SUPREME COURT OF YUKON

Citation: *R v Murphy,* 2015 YKSC 30

Date: 20150708
No.: S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ALICIA ANN MURPHY

Applicant

A publication ban pursuant to ss. 645(5) and 648(1) of the *Criminal Code* has lapsed.

Before: Mr. Justice L.F. Gower

Appearances:
Noel Sinclair and
Paul Battin — Counsel for the Crown
Jennifer Cunningham and
Michael Dineen — Counsel for Alicia Murphy

RULING
(Application to Exclude Evidence)

[1] This is a pre-trial application by the accused, Alicia Ann Murphy, to exclude certain evidence which the Crown expects to call on the basis that it is irrelevant and has the potential to be significantly prejudicial. The accused is charged with the second-degree murder of Evangeline Billy on or about June 22, 2008. Two key Crown

witnesses, Tanya Murphy and Rae Lynn Gartner, each claim that the accused separately confessed to the murder to them. The accused was convicted of second-degree murder following her first trial in 2009. However, that conviction was overturned by the Court of Appeal in 2014, and a new trial was directed. The accused has new counsel representing her on the retrial.

[2] The evidence at issue is of two types:

a) lay opinion evidence from Lynn Rose Johns that, shortly before the homicide, the accused was jealous of a sexual relationship between the deceased, Ms. Billy, and Ms. Johns' brother, Howard Johns; and

b) evidence about the demeanour of Tanya Murphy and Rae Lynn Gartner when they gave their statements to the police alleging that the accused had confessed to the murder.

I will deal with each type of evidence separately.

The Opinion of Jealousy

[3] Lynn Rose Johns gave two statements to the RCMP. The first was on June 24, 2008, and the second was on July 9, 2008.

[4] I understand from counsel that Ms. Johns made no mention of the jealousy in her first statement. On the contrary, when asked whether Ms. Billy had any enemies that she was aware of, Ms. Johns replied in the negative.

[5] About halfway through Ms. Johns' second statement, the RCMP suggested that she may have helped the accused commit the murder. In response, Ms. Johns launched into a lengthy, profane, and often incoherent tirade about the accused, part of which involved the initial allegation of jealousy:

> ... I don't know what the fuck she did but she was fucking jealous over my brother Hoss, she always fucking want Hoss to be her fucking man … and ahh you know she was jealous over Hoss even though she was with Albert she had a thing for fucking Duke, she had a thing for Hoss, Hoss she called him my horse dink and shit like that…
>
> …
>
> … Friday we're all together on the riverbank and she found out that Hoss was with us and she was jealous, she's like fucking … psycho over my brother Hoss. Like she had a thing for him …
>
> …
>
> like a lust thing and umm Howard and Evanne, me we're all together and Howard and Evanne were kissing and doing their thing whatever you know it's their business …
>
> …
>
> … Friday when we're all sitting down here partying at the pumphouse we're all end up leaving, everyone went their own way, we went up we're at so … she found out that, about this night and got fucking all hernia and jealous over Hoss …
>
> …
>
> … So I know for a fact that she got jealous about the Friday, Saturday morning's when we went downtown and she was talking weird shit being weird and she wouldn't walk, why wouldn't she walk downtown with us right…

(Friday was June 20, 2008, and the murder allegedly occurred on Sunday, June 22nd.

"Evanne" is a reference to the deceased, Evangeline Billy.)

[6] At the first trial, Ms. Rose also testified about the jealousy as follows:

> Q Okay. Were you out with Evangeline Billy and your brother Howard, or Hoss Johns [phonetic], on Friday, June 20th?
> A yes, I was.
> Q What were you doing with them?

A Drinking, smoking crack.
Q Was that down along the riverbank near the 98 Hotel?
A Yeah, I left. I caught a cab and took off.
Q Okay. And did Evangeline and your brother Hoss know each other well?
A Yeah.
Q And how were they behaving towards each other that night?
A Kissing, hugging, holding; I don't know, I wasn't watching. I was sitting somewhere else, and they were sitting somewhere else, and they came back and I just told my brother Hoss I didn't want to be there. So I hollered for him and we left, and.
Q Okay. And on Saturday, June 21, 2008, were you hanging out with Alicia Murphy at all that day?
A Probably drank a couple of beers with her and left her house, yeah.
Q And to your knowledge, did Alicia know anything about the behaviour between Evangeline –
A She didn't say anything. She was jealous. She was jealous over my brother, I guess. I don't know what happened. If I can turn back time and change the world with the palm of my hands, I would if I could, but I can't. All's I know is they're both friends of mine. I lost them both and I don't want to be here right now.
Q Was – to your knowledge, was Alicia Murphy interested in your brother around that time?
A She was fooling around with him, yeah. She was always, I don't know. I don't know.
A And how did she express that she was jealous about the contact between Evan and your brother?
A She just asked me a million questions in the book and asked me, "Where were you guys? Where were you drinking? What were you doing: Who were you with?"
Q Did she say anything about Evangeline at that time?
A No, she didn't. she didn't – I didn't know nothing. I didn't know nothing. I just was sick and hungover, and I just wanted to get my next drink, you know, and just walk. I was walking and walking and.
Q Did you answer Alicia's questions about your brother and Evangeline?
A Yes, I did.
Q And how did she respond to that?
A She just said, "What were they doing" and.
Q How was it that she was demonstrating her jealousy?

A I don't even know if she was jealous because she was asking me a million questions. And I was just hungover, and I took a cab home. I just wanted to leave.
Q You said earlier in your testimony that she was jealous about it. So what did you mean by that?
A I don't know. She was fooling around with my brother and, I don't know, and then we ended up going down the riverbank and Evan kept following us, kept coming with us, and I kept giving her drinks and giving her whatever else, and.
Q But how was Alicia jealous?
A She just wanted to know what we did. She asked me questions and where we were at, and what we did, and who was all there, and.
Q And when you told her that, how did she respond to that?
A Just asked a million more questions. I don't know; I was too hungover. I didn't want to be around there.
Q What is it about her behaviour that made you say that Alicia was jealous?
A Because she just asked what my brother Hoss was doing. Who he was with, how he was with them, how he got there, where he went, where we came from, what we did. I can't say for a fact she was jealous over my brother. I know she cared for my brother and I – I just know she was. Or just – I don't know; I don't know anymore. I do know – can I go now?

[7] The accused also testified at the first trial. While she admitted a brief "open" relationship of three months with Howard Johns in 2005, she denied any jealousy towards him in 2008.

[8] The leading case which authorizes the admission of opinions by lay witnesses is *R. v. Graat* (1982), 2 CCC (3d) 365 (SCC). In *Graat*, Dickson J. (later Chief Justice), speaking for the Supreme Court of Canada, examined what he called the "vexed" question of when non-expert opinion on matters requiring no special knowledge is admissible. He began by reviewing the law from several Commonwealth jurisdictions,

as well as a number of text writers and law reform proposals. Dickson J. then concluded, at pp. 377- 78:

> We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions. The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in Sherrard v. Jacob, supra, is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person--e.g. whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things--e.g. worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.
>
> Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between “fact” and “opinion” is not clear. (my emphasis)

[9] Dickson J. further said that lay witnesses could present their observations as opinions where they “are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly” (p. 382). This reflects his language earlier in the decision, where he said that non-expert opinion is allowed “where it is virtually impossible to separate the witness’ inference from the facts on which the inference is based” (p. 370).

[10] David Paciocco and Lee Stuesser, in their text, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008), at pp. 185-87 summarize the general rule excluding opinion evidence from laypersons and its exceptions as follows:

> In simple terms, we let lay witnesses offer opinions when there is no other meaningful way for them to communicate ordinary knowledge that they possess.

[11] The authors of McWilliams' *Canadian Criminal Evidence*, fifth edition, Volume 2, at pp. 12-15 summarize the law allowing a lay witness to provide an opinion on another's emotional state as follows:

> In the *Graat* case, the court recognized an ordinary witnesses competence to describe another person's emotional state, for example whether "distressed, angry, aggressive, affectionate or depressed". A lay witness testified that the accused appeared visibly shaken when he called the police after discovering the deceased's body. An ordinary witness may provide the accused's reaction on learning of his brother's death. Frequently, a lay witness gives an opinion as to the emotional condition of a sexual assault complainant. Other examples include testimonial references to a person being excited, surprised, fearful, sad, frustrated, sincere, or to someone being obsessed with another.

[12] Watts' *Manual of Criminal Evidence*, 2014, refers to the topic this way:

> A lay witness may also give evidence of opinion in relation to what are commonplace mental or emotional states of another, as for example, "impaired", "drunk", "intoxicated", "distressed", "angry", or "aggressive"….

[13] The danger with such evidence is that drawing an inference about an accused's emotional state simply based on a subjective impression of their demeanour may appear to be a tenuous exercise in mind reading. This danger was highlighted by Rothstein J. in *R. v. White*, 2011 SCC 13, where he spoke about the hallmark flaws associated with "demeanour evidence". At paras. 75 and 76, he continued:

> 75 …Such hallmark flaws are generally associated with evidence in the form of a witness's impression of the accused's mental or emotional state (e.g. appeared calm or nervous), as inferred by the witness from the accused's outward appearance or behaviour. The accused's mental or emotional state is then submitted as suspect and probative of guilt (see *Nelles*; *R. v. Levert* (2001), 150 O.A.C. 208, at paras. 24-27; *R. v. Trotta* (2004), 191 O.A.C. 322 at paras. 40-43 (an appeal was allowed by this Court and a new trial

> was ordered, but solely on the basis of fresh evidence, 2007 SCC 49, [2007] 3 S.C.R. 453)).
>
> 76 A problem with such evidence is that the inferential link between the witness's perception of the accused's behaviour and the accused's mental state can be tenuous (*Trotta*, at para. 40). The witness's assessment depends on a subjective impression and interpretation of the accused's behaviour (*Levert*, at para. 27). Moreover, it appears to involve an element of mind reading (*R. v. Anderson*, 2009 ABCA 67, 3 Alta. L.R. (5th) 29, at para. 51). Additionally, insofar as the witness is inferring the accused's state of mind from the accused's outward appearance, there may be a legitimate concern that this is inadmissible lay opinion evidence. This is to be contrasted with evidence of objective conduct that allows the jury to draw its own inferences about the accused's state of mind.

[14] This danger was helpfully discussed by the Alberta Court of Appeal in *Anderson* (cited in the quote immediately above) at para. 51:

> 51 Evidence of an accused's demeanour is a risky type of evidence. It could be meaningless and prejudicial. … Depending on the circumstances, a 'demeanour' observation may be the sort of partial evidence that is more prejudicial than probative: ... In a real sense, demeanour evidence involves a form of mind reading. Accordingly, such evidence should be approached with circumspection where it is proposed to take it to indicate guilty mind (citations omitted)

[15] In my view, the evidence of Ms. Johns' opinion about the accused's jealousy of the relationship between the deceased and Howard Johns is admissible for the following reasons.

[16] The evidence is relevant to the element of intention in second-degree murder. It goes to animus and motive on the part of the accused. In *R. v. Carroll*, 2014 ONCA 2, at para. 104, the Ontario Court of Appeal put it this way:

> … [T]he state of the relationship between an accused and a deceased in a time leading up to the unlawful killing of the deceased may demonstrate animus and motive on the part

> of the accused, and thus be relevant to the identity of the deceased's killer and the state of mind that accompanied the killing ...

[17] Further, this is not simply a case of demeanour evidence. Rather, the context arguably establishes at least a degree of objective support for Ms. Johns' opinion.

[18] First, there appears to be no dispute that the accused had a brief relationship with Howard Johns in 2005. Thus, there is the logical possibility that the accused might still have had feelings for Mr. Johns in 2008.

[19] Second, Ms. Johns' evidence suggests that, on Saturday, June 21, 2008, when the accused learned that Ms. Johns had been with her brother Howard and the deceased the previous night, the accused asked Ms. Johns "a million questions" about:

- where they had been drinking;
- what Howard was doing;
- what the group was doing;
- who all was there;
- who Howard was with;
- "how he was with them";
- how Howard got there; and
- where he went.

This evidence could be interpreted by the jury as an unusual level of interest in Mr. Johns' circumstances, consistent with jealousy.

[20] I acknowledge that the probative value of Ms. Johns' evidence may not be particularly significant, given the inconsistent manner in which she testified at the first

trial about whether she did or did not hold the opinion of jealousy. However, that is a matter going to weight and not admissibility.

[21] Counsel for the accused submits that the proposed evidence of jealousy will be prejudicial to the defence in two ways. First, the jury may draw speculative inferences from an inadequate evidentiary foundation as to whether the accused was indeed jealous of Mr. Johns. Again, in my view that as a matter going to weight and not admissibility.

[22] Second, it may force the accused to discuss her sex life and the sex lives of other people in her social circle, including that of Mr. Johns. This may give rise to reasoning prejudice, as it could be titillating and distracting for the jury, as well as embarrassing for the accused.

[23] I agree that reasoning prejudice is a factor in balancing the prejudicial effect of proposed evidence with its probative value. However, the risk in this particular case is not outweighed by the potential probative value of the evidence.

[24] In *R. v. Luciano*, 2011 ONCA 89, the Ontario Court of Appeal was addressing the balancing of the probative value of evidence of extrinsic misconduct by an accused with its prejudicial effect. At para. 232, the Court stated:

> The term “prejudice” does not refer to the risk of conviction, rather has to do with the risk of an unfocused trial and a wrongful conviction through an impermissible chain of reasoning …

The example of impermissible reasoning given by the court in that case is inference of guilt from general disposition or propensity.

[25] Here, I agree with Crown counsel that neither of those risks arise in the context of the jealousy evidence. First, the evidence is relatively brief and self-contained and will

not lead to an unfocused trial. Second, the evidence does not invite propensity reasoning or any other impermissible chain of reasoning. In any event, depending on how the evidence is presented, the jury can be instructed on avoiding any potential misuse of it. Accordingly, there is no prejudicial effect on trial fairness.

The demeanour of Tanya Murphy and Rae Lynn Gartner

[26] The Crown intends to adduce evidence at the trial of the demeanour of Tanya Murphy and Rae Lynn Gartner when they provided statements to others of the alleged confession by the accused to the murder. The Crown submits that this evidence is admissible as part of the narrative exception to the rule against prior consistent statements. The Crown does not intend to adduce the contents of the statements.

[27] The defence maintains that this evidence is simply oath helping, and was the subject of one of the grounds for appeal on which the accused was successful in obtaining a retrial: *R v. Murphy*, 2014 YKCA 7. Accordingly, defence counsel submits that I am bound by *stare decisis* to follow that decision.

[28] The Crown's evidence regarding Ms. Gartner's demeanour comes from two witnesses.

[29] The first is Lindsay Chambers. She did not testify at the first trial. Ms. Chambers is a close friend of Ms. Gartner. She provided a statement to the RCMP indicating that, on the day the homicide was discovered, June 22, 2008, she had a telephone conversation and a subsequent meeting with Ms. Gartner. Ms. Chambers described Ms. Gartner as very distraught, emotional and crying hysterically.

[30] The second witness is Constable Thur. He spoke with Ms. Gartner on the phone on the evening of June 22nd, and described her as sobbing at the time. Constable Thur

later met Ms. Gartner at her residence, and said that she had been drinking, that she was tired, and that she was very emotional. The following morning, Ms. Gartner came to the police station and gave a recorded statement. Constable Thur was of the opinion that she was upset at that time, but was more composed than the previous evening.

[31] The Crown's evidence regarding Tanya Murphy's demeanour comes from Constable Corbett. He interviewed Ms. Murphy on June 22 and 23, 2008. It was during the June 23rd interview that Ms. Murphy implicated the accused in Ms. Billy's homicide. I understand that Constable Corbett will say that during that interview Tanya Murphy became emotional and started crying at times.

[32] As stated, the Crown's position is that evidence of prior complaints, including demeanour evidence, is relevant to a witness' credibility and is admissible as narrative, since it can assist the jury in assessing whether the conduct of the witness at the time of the event is consistent or inconsistent with the witness' evidence of what occurred. All of the cases relied upon by the Crown in this regard involve sexual offences, often with young complainants: *R. v. Ay*, [1994] B.C.J. No. 2024; *R. v. J.E.F.* (1993), 85 CCC (3d) 457 (Ont. C.A.); *R. v. Clancy*, [1992] O.J. No. 158 (Ont. C.A.); *R. v G.C.*, [1997] O.J. No. 1817; *R. v. Dinardo*, 2008 SCC 24. They are also, with the exception of *Dinardo*, quite dated.

[33] In *Dinardo*, Charron J., speaking for the Supreme Court, summarized the law regarding prior consistent statements at paras. 36 through 38::

> 36 As a general rule, prior consistent statements are inadmissible ... There are two primary justifications for the exclusion of such statements: first, they lack probative value … and second, they constitute hearsay when adduced for the truth of their contents.

37 In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of truthfulness or credibility" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 [italics in original; underlining added]; …

38 In *R. v. G.C.*, [2006] O.J. No. 2245 (QL), the Ontario Court of Appeal noted that the prior consistent statements of a complainant may assist the court in assessing the complainant's likely truthfulness, particularly in cases involving allegations of sexual assault against children. As Rouleau J.A. explained, for a unanimous court:

> Although properly admitted at trial, the evidence of prior complaint cannot be used as a form of self-corroboration to prove that the incident in fact occurred. It cannot be used as evidence of the truth of its contents. However, the evidence can "be supportive of the central allegation in the sense of creating a logical framework for its presentation", as set out above, and can be used in assessing the truthfulness of the complainant. As set out in *R. v. F.(J.E.)* at p. 476:
>
> > The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.
>
> The trial judge understood the limited use that could be made of this evidence as appears from his reasons:
>
> > [I]t certainly struck me while the fact that you go and tell somebody that you were molested doesn't confirm the fact that you were molested. I'm struck by the

> manner or the way it came out, tends to confirm [the complainant's] story - how they were reading this book, and how the thing came up about child sexual abuse.
>
> In cases involving sexual assault on young children, the courts recognize the difficulty in the victim providing a full account of events. In appropriate cases, the way the complaint comes forth can, by adding or detracting from the logical cogency of the child's evidence, be a useful tool in assisting the trial judge in the assessment of the child's truthfulness. This was such a case. [underlining in original]

[34] What I understand Charron J. to be saying here is that, in some circumstances, the fact that a prior consistent statement was made, and the timing of when that happened, may be admitted as part of the “narrative” exception to the general rule that prior consistent statements are inadmissible. This is because the evidence can assist the trier of fact in the assessment of the truthfulness or credibility of the witness, particularly in cases involving allegations of sexual assault against children. I note however that in neither *Dinardo*, nor the quoted passage from *R. v G.C*. is there any specific reference to the exception including the demeanour of the witness when giving the prior consistent statement.

[35] One of the cases relied upon by the Crown is *R. v Ay*, [1994] 59 B.C.A.C. 161. *Ay* involved multiple charges of a sexual nature by a female complainant who alleged the incidents occurred when she was between five and 17 years of age. One of the issues on the appeal was whether evidence of the complainant’s prior consistent statements about the allegations to her mother, the investigating officers and others were admissible. Consistent with what was later said in *Dinardo*, the British Columbia Court of Appeal summarized its conclusion on this point as follows:

> 45 To summarize, the fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters relevant and admissible to establish the conduct of the complainant in a criminal case, from which conduct the trier of fact is entitled to draw inferences relative to the credibility of that complainant's evidence. However, the content of any prior statement cannot be used to demonstrate its consistency with, and therefore the probable truthfulness of, the complainant's evidence at trial, and thus such content is inadmissible unless relevant for some other purpose such as providing necessary context for other probative evidence. (my emphasis)

[36] Interestingly however, the Court of Appeal went on to comment about the evidence which ought not to have been admitted at trial, including evidence of the complainant's emotional condition during one of the statements:

> 47 What ought not to have been admitted was any evidence of the specific content of such statements, and any other evidence the sole purpose of which was to invite the jury to conclude that these prior statements were both truthful and consistent with her sworn evidence before them. That category includes the evidence led by the Crown from Constable Logan as to the manner in which the statement was taken from the complainant on May 11, 1989, including evidence of the length of time it took to complete that statement and her emotional condition at the time she gave it, which was some 13 years after the last of the alleged assaults,… (my emphasis)

[37] If there was any uncertainty in the law about whether the exceptional admission of prior consistent statements could include demeanour evidence, in my view that door was clearly closed by our Court of Appeal in this case. It is interesting that in response to the defence attack upon the oath helping evidence in the first trial, the Crown on the appeal attempted to justify its admission, just as it does here, as part of the narrative. The Court bluntly referred to that approach as "an impermissible strategy" (para. 6). To

get the full flavour of the Court of Appeal's conclusion on this point, it is necessary to quote from the reasons of Donald J.A., at some length:

> **Ground B -- Oath-helping**
>
> **5 The problems arising from this ground and from ground D [inadmissible opinion evidence re the investigation of the crime scene] result from an approach taken by the prosecution at trial that enlarged the notion of "narrative**" as a basis for admissibility of evidence of the police investigation. How the police took the evidence of the key admission witnesses, their impressions of the witnesses' statements, the lead investigator's methodology in conducting the investigation overall, and his working theories as to the crime scene and cause of death, were not led in response to any challenge to the integrity of the investigation by the defence, but out of a desire to enhance the Crown's case.
>
> **6 This is an impermissible strategy**. The respondent's stated purpose for calling evidence surrounding the taking of statements from Tanya Murphy and Rae Lynne Gartner was to make their testimony more reliable. The evidence of their initial dealings with the police was not only irrelevant, in the sense that there was no fact in issue, but it violated the rule against oath-helping.
>
> **7** As to the prosecution's purpose, this is what the prosecutor said in his closing address to the jury about Tanya Murphy's evidence:
>
> > Consider the timing of Tanya Murphy's statement to the police. First of all, she didn't go to the police with this. The police came to Tanya Murphy after the fact, after they had heard from Rae Lynne Gartner. This was another part of their investigation, to go to Tanya Murphy and find out if she knew anything about this. And so it was a statement which was given by Tanya Murphy to the police very shortly after the meeting between her and her sister. She was at the detachment. You heard Constable Corbett testify about what Tanya Murphy's demeanour was as she was providing that information to the police. It was very difficult for Tanya Murphy. This wasn't some sort of lark or anything of that nature.

and as to Rae Lynne Gartner's evidence:

> Rae Lynne talked about how she hung around for a period of time, didn't want to attract attention to herself, just was trying to figure out how do I get myself away from this woman. And that eventually she left and immediately went, called her friend, asked to be picked up. Rae Lynne said she was hysterical at that time. And wouldn't she be? She then talked about call [*sic*] 9-1-1 and speaking with Constable Thur, about being extremely emotional. And again, wouldn't she be?
>
> And that was corroborated by Constable Thur in his testimony. He said that when he first talked to her on the telephone she was extremely emotional, and that she continued to be that way during his initial interview of her, and then later, when they were speaking to her some more, she calmed down. But all of that evidence offered by Constable Thur, and the reason for those questions to Rae Lynne Gartner about how she was feeling at the time of this, are -- were asked because that's all part of the narrative. That's part of the story. And when you're looking at what she says Alicia has said to her, you can look at the way that the story came out, in assessing whether Rae Lynne Gartner's evidence is reliable. And I say that, because of the way that the story was told, it's clearly reliable.
>
> **8 The "story" to which counsel referred had no probative value.** Had the defence raised police misconduct, such as bullying or other oppressive conduct, then the interaction of the witnesses with the police would have had some relevance; but in any event it could not have been used to bolster the Crown's case, only to answer some point taken by the defence. No such allegation arose. **What the witnesses said to the police, their demeanour, emotional condition and cooperativeness, should have had nothing to do with their testimony at trial, yet it was used to make the evidence more reliable.** (underlining in original; bolding added)

[38] I agree with defence counsel that the admissibility of this demeanour evidence was squarely at issue on the appeal and the Crown had a full opportunity to defend and

justify the admission of such evidence. However, the Court of Appeal, has clearly ruled against the Crown on the point and I am bound by that ruling.

[39] A recent case from the Ontario Court of Appeal, *R. v. Rhayel*, 2015 ONCA 377, comes to a similar conclusion in a slightly different set of circumstances. There, the accused was convicted of sexual assault and threatening death. Leading up to the trial, the complainant gave two statements to the police, one of which was videotaped. She also testified at the preliminary inquiry, but died before the trial took place. At the trial, the transcript of the complainant's evidence at the preliminary inquiry was admitted for its truth by consent. The Crown also persuaded the trial judge to admit the complainant's videotaped statement both for the truth of its contents and for its value in providing an opportunity to observe the complainant's demeanour as she gave her account of the events at issue. On the appeal, the accused successfully argued that the trial judge erred in admitting the complainant's videotaped statement into evidence for the truth of its contents. The Court of Appeal held that the admission of the statement violated both the principled approach to the admission of hearsay and the rule against admitting a prior consistent statement. The Court made some general remarks regarding the latter rule, and then specifically addressed the lack of probative value of the complainant's demeanour in the videotaped statement:

> **ii. The Rule Against Prior Consistent Statements**
>
> 76 In the light of the express recognition that the complainant's testimony at the preliminary inquiry was "virtually identical" to her account as recorded in the videotaped statement, what the complainant said in her statement amounts to a prior consistent statement.
>
> 77 Prior consistent statements are generally inadmissible because they lack probative value, are often self-serving,

> and are hearsay: *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36.[1]
>
> 78 Prior consistent statements lack probative value as, by definition, they are merely a repeat of evidence. Their lack of probative value stems from the fact that it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth. Thus, repetition does not demonstrate or prove anything …
>
> …
>
> 81 The trial judge received the videotaped statement into evidence, in a sense, as a package. He received not only the words spoken by the complainant for their truth, but also the manner in which she delivered her statement -- in other words, her demeanour. The trial judge found the complainant's demeanour to be important as it brought her words to life.
>
> 82 Given my conclusion that the videotaped statement was inadmissible for its truth, it follows that the complainant's demeanour as she gave the statement was also inadmissible. I see no value in the way the complainant spoke inadmissible words at a moment in time removed from when she gave her evidence at the preliminary inquiry. (my emphasis)

[40] As the contents of the statements of Tanya Murphy and Rae Lynn Gartner are not admissible, I similarly fail to see how the demeanour of the respective witnesses when they gave their inadmissible statements is in any way probative.

[41] After the hearing of this application, the Crown filed the case of *R. v. E.(M.)*, 2015 BCCA 54. In my view it simply restates the principles in *Dinardo*, and does not affect my conclusion.

[42] The accused’s application to have this demeanour evidence excluded is granted.

_____

GOWER J.