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Assessing Credibility: The Impact of a Motive to Lie and the Embellishment of Evidence — the Canadian Approach

Wayne K. Gorman

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In *R. v. Bowers*, the Alberta Court of Appeal suggested that it has been "recognized that the process of assessing credibility cannot be reduced to or confined by legal rules . . . [and] there is no fixed set of rules to use in assessing the credibility of a witness." 2022 ABCA 149, paras. 39-40 (Can.).

Two exceptions to this general rule involve a witness having a motive to lie and the embellishment of evidence by a witness. In both instances, a witness's credibility will general be negatively impacted. However, what if the opposite occurs? What if a trial judge concludes that the witness did not embellish their evidence? What if there is no evidence that the witness, particularly a complainant, had a motive to falsely implicate the accused? How are trial judges to deal with these scenarios? These issues have recently been the subject of considerable appellate commentary in Canada, including by the Supreme Court of Canada.

In this column, I review that Supreme Court of Canada decision in *R. v. Gerrard*, 2022 SCC 13 (Can.) and a number of recent Canadian appellate court decisions in an attempt to explain how Canadian trial judges are being directed to consider the scenarios I have set out above when they are making credibility assessments. As will be seen, the directions set out in the appellate jurisprudence are not always easily followed. It has been noted, for instance, that the "distinction between absence of evidence of a motive to fabricate and absence of a motive to fabricate is not easily digestible." R. v. John, 2017 ONCA 622, para. 97 (Can.).

I commence with a review of Canadian appellate jurisprudence on two negative propositions:

(1) how is a trial judge to consider a lack of evidence of an apparent motive to lie in assessing the credibility of a witness; and
(2) how is a trial judge to consider a lack of embellishment in assessing the credibility of a witness?

MOTIVE TO LIE

It is well established that if it is proven that a witness has a motive to lie, this an important factor in assessing that witness's credibility. It has been pointed out that it "is difficult to think of a factor which, as a matter of common sense and life experience, would be more germane to a witness' credibility than the existence of a motive to fabricate evidence." R. v. Batte (2000), 49 O.R. 3d 321, para. 120 (Can. Ont. C.A.).

However, "[i]f the Crown has proven that the complainant had no motive to fabricate, the Crown has 'a powerful platform to assert that the complainant must be telling the truth.'" R. v. Ignacio, 2021 ONCA 69, para. 32 (Can.). More recently in *R. v. W.D.M.*, 2022 SKCA 64, para. 35 (Can.), the Saskatchewan Court of Appeal stated that it "is clear that an accused does not bear 'an onus to demonstrate that a complainant has a motive to fabricate evidence'. Importantly, the absence of a demonstrated motive to fabricate does not necessarily mean that there was no motive and the absence of a motive to fabricate does not conclusively establish that a witness is telling the truth." What if there is no evidence establishing the presence or absence of a motive to lie (i.e., no evidence either way)? As noted in *Ignacio*, "in most cases, the trier of fact will be faced…with an absence of evidence of any motive to fabricate on the part of the complainant." 2021 ONCA 69 at para. 32. In such situations, a trial judge must be alert to the possibility that "[p]eople may accuse others of committing a crime for reasons that may never be known, or for no reason at all." R. v. Bartholomew, 2019 ONCA 377, para. 22 (Can.).

The question of how a trial judge is to consider the absence of evidence establishing a motive to lie was considered by the Ontario Court of Appeal in *John*. 2017 ONCA 622. The Court of Appeal drew a distinction between "absence of evidence of a motive to fabricate and absence of a motive to fabricate":

> The law maintains a distinction between absence of evidence of a motive to fabricate and absence of a motive to fabricate. The former is not the equivalent of the latter, nor is the latter the same as the former.…Said in another way, it does not logically follow that, because a witness has no apparent reason to lie, the witness must be telling the truth.…The fact that a witness has no apparent motive to fabricate does not mean that the witness has no motive to fabricate. *Id.* at para. 93.

In other words, a trial judge should not place undue emphasis on there being no proof that a complainant had a motive to falsely implicate the accused because a lack of such evidence does not establish the absence of such a motive. This point was made in *Ignacio*, in which the Ontario Court of Appeal indicated that "[w]hile the cases leave open the possibility that the Crown can prove that a complainant had no motive to fabricate, they set a high bar for proving no motive to fabricate. This is because motives can remain hidden or there may be no motive at all…in most cases, the trier of fact will be faced instead with an absence of evidence of any motive to fabricate on the part of the complainant." 2021 ONCA 69 at paras. 31-32.

THE APPLICABLE PRINCIPLES REGARDING MOTIVE TO LIE

The Court of Appeal went on in *John* to indicate that in "instructing juries on motive to fabricate, trial judges must avoid making any suggestion that":

i. an accused has an onus to demonstrate that a

complainant or witness has a motive to fabricate evidence;

ii. the absence of a demonstrated motive to fabricate necessarily means that there was no motive to fabricate; or

iii. that the absence of a motive to fabricate conclusively establishes that the complainant or witness is telling the truth. 2017 ONCA 622 at para. 95.

Subsequently, in *R. v. Dindyal*, 2021 ONCA 234, para. 23 (Can.), the Ontario Court of Appeal indicated that "the mere absence of any evidence of a motive to fabricate is only one of many factors to be considered in a credibility assessment. It alone cannot serve as the foundation of the credibility assessment." What does this mean? As will be seen, it appears to mean that the absence of such evidence cannot be a stand-alone basis for the conclusion that a witness's evidence is credible.

In *Dindyal*, the accused was convicted of a number of assault offences involving his former partner. 2021 ONCA 234 at paras. 1-2. The trial judge indicated that he found the complainant to be a reliable witness because she had "no reason to lie, to fabricate or to embellish the accusations against [the accused]." *Id.* at para. 19.

The Ontario Court of Appeal noted that it "has explained, on a number of occasions, the permissible and impermissible use of evidence, or the absence of evidence, relating to motive." *Dindyal*, 2021 ONCA 234 at para. 22. In setting aside the convictions, the Court of Appeal suggested that the trial judge "appears to have conflated the absence of evidence of a motive to fabricate with a proven lack of motive, contrary to *Batte*. This is a significant error…the trial judge impermissibly used the absence of any evidence of a motive to fabricate as if it had been proven that the complainant had no motive to fabricate, in coming to his credibility conclusion regarding the complainant. Rather than consider it as a factor, the trial judge clearly used it to conclude that the complainant must be telling the truth, contrary to the admonition I have just set out above." *Id.* at paras. 23-24.

In *Ignacio*, the accused was convicted of the offence of sexual assault. 2021 ONCA 69 at para. 1. In convicting the accused, the trial judge concluded that the evidence of the complainant was "plausible and consistent," she was not "prone to exaggeration," and she "had no motive to falsely accuse Mr. Ignacio of a serious crime. To the contrary, it is clear from the evidence that prior to the sexual activity, she liked Mr. Ignacio and hoped to get to know him better." *Id.* at para. 22.

> The accused appealed from conviction, arguing that the trial judge erred "in finding that the complainant had no motive to fabricate." *Id.* at para. 25.

In this case, the appeal was dismissed. The Ontario Court of Appeal indicated that "had the trial judge found that the Crown had proven no motive to fabricate, such a finding would have been in error. The only evidence upon which the trial judge could make this finding was the evidence that the complainant and the appellant had a prior good relationship. Evidence of a good relationship between the complainant and the accused, standing alone, is insufficient to establish that the complainant had no motive to fabricate." *Ignacio*, 2021 ONCA 69 at para. 32. However, the Court of Appeal concluded that "the trial judge was required to consider motive to fabricate due to the defence allegation that the complainant had a motive to fabricate. In the context of the defence submissions, he was entitled to look to the evidence for any suggestion of motive and conclude that there was no such evidence. . . . The trial judge did not find that the Crown had proven that the complainant had no motive to fabricate. He effectively found that there was an absence of evidence of any motive to fabricate, and he treated this finding as one factor in the credibility analysis." *Id.* at paras. 35-36.

" . . . the trial judge impermissibly used the absence of any evidence of a motive to fabricate as if it had been proven that the complainant had no motive to fabricate."

In *R. v. Swain*, 2021 BCCA 207, para. 32 (Can.), the British Columbia Court of Appeal noted that a "trier of fact may consider the absence of evidence of a motive to fabricate as one of various factors in assessing the complainant's credibility and must not place excessive weight on it." It pointed out that "[i]n most cases…the trier of fact will be provided [with] no evidence of any motive to fabricate on the part of the complainant, but the evidence will fall short of actually proving that the complainant has no motive to fabricate." *Id.* at para. 29. Finally, the Court of Appeal then asked what is the most important question:

> The question becomes whether and how such an absence of evidence of motive can be considered by the trier of fact in assessing what is almost always the complainant's credibility. *Id.*

HOW IS A FINDING OF AN ABSENCE OF EVIDENCE OF ANY MOTIVE TO FABRICATE TO BE USED IN A CREDIBILITY ANALYSIS?

Despite setting out the question every Canadian trial judge wants an answer to, the British Columbia Court of Appeal declined to provide an answer. Instead, it concentrated on setting out "certain risks" that "must be avoided" by trial judges in considering "an absence of evidence of motive to fabricate when assessing a complainant's credibility." *Swain*, 2021 BCCA 207 at para. 30. These risks were described as being the following:

> First, the trier of fact must not equate the mere absence of evidence that a complainant has a motive to fabricate evidence with a proven absence of motive;
>
> Second, and for the same reason, the trier of fact must not consider that an absence of evidence of motive to fabricate, or even a proven absence of motive, conclusively establishes that the complainant is telling the truth; and
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> Third, the trier of fact must not reverse the burden of proof, which remains on the Crown to prove its case against the accused beyond a reasonable doubt. *Id.* at paras. 31-33.

" . . . the trier of fact is entitled to consider the absence of evidence of motive to fabricate as one factor is assessing the complainant's credibility."

These points are well made, but they do not assist in explaining how a trial judge is to consider the absence of evidence of an apparent motive to fabricate as one of various factors in assessing a complainant's credibility.

This question was also raised by the Ontario Court of Appeal in *Ignacio*. The Court cautioned "against placing an improper emphasis on the absence of evidence of motive to fabricate," 2021 ONCA 69 at para. 47, but indicated that that "the trier of fact is entitled to consider the absence of evidence of motive to fabricate as one factor in assessing the complainant's credibility." *Id.* at para. 52. Unfortunately, the Ontario Court of Appeal also declined to explain how the absence of evidence was to be "considered" in assessing credibility. *Id.*

Having said this, it appears clear that a trial judge must not place an onus on the accused to explain a complainant's motivation, *see* R. v. D.M., 2022 ONCA 429, para. 69 (Can.), and must not jump to the conclusion that the complainant must be telling the truth because an alleged motive to lie has not been established. *Id.* However, beyond these requirements, how the use of the absence of evidence to establish a motive to lie is to be considered remains difficult to explain.

In *R. v. S.S.S.*, 2021 ONCA 552, para. 1 (Can.), the accused was also convicted of the offence of sexual assault. In convicting the accused, the trial judge stated:

> I have taken into consideration that there is no evidence of a motive to fabricate or animus in this case. To the contrary, by coming forward the complainant stood to jeopardize her friendship with the defendant's sister. The complainant's mother risked the close relationship and support of the defendant's parents, both of whom she considered family.
>
> The existence or absence of a motive to fabricate is a relevant factor to be considered. I acknowledge that when dealing with the issue of a complainant's motive to fabricate, it is important to recognize that the absence of any evidence of motive to fabricate is not the same as absence of motive to fabricate. It is dangerous and impermissible for me to move from an apparent lack of motive to the conclusion that the complainant must be telling the truth. People may accuse others of committing a crime for reasons that may never be known, or for no reason at all. The burden of production and persuasion is upon the prosecution and an accused need not prove a motive to fabricate on the part of a principal Crown witness. *Id.* at para. 20.

This time, the Ontario Court of Appeal set aside the conviction, holding that "treating the lack of evidence of motive to fabricate as a factor in assessing the credibility of the complainant in this case amounts to an error of law, because it had the effect of putting an onus on the appellant to disprove that the complainant had no motive to fabricate." *Id.* at para. 21. The Court of Appeal concluded that the trial judge "found that there was no motive to fabricate, which she used as a make-weight for the complainant's credibility." *Id.* at 30. However, a fair reading of the passage above does not support the Court of Appeal's contention.

The Ontario Court of Appeal's decision in *S.S.S.* is difficult to reconcile with its earlier decision in *Ignacio*. However, the Court attempted to do so. It suggested in *S.S.S.* that *Ignacio* was distinguishable because in that case "the issue of motive to fabricate was raised by the defence and therefore had to be addressed by the trial judge, whereas in this case, the issue was not raised by the defence. Consequently, in *Ignacio*, the court did not have to consider the risk of the onus being reversed in situations where the issue is not raised by the defence." *S.S.S.*, 2021 ONCA 552 at para. 36. This is a weak basis for the distinction made.

Does it matter who raises the issue? No. A trial judge must address it regardless of who raises it. In *S.S.S.*, the trial judge explicitly followed what was suggested in *Ignacio*, yet the conviction was overturned. The Ontario Court of Appeal has indicated that an absence of evidence establishing a motive to fabricate evidence is a factor a trial judge can consider, but it has consistently declined to explain how. Let me try.

A SUGGESTED APPROACH FOR JUDGES TO CONSIDER

First of all, trial judges should generally avoid mentioning a motive to lie unless it is raised by one of the parties or is obviously in issue. If the accused argues that a witness has a motive to lie and an evidentiary basis in support of the motive, even if not established, is presented, then it must be assessed and considered. As pointed out by the Saskatchewan Court of Appeal in *W.D.M.*, "[w]here credibility is a central issue and there is evidence suggesting that a complainant may have been motivated to fabricate an allegation against the accused, the trier of fact is required to consider this information" 2022 SKCA 64 at para. 42. Finally, if the argument is made, but there is no evidentiary basis to support it, then the judge should indicate that they have rejected the submission.

The rejection of the submission can be used as a factor supporting the witnesses's credibility, but only to the extent that the specific motive to lie alleged has been refuted. In other words, the witness's credibility is not negatively impacted by the specific motive alleged, but it is not otherwise enhanced. Most importantly, the failure to establish or present an evidentiary basis in support of the purported motive cannot be used as a "makeweight." [1] What I mean by this is that it cannot be used to

Footnotes

1. The word "makeweight" has been defined as meaning "something put on a scale to make up a required weight," *see Makeweight*, COLLINS ONLINE DICTIONARY, http://www.collinsdictionary.com/dictionary/english/makeweight (last visited July 14, 2022), and as "something thrown into a scale to bring the weight to a desired value." *See Makeweight*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/makeweight (last visited July 14, 2022).

shore up the credibility of a witness. In most cases, it will become a neutral factor. One possible exception being those cases in which the motive to lie is the essence of the defence. Finally, in those extremely rare cases in which the Crown can prove a lack of motive to lie, this can be used to enhance the witness's credibility.

Remember that it can be virtually impossible to establish that a witness does not have a motive to lie (who knows what another person is really thinking?). However, presenting evidence of a possible motive to lie is much easier. In many cases, a motive to lie is suggested, but not proven, though there is an evidentiary basis in support of the inference the trial judge is being asked to draw. If such a motive is alleged and proven, this is extremely significant evidence. However, the existence of a motive to lie does not mean that the witness lied.

Most importantly, it must be remembered that if a motive to lie is alleged but not proven, this does not mean that such a motive does not exist, but only that it has not been proven. As a result, that witness should not be found truthful solely on this basis standing alone. In other words, the witness's credibility is not enhanced by the absence of proof of such a motive, but neither is it diminished. It is a neutral and at times an irrelevant factor, depending on the circumstances of each case. The mere fact that it is suggested to a witness that she or he has a motive to lie is not necessarily significant.

R. V. A.E.S.P.

The Ontario Court of Appeal returned to these issues earlier this year in *R. v. A.E.S.P.*, 2022 ONCA 405 (Can.). In that case, the accused was convicted of sexually assaulting his two sisters-in-law (K.H. and S.H.). *Id.* at para. 2. In entering the convictions, the trial judge stated that K.H. and S.H. "had no motivation to make up such a story against the defendant." *Id.* at para. 41.

Despite these comments, and similar ones having been found to be a significant error in *Dindyal*, the Ontario Court of Appeal upheld the convictions. *Id.* It concluded that "it was open to the trial judge to reach that conclusion" because of a number of factors including that "there was nothing to suggest the sisters had any *animus* toward the appellant, anything to gain from revealing the assaults to the police, or any other reason to fabricate their story." *Id.* at para. 41.

The Ontario Court of Appeal referred to *Gerrard* and concluded that it would "defer to the trial judge's assessment" of credibility:

> The trial judge did not move directly from a finding that the sisters had no motive to a determination that the sisters were credible, or that the appellant was guilty. Nor did the trial judge reverse the burden of proof and look to the appellant to provide evidence of a motive to fabricate. Ultimately, the trial judge considered the absence of any apparent motive to fabricate as one consideration to be balanced with others in assessing the credibility of the sisters. Credibility assessments fall four square within the purview of the trial judge. We defer to the trial judge's assessment.

A.E.S.P., 2022 ONCA 405 at para. 42. This decision cannot be reconciled with *Dindyal*. In my view, it suggests a backing away from the more absolute approach taken in *Dindyal* to one that concentrates on substance. Thus, the Ontario Court of Appeal's comments concerning the trial judge not having reversed the onus and not having leaped from an absence of evidence to a positive credibility assessment. Unfortunately, the Ontario Court of Appeal reverted, in the last portion of the above paragraph, to stating that the absence of evidence of an apparent motive to fabricate being "one consideration." Once again, however, the Ontario Court of Appeal refers to this principle but does not explain it.

"... the witness's credibility is not enhanced by the absence of proof of such a motive [to lie], but neither is it diminished."

More recently, the British Columbia Court of Appeal considered how trial judges are to consider the absence of evidence of an apparent motive to fabricate in assessing a witness's credibility.

R. V. DAVIES

In *R. v. Davies*, 2022 BCCA 172, para. 1 (Can.), the accused was convicted of the offence of sexual assault. In convicting the accused, the trial judge said that she "found the complainant to have testified 'in a forthright manner and did not exaggerate.' She noted that the complainant 'had no motive to fabricate these events.'" *Id.* at para. 35.

In upholding the conviction, the British Columbia Court of Appeal concentrated on what I would suggest is the crucial issue. It noted that "nothing in the reasons for judgment demonstrates the judge placed an onus on Mr. Davies to explain why the complainant fabricated her allegations." *Id.* at para. 81.

Has the Supreme Court of Canada's recent decision in *Gerrard* altered this jurisprudence?

R. V. GERRARD

In *Gerrard*, the accused was convicted of a number of offences involving violence against an intimate partner (Ms. Day). 2021 NSCA 59, para. 1 (Can.). At his trial, the accused argued that the complainant had a motive to falsely implicate him (she had allegedly threatened to "ruin his life" because of issues in their relationship). *Id.* at para. 22. In convicting the accused, the trial judge stated:

> There's no evidence before me that she's [the complainant] motivated to lie or made previous false claims. *Id.* at para. 25.

On appeal from conviction, the accused argued that the trial judge erred in assessing the complainant's credibility based upon an apparent lack of a motive to lie. The convictions were upheld by a majority of the Nova Scotia Court of Appeal. *Id.* at para. 75.

The majority of the Court of Appeal agreed that it constitutes an error for a trial judge to rely on an absence of evidence to establish a motive to lie in assessing the credibility of a witness. However, the Court concluded that this did not occur in this case. It held that an error did not occur because "the allegation of motive to lie was squarely before the judge as a result of Mr. Ger-

". . . the absence of evidence of a motive to lie is not the same as proof of a lack of a motive to lie, though it may be relevant in assessing credibility . . ."

rard's testimony that Ms. Day made things up to get back at him—to fulfill Ms. Day's threat to keep him away from their young daughter and to punish him for telling lies about her to her older daughter. The judge had to deal with this evidence." *Gerrard*, 2021 NSCA 59 at para. 52.

Yes, but that was not the point. The accused was arguing that the trial judge took the absence of evidence establishing a motive to lie and used it to bolster the complainant's credibility.

In a dissenting opinion, Justice Bryson recognized this point by indicating that the flaw in in the trial judge's reasons was that she used the lack of evidence of apparent motive to lie "to conclude that Ms. Day's evidence was reliable," thus "treating negative factors—factors that at best did not diminish the complainant's credibility—as positive by turning them into reasons to conclude that the complainant was credible and reliable." *Gerrard*, 2021 NSCA 59 at paras. 79, 82.

The accused appealed to the Supreme Court of Canada. The Supreme Court rendered a brief oral judgment in which it considered the impact of the absence of evidence establishing a motive to lie.

THE SUPREME COURT OF CANADA'S DECISION

The Supreme Court noted that at his trial, the accused had argued that "the complainant had long threatened to report him to the police and finally followed through with this threat by fabricating allegations because he made a derogatory comment about her to her daughter. Put another way, he alleged that she had a motive to lie and was, in fact, lying." R v. Gerrard, 2022 SCC 13 (Can.).

In dismissing this ground of appeal, the Supreme Court stated as follows:

> [W]e do not accept Mr. Gerrard's submission that the trial judge made improper credibility findings about the complainant regarding lack of motive to lie . . . . The trial judge properly considered each of these factors in assessing the complainant's credibility as a direct response to Mr. Gerrard's defence at trial, namely that the complainant had long threatened to report him to the police and finally followed through with this threat by fabricating allegations because he made a derogatory comment about her to her daughter. Put another way, he alleged that she had a motive to lie and was, in fact, lying. Credibility findings are owed significant deference on appeal . . . . The trial judge's reasons were responsive to live issues at trial — raised by Mr. Gerrard — and reveal no error justifying intervention.
>
> Lack of evidence of a complainant's motive to lie may be relevant in assessing credibility, particularly where the suggestion is raised by the defence . . . . Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility — neither is conclusive in a credibility analysis; and (2) the burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations. *Id.*

It is unfortunate that the Supreme Court issued a brief oral judgment on such an important issue, but it appears that the Supreme Court of Canada is saying that:

> (1) the absence of evidence of a motive to lie is not the same as proof of a lack of motive to lie, though it may be relevant in assessing credibility; and
>
> (2) trial judges must not effectively reverse the burden of proof by requiring the accused to establish that the witness has a motive to lie or to explain why the witness would make a false complaint.

On the latter issue, it is well established "an accused person cannot be called upon to explain or theorize as to why a complainant would make an allegation against him . . . . The rationales for such a prohibition are multiple, though most often it is said that this questioning is impermissible because it undermines the presumption of innocence by shifting the onus of proof to the accused." *See* R. v. Bernier, 2021 ABCA 27, paras 19, 21 (Can.).

However, if the existence of embellishment or proof of a motive to lie can negatively impact a witness's credibility, it appears counterintuitive to ignore the opposite: the absence of evidence of a motive to lie or a lack of embellishment. The former would, for instance, appear to be a basis to conclude that a witness is not exaggerating, a basis generally for a positive finding in relation to credibility.

SUMMARY/MOTIVE TO LIE

In cases in which an alleged motive to lie is raised, there are generally four scenarios which can unfold:

1. The witness accepts that they have a motive to lie about the accused;
2. The witness denies that they have a motive to lie about the accused, but the evidence establishes the existence of the motive;
3. The witness denies that they have a motive to lie about the accused and though the evidence does not establish the existence of the motive, there is a sufficient evidentiary basis for the trial judge to consider whether the motive exits; and
4. The witness denies that they have a motive to lie about the accused and the evidence fails to establish the

existence of the motive or an evidentiary basis upon which the allegation can be considered.

I would suggest the following when an issue of motive to fabricate a complaint arises:

(1) when such an allegation is made and proven, it is significant evidence that must be considered, *see* R. v. S.R., 2022 ONCA 192, para. 30 (Can.);
(2) when such an allegation is made but not proven, a trial judge should state that it has not been proven and as a result the suggested motive to fabricate will not be considered in assessing that witness's reliability; and
(3) when such an allegation is made, and though not proven, an evidentiary basis upon which an inference could be drawn has been presented, this inference must be weighed and considered by the trial judge in the context of the case as a whole.

Thus, proof of a motive to lie is a significant factor in assessing a witness's evidence, but it does not necessarily prove that the witness lied. An unproven suggestion that a witness had a motive to lie is a neutral factor that neither enhances nor diminishes a witness's credibility. If a motive to lie is suggested, any evidence in support of the suggestion must be assessed. Finally, and most importantly, when a motive to lie is rejected or not proven, this does not enhance the general credibility of the witness. It cannot be used as a makeweight or as a means of switching the onus of proof to the accused.

What about the second issue raised at the beginning of this column: the impact of embellishment or a lack of embellishment on the credibility of a witness?

LACK OF EMBELLISHMENT OR LACK THEROF

If a trial judge concludes that a witness has exaggerated or embellished their testimony, this will normally have a negative impact upon their credibility. Embellishment has been described a constituting "evidence of incredibility." *See* R. v. A.M., 2022 ONCJ 205, para. 71 (Can.).

However, what if the trial judge finds no indication of exaggeration or embellishment? Does this enhance the witness's credibility? It has been held that "it is improper for a trial judge to infer that a more modest sexual assault allegation is more likely to be true because a false allegation is likely to be serious." *See* R. v. J.L., 2022 ONCA 271, para. 12 (Can.).

THE APPLICABLE PRINCIPLES

In *R. v. Kiss*, 2018 ONCA 184, para. 1 (Can.), the accused was convicted of the offence of sexual assault (in relation to K.S.). In entering the conviction, the trial judge indicated that he found no examples of the complainant having exaggerated or embellished her testimony. *Id.* at para. 51. On appeal, the accused argued that "the trial judge erred in law by using the lack of exaggeration or embellishment to enhance K.S.'s credibility." *Id.*

The appeal was dismissed. The Ontario Court of Appeal indicated that the trial judge "would have erred if he treated the absence of embellishment as adding to the credibility of K.S.'s testimony. It is wrong to reason that because an allegation could have been worse, it is more likely to be true.…While identified exaggeration or embellishment is evidence of incredibility, the apparent absence of exaggeration or embellishment is not proof of credibility. This is because both truthful and dishonest accounts can appear to be without exaggeration or embellishment." *Kiss*, 2018 ONCA 184 at para. 52.

" . . . While identified exaggeration or embellishment is evidence of incredibility, the apparent absence of [it] is not proof of credibility."

However, the Court of Appeal concluded that "there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. As long as it is not being used as a makeweight in favour of credibility, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination" The Court of Appeal noted that these "are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible." *Id.* at para. 53.

Subsequently in *R. v. Alisaleh*, 2020 ONCA 597, para. 1 (Can.), the accused was also convicted of the offence of sexual assault. The Ontario Court of Appeal noted that in "addressing why she believed the complainant, the trial judge explained: '[t]here are two important factors that I find enhance [the complainant's] credibility'. One of those two important factors pertained to the view that the complainant had not embellished during her evidence. As the trial judge explained, although every allegation of sexual assault is serious the allegations made by the complainant were 'relatively modest' and that the complainant 'gave a measured description of what took place between them without apparent exaggeration.' The trial judge also emphasized that the complainant's description of the assault was 'understated.'" *Id.* at para. 15.

The Court of Appeal stated once again that "it is not an error to simply note that there is an absence of embellishment in the complainant's testimony. This court has held that the presence of embellishment can be a basis to find the complainant incredible, and there is nothing wrong with noting the absence of something that could have diminished credibility. However, it is wrong to reason that because an allegation could have been worse, it is more likely to be true." *Alisaleh*, 2020 ONCA 5970 at para. 16.

However, the Court of Appeal concluded that a new trial was required. It held that "[i]n this case, the trial judge was not simply noting that the complainant's evidence did not suffer from a problem of exaggeration or embellishment that diminished its weight in response to a defence argument that the complainant had embellished her allegations. Rather, the lack of embellishment was specifically noted as an 'important' factor used to 'enhance' the complainant's credibility." *Alisaleh*, 2020 ONCA 5970 at para. 17.

More recently, in *R. v. J.B.*, 2022 ONCA 214, para. 13 (Can.), the accused, in appealing from conviction, argued that "the trial judge improperly used the absence of exaggeration to bolster J.D.'s evidence." In convicting the accused, the trial judge had stated:

". . . lack of embellishment is not an indicator that a witness is more likely telling the truth because both truthful and dishonest accounts can be both exaggerated and embellished."

At no time did [J.D.] appear to embellish or exaggerate the sexual abuse incidents against her by J.B. that could reflect a carelessness for the truth when testifying under oath. In fact, she made it clear when first describing the incidents to her stepmother and the police that there was no rape by him or touching by him on her breasts or vagina. *Id.*

On appeal, the Court of Appeal, in upholding the conviction, held that "the trial judge was not using the absence of exaggeration in J.D.'s evidence or her lack of motive to lie as a 'makeweight in favour of credibility'. It was merely one of the explanations he gave for why he did not find the complainant to be incredible . . . . He was not reasoning that, because the allegations could have been worse, they were more likely to be true." *Id.* at para. 17.

R. V. GERRARD:

At the Court of Appeal level of *Gerrard*, it was held that it constitutes an error to use "the absence of embellishment" as a factor that enhances a witness's credibility. 2021 NSCA 59 at para. 53. However, the Nova Scotia Court of Appeal had held that "it is permissible for a judge to consider the absence of embellishment by a witness in determining if his or her evidence is not credible, but not as a makeweight in favour of the credibility of his or her evidence." *Id.*

This issue was addressed on subsequent appeal by the Supreme Court of Canada in *Gerrard,* 2022 SCC 13 at para. 5. The Court stated that a lack of embellishment has a limited role in assessing a witness's credibility:

> Lack of embellishment may also be relevant in assessing a complainant's credibility and often arises in response to suggestions that the complainant has a motive to lie. But, unlike absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, lack of embellishment is not an indicator that a witness is more likely telling the truth because both truthful and dishonest accounts can be free of exaggeration or embellishment. Lack of embellishment cannot be used to bolster the complainant's credibility — it simply does not weigh against it. It may, however, be considered as a factor in assessing whether or not the witness had a motive to lie."*Id.*

It is not clear exactly what the last portion of this statement means, but it appears that the Supreme Court of Canada is saying that lack of embellishment is a non-factor in assessing credibility, though it can be considered as a factor in assessing whether or not the witness had a motive to lie. This would appear to suggest that if the accused alleges that a complainant has a motive to lie, a lack of exaggeration or embellishment can be considered. The difficulty, however, is that the Supreme Court has also suggested that "both truthful and dishonest accounts can be free of exaggeration or embellishment." *Id.* Thus, a lack of embellishment does not appear to support the proposition that the witness did not have a motive to lie. At best, it would appear to be a factor in concluding that an alleged motive put forward has not been proven and thus will not be considered in assessing the witness's overall credibility.

SUMMARY/EMBELLISHMENT

The Supreme Court's decision in *Gerrard* makes it clear that a Canadian trial judge must not fall into the trap of seeing a lack of apparent embellishment as a factor that enhances a witness's credibility. However, it can be considered when raised by the defence. As with suggestions of a motive to lie, the key is not to jump from a rejection of such an argument to a positive finding of credibility. In other words, the rejection of an allegation of embellishment does not enhance a witness's credibility.

CONCLUSION

In conclusion, as can be seen, the issues considered here have consistently been raised in sexual offences. This may be because credibility of the complainant is often an important issue in such cases and because there is an undeniable attraction to asking: "Why would the complainant make this up?"

However, trial judges must refrain from asking themselves this question because asking it leads a trial judge on to a path of forbidden reasoning: an inability by the accused to explain why a complainant would make a false allegation of sexual assault means the complainant's credibility is enhanced, i.e., she or he must be telling the truth.

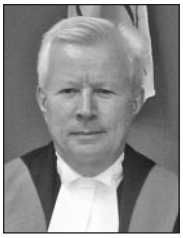
Obviously, this reverses the onus of proof and it puts an accused person in an impossible position: it is simply not always possible to know and therefore impossible to prove what the motivation of a specific witness consists of. Thus, in *Swain*, in overturning a conviction, the British Columbia Court of Appeal pointed out that a trial judge erred because the accused's "failure to offer 'some rationale or motivation' for why the complainant would have fabricated her version of events weighed significantly in the trial judge's credibility assessment."[2] 2021 BCCA 207 at para. 57.

In *R. v. Musara*, 2022 ONSC 2835 (Can.), Justice Nakatsursu adopted an approach that other judges might consider following.

2. In Glassie v. R [2018] NZCA 308 at [42] (N.Z.), the New Zealand Court of Appeal indicated that "[i]t is well settled in New Zealand that it is permissible for prosecutors to question defendants (should they choose to give evidence) on a complainant's motive to lie and to close on the subject. But prosecutors must be moderate in their treatment of the subject. The risk that must be guarded against is the prospect that raising the absence of evidence of a complainant's motive to lie will subtly shift the onus of proof in the minds of the jury and lead them to convict unless the defendant can offer a plausible reason for why the complainant must be lying." Similarly, the High Court of Australia has cautioned against asking "a person accused of sexual offences, in cross-examination, whether that person could offer any reason or motive for the complainant to lie," because it diminishes "the standard of proof by strengthening the complainant's credibility. As the plurality in *Palmer* pointed out, absence of proof of a motive for the complainant to lie about the

In *Musara*, Justice Nakatsuru considered that there was a lack of evidence to establish that the complainant (S.D.) had a motive to lie, but instead of using this as a general makeweight, he indicated that "[t]his adds nothing to the proof of the prosecution case. It proves nothing nor does it *per se* support S.D.'s credibility. There is no onus on the defence to prove a lack of motive. I just refer to motive to assess the defence argument about a potential motive to lie. Motive, or lack of a motive, is just one factor in the assessment of credibility.…Here, I do not find any motives that prevent me from finding S.D. credible." 2022 ONSC 2835 at para. 29.

This is an approach that has much to commend it because it does not overuse the apparent lack of evidence, but uses it in a proper manner: it refutes the specific allegation of a motive to fabricate leaving the rest of the evidence presented to be assessed in the normal manner.



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incident in issue 'is entirely neutral' and, as a result, the fact that the accused can point to no reason for the complainant to lie is 'generally irrelevant'. To introduce an inquiry into why would the complainant lie would focus the jury's attention on irrelevancies by inviting the jury to accept the complainant's evidence unless there were some demonstrated motive to lie. That would deny that the trial is an accusatorial process in which the prosecution bears the onus of proving the offence beyond reasonable doubt." *See* Hargraves v The Queen [2011] HCA 44, para. 44 (Austl.).

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