COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bagherzadeh, 2023 ONCA 706
DATE: 20231025
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Simmons, Miller and Harvison Young JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Nick Bagherzadeh

Appellant

James Lockyer, for the appellant

Philippe G. Cowle and Emily Bala, for the respondent

Heard: March 23, 2023

On appeal from the conviction entered on April 26, 2018 by Justice Anne Mullins of the Superior Court of Justice, sitting with a jury.

Harvison Young J.A.:

A. OVERVIEW

[1] What use can a trier-of-fact make of a mixed statement of an accused led by the Crown when the accused later testifies as to the exculpatory aspects of the

statement, rendering those aspects a prior consistent statement? That question forms the central issue in this appeal.

[2] The appellant was convicted of second-degree murder and aggravated assault after he stabbed two men, one of whom died from his injuries, during a fight outside a nightclub in Vaughan.

[3] At trial, the Crown introduced statements that the appellant made to his friends shortly after the incident. On appeal, the Crown acknowledges that those statements could be interpreted as admitting that he stabbed the victims. However, in these statements the appellant also claimed he had acted in defence of his friend Chris MacDonald (the “mixed statements”). When the statements were admitted, the trial judge instructed the jury that they could rely on the appellant’s out-of-court statements, including their exculpatory aspect, in deciding the case.

[4] The appellant subsequently decided to testify. His evidence was consistent with the mixed statements that had been led by the Crown: he had stabbed the victims in defence of Mr. MacDonald. In her final charge, the trial judge instructed the jury that the exculpatory aspect of the appellant’s out-of-court statements could not be used for their truth, but that they could have “a bearing on [the appellant’s] credibility” and were circumstantial evidence that could be considered as to the appellant’s state of mind.

[5] The appellant's central ground of appeal is that the trial judge erred in instructing the jury that it could not rely on the appellant's out-of-court statements for their truth. He argues that whether or not the accused testifies at trial, a mixed statement introduced by the Crown can be used by the jury as evidence of its truth. The Crown argues that when the accused testifies and adopts the exculpatory aspect of an out-of-court statement, it becomes a prior consistent statement and is subject to the usual exclusionary rule, unless an exception applies.

[6] As a second ground of appeal, the appellant submits that the trial judge erred by failing to put the defence of provocation to the jury. The Crown argues that the defence was not put to the jury because, as defence counsel (not Mr. Lockyer) properly conceded at trial, there was no air of reality to it.

[7] For the reasons that follow, I agree that the trial judge erred in preventing the jury from relying on the exculpatory aspect of the mixed statements for their truth. A mixed statement introduced by the Crown is admissible for the truth of its contents for and against the accused, whether or not the accused later testifies in a manner consistent with the exculpatory aspect of that statement. However, the exculpatory aspect of a prior consistent mixed statement cannot be used for two impermissible lines of reasoning. First, the mere fact that a statement has been repeated does not mean that it is more likely to be true. Second, exculpatory aspects of the accused's prior out-of-court statement cannot be treated as if it were

independent verification of the accused's in-court testimony, because it comes from the same source.

[8] As I will explain below, I am not satisfied that this is a case in which the curative proviso should be applied, and for that reason, I would allow the appeal and order a new trial.

B. BACKGROUND FACTS

[9] On February 7, 2016, the appellant went to a nightclub in Vaughan to celebrate his 20th birthday with his friends. The appellant had a knife,[1] which he concealed in his shoe to get through security.

[10] When the appellant and his friends left the nightclub around closing time, they encountered a group of men they did not know, including Gianluca Cellucci and Daniel DeAngelis. The two groups got into an argument. The argument turned into a fight as a result of which Mr. Cellucci died and Mr. DeAngelis was seriously injured. Part of the fight was filmed by an Uber driver who witnessed the scene.

[11] Two members of the deceased's group, Jason Mills and Giancarlo Caranci, testified that the appellant had initially acted as a "peacemaker". However, as the situation escalated, the appellant entered the fray on three occasions and stabbed Mr. Cellucci and Mr. DeAngelis. This was captured on the Uber driver's video.

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[1] There was conflicting evidence at trial concerning whether the appellant agreed to carry the knife into the club for one of his friends.

[12] The appellant testified at trial. His evidence was that the argument started when someone from the other group directed an insult at him. The appellant initially ignored the comment and kept walking, but when he passed the group, his friend Elyar Ighani confronted the person who had insulted the appellant. Despite the appellant's attempt to defuse the situation by saying "[l]et's not do this, you guys, let's just go home", the argument turned into a fight.

[13] The appellant testified that he was punched in the area of his nose and lips and fell to the ground. He testified that when he got up, he saw someone he thought was his friend Amir Noshad on the ground, and someone holding a knife on top of him. Fearing that his friend was going to get stabbed, the appellant stabbed the deceased twice in the buttocks. In fact, the footage depicted that it was the deceased on the ground with Mr. MacDonald on top of him. The appellant attributed his error to his disoriented state from the punch and significant alcohol consumption.

[14] The appellant stepped back to assess the situation, but then saw Mr. MacDonald with his shirt pulled over his head being attacked by two people, one of whom he thought was wielding a knife and about to stab or potentially kill Mr. MacDonald. The appellant stabbed one of the assailants but stepped back once again to re-evaluate the situation when he thought the assailant no longer posed a danger to his friend. The appellant returned to the fray a third time and stabbed another assailant he saw attacking his friend.

[15] The appellant testified that he had no intention to kill anyone. He only wanted them to “feel” the knife and stop attacking Mr. MacDonald. He had seen a knife and thought Mr. MacDonald could be killed. The entire altercation lasted approximately 30 seconds.

[16] Mr. Cellucci sustained a stab wound to his left chest, which penetrated into his heart and caused his death. He also sustained two stab wounds to his buttocks. Mr. DeAngelis sustained one stab wound to his chest, which punctured a lung, and one stab wound to his abdomen. He also suffered two rib fractures. Mr. DeAngelis did not know he was stabbed until the fight ended and did not know who stabbed him.

[17] After the stabbings, the appellant and his friends left the area when they heard the police were coming. The appellant discarded the knife in a sandbag as he was leaving. The group met up at a barn on the property of one of the friend’s aunts, where they had been drinking before going to the nightclub. There, the appellant told his friends that he had done “what [he] had to do to protect” Mr. MacDonald, whom he believed was being stabbed during the fight. In the morning, the appellant retrieved the knife from the sandbag. He testified that when he opened it and realized it had blood on it, he fainted and dropped it on a path near his mother’s house. The police recovered the knife from an adjacent pond several months after the events.

C. THE JURY INSTRUCTION

[18] At trial, the Crown elicited the out-of-court statements the appellant had made to his friends through its examination of Mr. MacDonald. Mr. MacDonald testified that "[Mr. Noshad and the appellant] were telling me that I was being attacked and I was losing the fight and was in a pretty bad position. They were saying they were acting out of protection of me and they were fighting for me." In cross-examination he stated that he remembered the appellant telling him: "I tried to protect you. I did what I had to do to protect you." Mr. MacDonald also heard the appellant say he had stashed the knife.

[19] Similarly, in cross-examination by defence counsel, Mr. Noshad was shown statements he had given at the preliminary inquiry and confirmed that he remembered the appellant saying he had stabbed someone because he thought that Mr. MacDonald was being stabbed. Cody Showers, one of the appellant's friends who was also present on the night of the incident, was also shown statements he had given at the preliminary inquiry on cross-examination and confirmed that the appellant said that he thought that Mr. MacDonald was being stabbed.

[20] After the jury heard Mr. MacDonald's evidence, the trial judge gave the following mid-trial instruction:

> When witnesses testify to us about what they say they heard an accused person say, as for example Mr. Ighani

> and Mr. MacDonald have given evidence about, you have to decide for yourselves whether you believe that Mr. Bagherzadeh said any of those words.
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> In deciding whether Mr. Bagherzadeh said anything that the witnesses say he did, you should use your common sense. …
>
> If you decide that a witness has accurately reported all or part of what Mr. Bagherzadeh said, you may rely on that testimony along with the rest of the evidence to help you decide this case.
>
> Some or all of the statements may help Mr. Bagherzadeh in his defence. You must consider any remarks that may help him along with all of the other evidence unless you are satisfied that he did not make those statements. In other words, you must consider all of the remarks that might help Mr. Bagherzadeh even if you cannot decide whether he said them.
>
> If you decide that he made the remarks attributed to him by the witness or any witness, or if you cannot decide whether he made them, you are to consider the statements along with the rest of the evidence in deciding whether you have a reasonable doubt about Mr. Bagherzadeh's guilt. [Emphasis added.]

[21] After the Crown concluded its case, the appellant decided to testify. He admitted that he had stabbed Mr. Cellucci and Mr. DeAngelis, but claimed that he had acted in defence of his friend, Mr. MacDonald. His testimony was therefore consistent with the exculpatory aspect of the mixed statements introduced by the Crown.

[22] After hearing counsel submissions regarding the appellant's out-of-court statements during the pre-charge conference, the trial judge decided to instruct the

jury in general accordance with defence counsel's request. Her final charge to the jury on this issue was as follows:

> If you find Mr. Bagherzadeh said these words, that "I did what I had to do to protect you" and his fear about Chris being messed up, this can not be taken as evidence that what he said was true, but you may use that evidence as having a bearing on his credibility, and it is circumstantial evidence that you may consider as to his state of mind. [Emphasis added.]

[23] The defence of provocation was also discussed during the pre-charge conference. Defence counsel advised that they were not seeking an instruction on the defence of provocation because there was no "factual foundation for provocation" given that there was no indication that the appellant had lost control. The defence of provocation was not put to the jury.

D. PRIOR CONSISTENT STATEMENTS AND THE MIXED STATEMENT RULE

(1) Law and Analysis

[24] There is no dispute that a mixed statement of an accused led by the Crown is admissible for its truth both for and against the accused when the accused does not testify: *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111, at para. 37. The central issue in this appeal is whether the situation changes when the accused chooses to testify such that the mixed statement rule intersects with the rules governing prior consistent statements.

[25] Prior consistent statements of a witness, including the accused, are generally inadmissible because they are seen to lack probative value and to be self-serving: *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; *R. v. Edgar* (2000), 142 C.C.C. (3d) 401 (Ont. C.A.), at para. 33. When adduced for the truth of their contents, they also constitute hearsay: *R. v. Dinardo*, 2008 SCC 24, [2008] 1 SCR 788, at para. 36. The rule's primary concern is that evidence may be manufactured by witnesses through mere repetition of a consistently false story: David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2022), at para. 19.08.

[26] However, there are several exceptions to this general exclusionary rule. For example: a prior consistent statement may be admissible to rebut an allegation of recent fabrication; as an excited utterance made as part of the *res gestae*; as evidence of the physical, mental or emotional state of the declarant; and other specific reasons[2]: S. Lederman, A. Bryant and M. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022), at paras. 7.5-7.6. When prior consistent statements are admitted under one of these

[2] These include: to establish eyewitness prior identification of the accused; to prove recent complaint by a sexual assault victim; to adduce facts as part of the narrative; to prove that a statement was made on arrest; to prove that a statement was made on the recovery of incriminating articles; to address the argument that a witness' testimony is replete with inconsistencies; or to prove videotaped complaints under s. 715.1 of the *Criminal Code*.

exceptions, their permitted use by a trier-of-fact is usually restricted and tailored to the specific rationale underlying the applicable exception.

[27] Importantly, the trier-of-fact can never infer that repetition alone makes the statement more likely to be true. As Bauman C.J. stated in his dissenting reasons in *R. v. Langan*, 2019 BCCA 467, 383 C.C.C. (3d) 516, at paras. 99-100, which were adopted by the Supreme Court in *R. v. Langan*, 2020 SCC 33, 396 C.C.C. (3d) 149:

> It is well-established that prior consistent statements may be used to assess credibility. Proper use turns on whether the statements are used to find a witness credible because of specific, permissible inferences of credibility, such as: "evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint" (*Khan* at para. 43); understanding "the sequence of events from the alleged offence to the prosecution so that [the trier of fact] can understand the conduct of the complainant and assess her truthfulness" (*R. v. F. (J.E.)*, 1993 CanLII 3384 (Ont. C.A.) at 476, cited in *Dinardo* at para. 38); or assessing if there is "evidence that an individual has a motive to lie" (*R. v. Stirling*, 2008 SCC 10 at para. 12).
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> <u>These uses are all distinct from the impermissible use of finding credibility through repetition.</u> [Emphasis added.]

[28] Citing David Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's Get It Right" (2013), 17 Can. Crim. L. Rev. 181 ("Let's Get It Right"), Bauman C.J. also observed, at para. 93, that "inferences arising from the content and context of the prior consistent statement are permissible – '[w]here logic yields inferences based on the fact statements are made and the

circumstances in which they were made there is nothing improper in drawing them'".

[29] The mixed statement rule provides that if the Crown chooses to tender an out-of-court statement of the accused at trial, it must tender the whole statement, including any exculpatory aspect, and both inculpatory and exculpatory elements are admissible for the truth of their contents: *R. v. Hughes*, [1942] S.C.R. 517, at p. 521.

[30] The mixed statement rule sets out an exception because unlike inculpatory out-of-court statements, which are admissible against the accused as an admission against interest provided that they are voluntary and compliant with the *Charter*, exculpatory out-of-court statements are generally excluded: *R. v. Edgar*, 2010 ONCA 529, 101 O.R. (3d) 161 ("*Edgar II*"), at paras. 25 and 28, leave to appeal refused, [2010] S.C.C.A. No. 466. As explained in *R. v. Campbell* (1977), 17 O.R. (2d) 673 (Ont. C.A.), at p. 685, the underlying rationale is that exculpatory out-of-court statements constitute hearsay when elicited from witnesses other than the declarant and lack probative value when led in support of the declarant's own testimony. Moreover, an accused should not be permitted to elicit his own exculpatory out-of-court statements from other witnesses without exposing himself to cross-examination: *Campbell*, at p. 685; *Edgar II*, at para. 30.

[31] In *Rojas*, at para. 37, the Supreme Court explained that "[f]airness to the accused is the obvious rationale for the mixed statement exception" and that it "is also based on the more pragmatic consideration that it is often difficult to determine which parts of a statement are inculpatory and which parts are exculpatory." On this second point, the Supreme Court distanced itself from the English rule from *R. v. Duncan* (1981), 73 Cr. App. R. 359, which permits trial judges to comment adversely on the quality of the exculpatory parts of a mixed statement which have not been tested by cross-examination.

[32] Importantly, *Rojas* restated the rule from *Hughes* as an exception both to the hearsay rule and the prior consistent statement rule:

> [36] Exculpatory out-of-court statements made by an accused are also subject to the general exclusionary rule against hearsay. Where the accused testifies, such statements are generally inadmissible because they are viewed as self-serving and lacking in probative value. Where the accused does not testify, there is an additional rationale for excluding such statements. …
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> [37] Of course, the general rule that excludes out-of-court exculpatory statements is not without exceptions. One such exception is relevant here — the mixed statement exception. Just as in England, it has long been established that where the Crown seeks to tender an accused's out-of-court statement which contains both inculpatory and exculpatory parts, it must tender the entire statement, and the exculpatory portions are substantively admissible in favour of the accused. [Emphasis added, citations omitted.]

[33] Although the accused in *Rojas* had not testified at trial, it is clear from the Supreme Court's comments in para. 36 that it was alive to that possibility. Moreover, in explaining the rationale for rejecting the *Duncan* approach, the Supreme Court cited and endorsed the reasons of Ryan J.A. in *R. v. David and Seitcher*, 2006 BCCA 412, 213 C.C.C. (3d) 64, in which the two accused had testified and adopted parts of the mixed statements led by the Crown. In that context, it is difficult to argue that the court did not contemplate that the mixed statement rule it articulated in para. 37 would operate as an exception to the presumptive exclusion of out-of-court exculpatory statements even when oath-helping concerns arise as a result of the accused testifying.

[34] In *Edgar II*, the defence sought to adduce statements made by the accused shortly after his arrest in which he claimed, somewhat incoherently, to have acted in self-defence. Although the mixed statement rule did not apply because it was the defence rather than the Crown that tried to lead the statements, this court mentioned the exception and structured the relationship of the mixed statement rule to the prior consistent statement rules in the following way:

> [35] It is well recognized, however, that the prior consistent statements of an accused are not always excluded. Two established exceptions have already been mentioned. … A third exception is made for "mixed" statements that are partly inculpatory and partly exculpatory. Where the Crown seeks to adduce evidence of such a statement, the inculpatory portion is admissible as an admission against interest and, as a matter of fairness to the accused, the Crown is required to tender

> the entire statement, with the exculpatory portion being substantively admissible in favour of the accused. [Emphasis added, citations omitted.]

[35] In the paragraph immediately preceding the one excerpted above, explaining the rationale for the traditional exclusionary rule regarding prior consistent statements, Sharpe J.A. wrote: "[e]xclusion of the prior consistent statements of the accused is also viewed as a product of the rule against oath-helping or adducing evidence solely for the purpose of bolstering a witness's credibility": at para. 34. Accordingly, although the facts of *Edgar II* did not engage the mixed statement rule, the court articulated it as an exception to the general exclusion of prior consistent statements and did not characterize the holding in *Rojas* as dependent on whether or not the accused testified.

[36] In his article "Let's Get It Right," Justice Paciocco, writing extrajudicially, took a different view. He argued that where a mixed statement becomes a prior consistent statement because the accused testifies, the exculpatory element of the mixed statement cannot be "double-counted", reasoning as follows:

> In effect, if the accused does testify and the exculpatory portions of the mixed statement become prior consistent statements, the hearsay part of the prior consistent statement block should notionally be removed from the scale, permitting the in-court testimony to stand in its place. The declaration part of the prior consistent statement block should also be notionally removed from the scale unless logically, in the circumstances of the case, the way in which the exculpatory claims were made in the out-of-court statement yield *indicia* of reliability that

> can give added confidence, over and above the trial testimony, that the exculpatory claims are true.

[37] In *R. v. Gill*, 2018 BCCA 275, 363 C.C.C. (3d) 284, relying on "Let's Get it Right", the Court of Appeal for British Columbia held, at para. 71, that when an accused testifies, a mixed statement introduced by the Crown has to "have some use beyond the prohibited uses of a prior consistent statement to be admissible". In other words, the mixed statement must meet one of the other exceptions to the presumptive inadmissibility of prior consistent statements to be considered by the trier-of-fact, and its permissible uses are circumscribed by the applicable exception.[3]

[38] Citing *Gill*, the Quebec Court of Appeal held in *R. c. Demers-Thibeault*, 2020 QCCA 1255, at para. 151, that when the Crown introduces a mixed statement of the accused into evidence and the accused decides to testify, he cannot rely on the exculpatory portions of the statement as self-corroboration. Without a proper instruction, the court concluded that there was a real and non-negligeable risk that the jury could have followed the illegal chain of reasoning advanced by defence counsel at trial to evaluate the credibility of the accused: at para. 159.

[39] By contrast, in *R. v. Baksza*, 2019 ABCA 237, where the accused testified, the Alberta Court of Appeal held at para. 12 that the Crown "[h]aving opened the

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[3] The court did clarify at para. 92 that the exceptions to the prior consistent statement rule are not closed categories and that the admissibility of a prior consistent statement turns on the relevance, materiality and probative value of the evidence.

door to the conversation between the appellant and the complainant's father, the appellant was entitled to lead evidence on the entire conversation and the exculpatory parts are substantively admissible in favor of the accused". In other words, the court followed the rule stated in *Rojas* notwithstanding that, unlike in *Rojas*, the accused had testified in a manner consistent with his exculpatory out-of-court statements.

[40] In my view, when read in its full context, the Supreme Court's articulation of the mixed statement rule in *Rojas* makes clear that it is meant to operate as an exception to the presumptive exclusion of out-of-court statements, including prior consistent statements. Accordingly, I would follow the approach taken by the Alberta Court of Appeal in *Baksza*, with the qualification stated in *Demers-Thibeault* that the mixed statement introduced by the Crown cannot be used to corroborate the accused's in-court testimony. To the extent that *Gill* suggests that mixed statements introduced by the Crown must meet one of the other exceptions to the general exclusion of prior consistent statements when the accused testifies, I would not follow it.

[41] Although this is the first time this court has had to directly address the application of *Rojas* when the accused testifies, counsel for the appellant pointed out in oral submissions that the situation has come up in lower court decisions appealed to this court on different grounds. In *R. v. M.P.*, 2018 ONCA 608, 363 C.C.C. (3d) 61, the Crown had introduced out-of-court exculpatory statements

made by the accused through its own witnesses and the accused later chose to testify. On appeal, the accused argued that the statements introduced by the Crown had not properly been put to the jury as part of the trial judge's *W.(D.)* instruction. While this court concluded that the statements had been properly put to the jury, it did not suggest that they were inadmissible because they constituted prior consistent statements as a result of the accused testifying. In fact, neither the Crown nor the court seemed to have contemplated that the mixed statement rule from *Rojas* may not apply when the accused testifies.

[42] Similarly, in *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, leave to appeal refused, [2010] S.C.C.A. No. 263, the Crown led out-of-court statements of the appellant that were facially exculpatory, but which the Crown argued were fabricated and therefore indicative of the appellant's guilt. The appellant testified at trial. On appeal, he argued that the trial judge had failed to clearly instruct the jury that the exculpatory portions of the statements led by the Crown were potentially important evidence for the defence. Again, this Court dismissed this ground of appeal, but not because the statements constituted inadmissible prior consistent statements – as the short answer would have been if the Crown's position in the present appeal were correct. Rather, Doherty J.A. held that the trial judge's instruction clearly conveyed to the jury that "the appellant's denials and exculpatory explanations given in his statements constituted "evidence" for their consideration": at para. 86. In short, the trial judge had properly instructed the jury

that the statements led by the Crown were substantively admissible as potential exculpatory or inculpatory evidence. See also *R. v. Selvanayagam,* 2011 ONCA 602, 281 C.C.C. (3d) 3, at para. 38, in which this court held a prior exculpatory statement led by the Crown was admissible as a prior inconsistent statement of an accused who testified at trial.

[43] In my view, the position implicitly endorsed by this court in *M.P.* and *Polimac*, i.e. that mixed statements led by the Crown are admissible for their truth irrespective of whether the accused subsequently testifies in a manner that is consistent with the exculpatory aspects of the prior statements, is most consistent with the presumption of innocence and the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. It is also consistent with the rationale underlying the mixed statement exception.

[44] As explained by this court in *R. v. Mallory*, 2007 ONCA 46, 217 C.C.C. (3d) 266, at para. 208, “[g]iving the jury an isolated utterance taken out of context deprives the jury of the opportunity to decide the true meaning of the whole statement.”

[45] The Crown argues that no such deprivation occurs when the accused testifies and gives context to their out-of-court inculpatory statement. I disagree. A trier-of-fact may discount an accused’s in-court testimony for a variety of reasons, some of which may or may not also bear on the reliability and credibility of their

out-of-court statement. However, the fact that an accused may turn out to be a poor witness does not relieve the Crown of its burden. Even if the trier-of-fact rejects the in-court testimony of the accused, it must be convinced beyond a reasonable doubt that the Crown has proven the charges, having considered the totality of the evidence. As inculpatory prior consistent statements are admissible for their truth as statements against interest, prohibiting a jury from considering the exculpatory portion of a mixed statement because the accused has chosen to testify could leave the trier-of-fact with an out-of-context party admission should they reject the accused's in-court testimony.

[46] Moreover, treating the exculpatory aspect of a mixed statement as inadmissible for the truth of its contents when the accused testifies in a manner that is consistent with that statement would engage the same pragmatic concerns that the Supreme Court sought to avoid when it rejected the *Duncan* approach in *Rojas*. As Charron J. explained:

> [40] In the same way, I see little advantage in expounding for the jury the underlying rationale for the mixed statement exception. If only for the pragmatic reason that it is often very difficult to differentiate between admissions and excuses, I too conclude… that it is dangerous for the judge to instruct the jury in a manner that suggests that inculpatory and exculpatory statements ought to be weighed differently. Such "common sense" comments are better left to the advocacy of counsel. Therefore, I conclude that the *Duncan* instruction should not be adopted by Canadian trial courts. [Citations omitted.]

[47] In cases such as this one, not only would it be difficult to distinguish between the inculpatory and exculpatory elements of the statement, but it would be impossible to remove the exculpatory portion without compromising the meaning of the statement as a whole, including the accused's motivation for making it. On this last point, I would observe that the common sense inference that an inculpatory aspect of the statement is likely to be true (otherwise why make it?) may or may not be as compelling when, as here, the confession forms part of a single statement which also asserts a valid legal defence. In any event, these are questions which are more appropriately for the trier-of-fact to consider in light of the totality of the evidence.

[48] A final factor to be taken into account is the potential confusion of the jury. It would be confusing for a jury to be instructed mid-trial that an out-of-court mixed statement is admissible for the truth of its contents, and then after the accused testifies in a manner that is consistent with the exculpatory aspect of that prior statement, to be retroactively instructed again that the previously adduced exculpatory prior consistent statement is now no longer admissible for the truth of its contents. When mixed statements such as these ones are admitted, it may be practically confounding for jurors to retroactively distinguish between relying on the truth of the content of the statement and its declaratory value (i.e., do the timing and circumstances of making the statement shed light on the likelihood that it is true?). As Sharpe J.A. put it in *Edgar II*, at para. 37, "[r]ules of evidence that prevent

the trier of fact from getting at the truth '[run] afoul of our fundamental conceptions of justice and what constitutes a fair trial', unless they can be justified on 'a clear ground of policy or law'."

[49] For these reasons, the rationale underlying the mixed statement rule is unshaken when an accused testifies in a manner consistent with the exculpatory aspect of out-of-court statements previously adduced by the Crown.

[50] To summarize, when the Crown adduces an out-of-court statement by the accused with a mix of both inculpatory and exculpatory elements, that statement is admissible for the truth of its contents: *Rojas*, at para. 37; *Hughes*, at p. 521, citing *Rex v. Higgins* (1829), 172 E.R. 565. If the accused subsequently testifies in a manner that is consistent with the exculpatory aspect of the mixed out-of-court statement, the exculpatory aspect of the previously adduced mixed statement remains admissible for the truth of its contents.

[51] The jury should be instructed, in accordance with the language of the mid-trial instruction given in this case, that it may consider the statements along with the rest of the evidence in deciding whether it has a reasonable doubt about the accused's guilt; that it may give any of his statements as much or as little importance as it deserves in deciding the case; and that it is only part of the evidence and should be considered along with and in the same way as all of the

evidence: see, for example, Final 24-A, David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015).

[52] However, the trier of fact must also now be cautioned against two impermissible lines of reasoning. First, the mere fact that a statement has been repeated does not mean that it is more likely to be true. This is because a witness can lie or be mistaken twice. Second, the accused's prior out-of-court statement cannot be used as independent verification of the accused's in-court testimony. This is because the source of the information in both statements is the same: *R. v. Khan,* 2017 ONCA 114, 136 O.R. (3d) 520, at para. 41, citing "Let's Get it Right", at pp. 19-20; *Stirling,* at para. 7; *Dinardo*, at para. 40.

[53] Whether any further instructions are required in the charge will depend on the specific circumstances of each case, as assessed by the trial judge with the assistance of the parties, according to the specific inferences sought to be drawn from the evidence or the specific uses of the evidence urged on the jury by counsel.

[54] Once the two impermissible lines of reasoning above are ruled out, the prior consistent statement may still be relevant to assessing the credibility of the accused or determining whether the Crown has met its burden of proof beyond a reasonable doubt.

[55] The use that should be made of the prior consistent statement, if any, is for the trier of fact to decide, with the benefit of the cautions against the two

impermissible lines of reasoning discussed above. In some cases, the trier of fact may choose to rely on the statement for the truth of its contents, either to assess the inculpatory part of the mixed statement or to consider the statement as a whole. For example, in *Hughes,* the substance of the mixed statement at issue was “that the gun accidentally went off”: at p. 521. Here, the inculpatory aspect is attenuated by the exculpatory aspect, and it would change the meaning of the statement in a way that is unfair to the accused to consider only the inculpatory aspect in isolation.

[56] In other cases, the relevancy of the truth of the contents of the prior consistent statement may be functionally eclipsed by the subsequent consistent in-court testimony of the accused, and the prior consistent out-of-court statement may only retain value because of the context in which it was uttered, i.e. what Justice Paciocco refers to as the “declaration part”, writing extra-judicially in “Let’s Get it Right", at p. 184. For example, the prior consistent statement may be relevant to the credibility of the accused “as evidence of the reaction of the accused to the accusation and as proof of consistency”. This may serve to prevent the jury from drawing “an adverse inference from the absence of evidence about what an accused said upon arrest” or to “rebut the [implicit impermissible] suggestion or potential inference that the accused tailored his or her evidence based upon pre-trial disclosure or having heard the Crown’s evidence in advance of testifying”: *Edgar II,* at paras. 63 and 72.

(2) Application

[57] There is no dispute on appeal that the statements made by the accused to his friends on the night of the stabbings were led by the Crown at trial and contained both inculpatory and exculpatory elements. On appeal, the Crown concedes that, depending on the witness, the essence of the out-of-court statements was that the appellant stabbed the victims, or "did what he had to do" (inculpatory) in the course of defending his friend (exculpatory).[4] They were thus admissible for their truth. This is not altered by the fact that the accused subsequently testified in a manner consistent with those prior out-of-court statements.

[58] This is not a case in which the exculpatory and inculpatory elements could be separated in order to exclude the exculpatory element without fundamentally changing the meaning of the statement and by tilting the burden of proof against the accused in a manner that would belie the presumption of innocence. The jury was entitled to hear the statements in their entirety, to determine whether all or parts of them were made, and what they meant. In this case, that meant that the jury should have been free to consider whether the accused made all or part of the

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[4] In fairness to defence counsel at trial, because of the video evidence, there was no real dispute at trial that the appellant stabbed the victims. The trial Crown did not lead evidence of an explicit out-of-court statement that the appellant stabbed the victims. Rather, it was the defence that led the evidence of that statement. The statements led by the Crown were to the effect that the appellant "did what he had to do" to protect his friend.

statements, and, if they were not satisfied he did not, to consider what his statement that he was acting out of self-defence on behalf of his friend meant and whether it was true. The Crown position was that that aspect of the statement was not true, and that the accused was manipulating his friends by making this statement so soon after the events, while they were still processing what had happened.

[59] The trial judge erred in telling the jury that the exculpatory aspect of the appellant's out-of-court statements "[could] not be taken as evidence that what he said was true". The mixed statements led by the Crown were admissible for the truth of their contents. The final instruction should also have cautioned the jury that in considering the evidence, it could not rely on the mere fact that the prior consistent statements had been repeated to infer that they were more likely to be true, or as independent verification of the accused's in-court testimony. In these respects, the trial judge's final instruction to the jury was incorrect, notwithstanding the fact that it was consistent with defence counsel's submissions during the pre-charge conference.

[60] In short, the final charge with respect to the mixed statements should have been the same as the mid-trial instruction, with the additional cautions that the jury could not rely on the mere fact that the statements were repeated to infer that they were more likely to be true, and that they could not rely on the prior out-of-court statements as independent verification of the accused's in-court testimony.

[61] However, this does not end the inquiry on appeal. Where an error in a jury charge causes no substantial wrong or miscarriage of justice, the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C., 1985, c. C-46 can be applied.

[62] The Crown argues that even if the trial judge erred in her instruction to the jury, the error could not have impacted the verdict because the principal inferences that were available from the evidence were left with the jury. The appellant argues that the contradiction between the trial judge's mid-trial instructions and her closing instructions would have confused the jury as to the use they could make of the statements made at the barn and caused prejudice and unfairness to the appellant and thus should preclude the application of the curative proviso. This was particularly the case given the centrality of the exculpatory elements of the statement.

[63] In her mid-trial instruction, before the appellant testified, she correctly instructed the jury as follows:

> If you decide that a witness has accurately reported all or part of what Mr. Bagherzadeh said, you may rely on that testimony along with the rest of the evidence to help you decide this case.
>
> Some or all of the statements may help Mr. Bagherzadeh in his defence. You must consider any remarks that may help him along with all of the other evidence unless you are satisfied that he did not make those statements.

[64] As indicated earlier in these reasons, however, her final instructions told the jury that they could not use these statements as evidence of their truth:

> If you find Mr. Bagherzadeh said these words, that "I did what I had to do to protect you" and his fear about Chris being messed up, this cannot be taken as evidence that what he said was true, but you may use that evidence as having a bearing on his credibility, and it is circumstantial evidence that you may consider as to his state of mind. [Emphasis added.]

[65] I cannot agree that the trial judge's error in telling the jury that they could not use the appellant's statement that he "did what he had to do" in order to protect his friend was harmless in the circumstances of the case. First of all, the closing instruction was not consistent with her mid-trial instruction and, as I have indicated, was incorrect.

[66] Second, any such confusion would have been exacerbated by the comments of both the Crown and defence counsel in their closing submissions. Both counsel had agreed, during pre-charge discussions, that the appellant's statements to his friends at the barn, despite having been led by the Crown, were not admissible for the truth of their contents, but could bear on his credibility.

[67] The defence closing, while cautioning the jury to listen to the judge's final instruction, stated that the barn discussions following the incident were fundamental to the "credibility" of the appellant's claim that he had been protecting his friend. In substance, it invited the jury to treat the appellant's statements at the barn as evidence of the truth of its contents. For example, in reviewing the evidence of the barn discussion, defence counsel said:

> Everybody else was thinking the serious – that Chris was being seriously harmed. Everybody else was talking to Chris and, you know, being awfully glad that he was in a good place. And it's tempting to say, "Oh, look," and I anticipate the Crown will say this to you, "Oh, look, he wasn't really harmed all that much," you know? "Oh, look. He didn't have"– "he wasn't stabbed" or "he wasn't really harmed. Therefore, they must have had no perception that he might have been." Twenty seconds in a fight in a darkened parking lot leaves you with no such assurances. Everybody checking out Chris after the fact was for a reason. They really believed that he was in bad shape. And it's tempting to look at this with our sober eyes and look at it and think that we know everything about it, but that's what I meant about circumstantial evidence.

[68] Later in his closing, defence counsel referred again to the barn discussions:

> …You'll also have ... the statements of the barn. Are we really to believe that [Mr. Bagerzadeh's] some sort of, you know, incredible Machiavellian, evil genius that's able to come up with the precise legal framework about how he can extricate himself from this, drunk and on the way off to the barn? Of course not, right? <u>When he's saying these things he's saying them from the heart</u>. When he's hugging Chris, very much as Cody hugged Chris, you know, he's saying that "I was actually protecting you." [Emphasis added.]

[69] Counsel further stated:

> [Y]ou all go in there – back in the – back to the barn, you're all sort of freaking out, you're all still under the influence of alcohol, you're looking at each other with these bleary eyes, talking about the whole thing, and this is what you come up with. <u>You come up with these things because they're true. You're not going to lie and tell lies to your friends about these things. They were there, they saw how it all went down… This is not something where,</u>

> you know, [the appellant] had all this time to come up with some sort of story… [Emphasis added.]

[70] The Crown also invited the jury to consider the truth of the statements in that it invited the jury to find that the appellant simply concocted the story to influence his friends to believe that he had intervened to protect his friends.

[71] In summary, then, the trial judge's erroneous final instruction would have confused the jury because of its inconsistency with her mid-trial instruction. The closing submissions, which seemed substantively to be more in line with the mid-trial instruction, would have added to the confusion. Telling the jury that the statements could bear on the appellant's credibility and could be treated as circumstantial evidence relevant to his state of mind would also have added to the confusion as it did not permit the jury to consider the appellant's out-of-court statements for their truth. In response to the Crown's claim that he was lying, the appellant should have been entitled to say that he said what he said to his friends, and what he said in court, was true. The fact that the jury was told they could not rely on the exculpatory statement for its truth was unfair and prejudicial.

[72] The cumulative effect of the incorrect instruction and the confusion caused by the submissions and instructions discussed above did give rise to unfairness to the accused. It was precisely because there was no dispute that the appellant was the one who stabbed the victim that the exculpatory statements at the barn and their use became so important at trial. They went to the heart of the availability of

a defence and the jury's assessment of the appellant's credibility. The curative proviso thus cannot apply. I would therefore allow the appeal on this ground.

E. PROVOCATION

[73] As the appeal is allowed on the basis of the treatment of the exculpatory statements, it is not necessary to address the provocation issue.

F. CONCLUSION

[74] I would allow the appeal and order a new trial.

Released: October 25, 2023 "J.S."

"A. Harvison Young J.A."
"I agree. Janet Simmons J.A."
"I agree. B.W. Miller J.A."