied the error in admitting the questioning of the complainant on her sexual history was significant, and had a material bearing on the acquittal.

The trial judge erred by denying Crown counsel's re-examination of the complainant

[199] After being permitted to cross-examine the complainant on her previous sexual history, the trial judge further erred in refusing Crown counsel permission to re-examine the complainant on her responses to the defence counsel about whether her testimony was inconsistent with what she had told police. Although the complainant attempted to clarify what she had meant in her earlier testimony in her responses to the suggestion she had lied, the Crown was refused the opportunity to re-examine her on this issue.

[200] Whether the complainant had been inconsistent in her testimony and what she told the police was an issue raised in cross-examination, and the Crown should have

been permitted to ask questions with a view to rehabilitating the witness on this point. As stated by Hoegg, J.A. in *R. v. Phillips*, 2021 NLCA 51, at paragraph 33:

33 It is well established that redirect examination, or re-examination as it is often called, must relate to matters arising out of cross-examination which deal with new matters or with matters raised in examination-in-chief which require clarification or explanation as to questions put and answers given in cross-examination (*R. v. Evans*, [1993] 2 S.C.R. 629, at 644 (S.C.C.)). The principle was elaborated on by the Ontario Court of Appeal in *R. v. Stiers*, 2010 ONCA 382, at para. 38, where the Court quoted Watt J.A. in *R. v. Candir*, 2009 ONCA 915, at para. 148, saying:

It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, ...

[Emphasis in original.]

[201] Given that the existence of the previous sexual history was never in issue, and given the prejudicial manner in which it was proposed to the witness that she had lied about this non-contentious issue, the truth seeking function of a trial supported the opportunity to permit the witness to clarify her testimony in relation to that allegation.

[202] For example, the complainant responded to the question by defence counsel “but I was upright with the police and lawyers”. It is unclear what the complainant meant by the word “upright”. It is possible that what the complainant meant to say was “forthright” or “upfront”. It would have been logical to ask the complainant in what regard was she “upright” with the police and the lawyers. But in the absence of any permitted re-examination, such ambiguity in her testimony was not clarified.

[203] The denial of re-examination of the complainant exacerbated the already unbalanced presentation of her evidence.

[204] I would also allow this ground of appeal.

CONCLUSION

[205] I am satisfied the above errors warrant a new trial. Each of the above errors was serious. Cumulatively these errors resulted in a trial that was unbalanced and distorted in the presentation of the evidence.

[206] The trial judge's treatment of the complainant's texts primarily as prior consistent statements resulted in the text message conversation being presented to the jury in a manner that was too restrictive. This unnecessarily restrictive approach not only improperly diminished the probative value of what was highly incriminating evidence, it distorted the complainant's testimony, and unfairly undermined her overall credibility. Had this error not been committed, the verdict might have realistically been expected to have been different.

[207] Likewise, admitting the previous sexual history of the complainant for the purpose of cross-examining her on alleged inconsistencies based on a misapprehension of the evidence, coupled with the failure to permit the Crown to re-direct the complainant on her responses to such cross-examination, also merits a new trial. The jury heard evidence that was highly prejudicial to the credibility of the complainant and of little probative value. The questioning should never have been permitted. This error was then compounded by refusing to permit the Crown to re-examine the complainant.

[208] In so concluding, I would allow the appeal and order a new trial.

F.J. Knickle J.A.

APPENDIX

DATE	TIME	PARTY	TEXT
October 25, 2018	15:26:23	Mr. Hanrahan	I am so sorry again, there is no excuse. I just feel like a piece of shit.
October 27, 2018	1:21:26	The Complainant	I literally don't understand how you went from concerned and trying to console me to putting your penis in me while I was passed out.
October 27, 2018	1:27:55	Mr. Hanrahan	It wasn't so simple like that. I was in and out of sleep and drunk. I've been playing it over and over in my head and I don't know how it got to that. At times we were both feeling around. I remember unbuttoning your onsie but you took it off. It is still 100% my fault, I absolutely own it and feel so bad. It's the worst thing I've ever done and I don't want to feel better about it cause I don't deserve to, but I promise you if I wasn't in th state I was in I would have never done that.
October 27, 2018	1:30:37	The Complainant	Dude, I was asleep. I 100% didn't feel around, there was no kissing, and being in that state isn't an excuse
October 27, 2018	1:31:43	The Complainant	Plus fuck an excuse, we agreed there was no sexual activities happening, we didn't touch all night, we didn't kiss, I didn't fucking touch you and I woke up with your dick in me
October 27, 2018	1:32:06	The Complainant	How in the hell did that seem consensual
October 27, 2018	1:33:25	The Complainant	At any point during whatever the fuck you did were my eyes opened or did I say anything or ya know... move
October 27, 2018	1:33:31	The Complainant	She sent an emoji "shrugging"
October 27, 2018	1:35:30	Mr. Hanrahan	I really don't know how I got myself to that point it's so fucked up I did not think I could ever be capable of rationalizing that kind of logic to myself. I don't have an excuse at all. I know I was in out of sleep, at some point I made those decisions and I have thought about it and regretting every second since. I am so unbelievably sorry and there is nothing I can do to make it right.

October 27, 2018	1:38:37	The Complainant	Like the premise of us hanging out was (unrelated discussion) (AND WE WERENT GOING TO FUCK) and you literally raped me? Because you were in and out of sleep
October 27, 2018	1:44:21	Mr. Hanrahan	I know it doesn't matter if I felt like I was in control of myself or not, or if I remember how it completely happened. I penetrated you and I stopped before you woke up, it doesn't make it any better at all, but I knew what I was doing was wrong and didn't continue. I am so sorry. If you want to call the police I will own it. I deserve it. I don't want to cause you anymore grief
October 27, 2018	1:45:42	Mr. Hanrahan	It's the biggest mistake I've ever made and you paid for it, I deserve to die.
October 27, 2018	1:48:09	The Complainant	How would I know about it if you stopped before I woke up?? I woke up and stopped it dude, I wasn't black out drunk, I remember waking up, you being inside of me. Anyways that's the end of this discussion, there's nothing forgivable about this entire situation so don't message me or come in my store plz
October 27, 2018	1:53:13	Mr. Hanrahan	[blank message]
October 27, 2018	1:53:13	Mr. Hanrahan	I really don't think it happened like that, but I am not in a position to make any claims, I literally remember throwing up one second and being in bed the next. I am so sorry and I would do anything to make it right if it were possible. Il delete your number now and leave you alone forever.