**File No. CR-2130000410**

**SUPERIOR COURT OF JUSTICE**
**(Toronto Region)**

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**Crown**

**– And –**

**HANWOOL HWANG**

**Accused**

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**ENDORSEMENTS AND PRETRIAL RULINGS**

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**A. Justice Code s.278.92 Endorsement - July 22, 2022**

**B. Justice Code Reasons for Judgment on a Pre-Trial Motion – May 12, 2023**

# TAB A

**CITATION:** R. v. Hwang, 2022 ONSC 4323
**COURT FILE NO.:** CR-21-30000410-0000
**DATE:** 20220722

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| HER MAJESTY THE QUEEN | ) | *Sylvana Capogreco* and *Katrina Kahler*, |
| Respondent | ) | Counsel for the Crown Respondent |
| **– and –** | ) | |
| | ) | |
| HANWOOL HWANG | ) | *Robert Geurts* and *James Gilbert*, Counsel for |
| Applicant | ) | the Applicant |
| | ) | |
| | ) | *Kelley Bryan*, Counsel for the Complainant |
| | ) | |
| | ) | |
| | ) | |
| | ) | **HEARD: June 29 and July 22, 2022** |

**M.A. CODE J.**

**ENDORSEMENT**

[1] The Applicant Hanwool Hwang is awaiting trial in this Court on a three count Indictment alleging sexual assault (s. 271), surreptitiously making a visual recording of sexual activity (s. 162), and administering a drug to assist in an indictable offence (s. 246). The trial is scheduled to proceed on October 11, 2022. The election was for trial by jury.

[2] I conducted a JPT in this matter last summer on July 19, 2021. I ordered that one pre-trial motion was to proceed well in advance of trial, pursuant to s. 278.92, in order to settle issues relating to certain video tapes that were in the possession of the accused Hwang and that allegedly depict the very offences charged in the Indictment. The parties brought on a further JPT before me on June 23, 2022, due to difficulties in scheduling the s. 278.92 motion. I ordered that the motion was to proceed before me on June 29, 2022. Counsel met the short filing deadlines that I set and the Motion proceeded as scheduled.

[3] The facts of the case, in brief summary, are that Hwang and the complainant J.N. knew each other and they agreed to meet at a club in downtown Toronto on the evening of July 11, 2019. Hwang had ordered "bottle service" and he mixed their drinks. It appears that J.N. had a number of drinks. At some point, she was undoubtedly rendered unconscious. Video surveillance at a hotel in Scarborough shows Hwang obtaining a room at the front desk at about 2:30 a.m. on the night in question. He then apparently waved to a taxi driver who was in front of the hotel. At this point, the

taxi driver entered the hotel, carrying the unconscious J.N. over his shoulder. Hwang and the taxi driver entered the hotel elevator at 2:38 a.m., and J.N. was placed on the floor of the elevator. At 2:39 a.m., the elevator arrived at the 12th floor of the hotel. Hwang and the taxi driver can be seen on the video surveillance literally dragging J.N. out of the elevator, with each man holding one of her arms. There is no dispute that J.N. was completely unconscious at this point.

[4] J.N.'s last memory of events that night was having several drinks at the club, not feeling well, and Hwang saying that he needed to get her home. She has no recollection of events at the Scarborough hotel until she awoke, fully dressed, at about 10:30 a.m. the next morning, that is, on July 12, 2019. Hwang was not in the hotel room. There were text message exchanges between them, including one in which he sent her a video clip depicting the two of them engaged in sexual intercourse. Hwang sent her this video clip after J.N. had asked, "Can u tell me what happen??"

[5] J.N. went to the hospital that same day and was examined by a nurse. A urine sample was taken and, upon analysis, it provided evidence of ketamine consumption. The effects of ketamine will be the subject of expert opinion evidence at trial.

[6] The defence is in possession of the one tape that was sent to the complainant on July 12, as well as four additional video tapes allegedly depicting events that night at the hotel. The Crown will introduce the one tape sent to J.N., in order to prove the Count Two s. 162 offence (surreptitiously making a video recording of explicit sexual activity).

[7] On the present Motion, the defence has disclosed the four additional tapes in its possession and seeks a ruling that they are admissible at trial, pursuant to s. 278.92. The Crown and the complainant's counsel have viewed the five tapes in the possession of the defence. All counsel have made a number of responsible admissions about the contents of the five tapes, as follows:

- all counsel agree that the five tapes are "records" within the meaning of s. 278.1 and that a ruling is required pursuant to s. 278.92, before the defence can use the tapes at trial;
- all counsel agree that the tapes depict the very subject matter of the present charges and, as a result, s. 276 has no application;
- all counsel agree that the meta-data associated with the five video files indicates that they were created on July 12, 2019, between 3:15 a.m. and 3:38 a.m.;
- all counsel agree that the tapes contain both audio and video, that the complainant is conscious at all times, and that she and Hwang are engaged in various sexual acts;
- all counsel agree that the total length of the five tapes is two minutes and 12 seconds.

[8] The s. 278.92 (2) test for admissibility is that the proffered evidence must have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice," based on a consideration of the nine factors listed in s. 278.92(3).

[9] I was satisfied, after hearing submissions on June 29, 2022, that the five short video clips have "significant probative value" for a number of reasons. First, the tapes show that J.N. was conscious between 3:15 a.m. and 3:48 a.m. This is important to the defence because J.N. was

clearly not conscious about 35 minutes earlier, when she was dragged out of the elevator at 2:39 a.m. Whether the complainant's words and conduct, as depicted in the five tapes, could indicate that she was or was not consenting to the sexual activities will depend to some extent on the experts' assessment of the tapes and their evidence at trial about the effects of ketamine. Second, the five tapes assist in inferring how Hwang was tape recording the sexual activities, whether J.N. would likely have seen that he was recording these activities, and whether Hwang likely had the requisite *mens rea* for the Count Two s. 162 offence in the circumstances depicted in the tapes. Third, the tapes provide important evidence as to the timing of the sexual activities. This is likely to be an important issue at trial because J.N. was clearly unconscious when she arrived on the 12th floor of the hotel at 2:39 a.m. Determining whether the sexual activity in the hotel room was close in time to 2:39 a.m., will assist in assessing J.N.'s capacity to consent and whether Hwang could reasonably have believed that she was consenting. The tapes provide significant assistance on this issue of timing. Fourth, the activities depicted on the five tapes evolve and change to some extent, between the first tape at 3:15 a.m. and the fifth tape at 3:38 a.m. In particular, the sexual activities evolve from vaginal intercourse to fellatio and N.J.'s clothing changes. She is topless during the first four tapes (with her skirt pulled up) but in the fifth tape she is wearing a brassiere. These changes in dress and in the nature and complexity of the activities may assist in assessing N.J.'s level of consciousness. Again, the experts would likely be assisted by viewing the tapes, when assessing this issue.

[10] Weighing the above four reasons together cumulatively, I was satisfied that the tapes have "significant probative value" in relation to the trial issues. On the other hand, I was also satisfied that there is a significant risk to the complainant's privacy and dignity. The tapes disclose the most intimate and private conduct imaginable. In addition, there is a real issue as to whether J.N. was aware of the tape recording, or was sufficiently conscious due to the effects of alcohol and ketamine to consent to the tape recording, or to consent to the sexual activities depicted. The humiliation and affront to privacy and dignity, resulting from these tapes being played in a public court room in front of 12 to 14 lay jurors, at least five courtroom staff, three or four lawyers, a judge, and an unknown number of spectators in the public gallery, would be enormous. Being cross-examined on the tapes in this public setting would increase the humiliation and affront to privacy and dignity. As a result, admitting the tapes in evidence could cause substantial damage to "society's interest in encouraging the reporting of sexual assault offences" and to "the complainant's personal dignity and right to privacy". These are two important factors in s. 278.92(3).

[11] Given the above very close and difficult balance between probative value and prejudice to the proper administration of justice, I asked all counsel at the initial June 29, 2022 hearing of the motion, to consider various ways to reduce and limit the prejudice. In particular, I suggested seven possible remedies or limits on the evidence that could be imposed and that could tip the balance in favour of admissibility. I asked the Crown, the defence, and complainant's counsel to consider the following:

i) First, whether a re-election to trial by judge alone was possible. In this way, 12 to 14 additional observers of the tapes would be eliminated. In addition, the number of court staff present when the tapes are played could be reduced to two (the Registrar and the Court Reporter). Finally, the number of times that the tapes would be played in open court would be reduced because there would be no need to play

them to a jury, and the judge could view them privately in chambers once they were admitted in evidence as exhibits at trial;

ii) Second, whether the parties would consent to an order closing the court room to the public whenever there was any legitimate need to play the tapes in open court;

iii) Third, whether an agreed statement of fact could be negotiated between counsel admitting the tapes in evidence, admitting the time, place, and date when the tapes were created, admitting that the tapes depict Hwang and J.N. and they overlap with the three offences charged, and attaching the tapes as exhibits. In this way, the defence would not need to prove the authenticity of the tapes, and there would be no need to play them to J.N. in order to question her about the who, what, and when that is depicted in the tapes;

iv) Fourth, whether the parties would agree to allowing the complainant J.N. to view the tapes in privacy, out of court, in order to see whether they assist in refreshing her memory. Once again, this would eliminate any need to have J.N. review the tapes in a public court room, in order to see whether they refresh her memory;

v) Fifth, whether the parties would agree to restrict any examination and cross-examination of the complainant J.N. about the tapes to two issues: first, whether she had privately viewed the tapes and whether they had assisted in refreshing her memory; and second, having now viewed the tapes, whether she thought it possible that she did consent to the sexual activity but simply has no memory of it. There would have to be some flexibility in allowing follow-up questions in these two areas. This could be left to the discretion of the trial judge;

vi) Sixth, whether the parties would consent to a sealing order preventing access to the tapes, once they were marked as exhibits; and

vii) Seventh, whether the parties would consent to an appropriate undertaking by counsel and any expert retained by the parties, to the effect that the tapes would not be copied, disseminated, or removed from counsel's or the expert's custody and control, and they would be returned or disposed of in some fashion after the trial. I am advised that there is already an appropriate undertaking in place in relation to the one tape that the Crown possessed and disclosed.

[12] There was broad consensus at the June 29th hearing, amongst all counsel, concerning the above seven proposed remedies or limits on use of the tapes. Counsel for the Crown and for the complainant indicated that if agreement could be reached concerning these seven proposals, then such an agreement could lead to a consent order to admit the evidence pursuant to s. 278.92. Counsel requested additional time to discuss and clarify the above proposals. In particular, defence counsel needed time to discuss a re-election with his client. As a result, the s. 278.92 motion was adjourned for a month to July 22, 2022.

[13] During this adjournment period, the Supreme Court released its decision in *R. v. J.J.* on June 30, 2022. That decision held, by a 6-3 majority, that the legislative scheme surrounding s. 278.92

is constitutional. The reasons of the majority also provided considerable guidance in how to apply the legislation. See: *R. v. J.J.*, 2022 SCC 28.

[14] A number of points emerging from *J.J.* are particularly applicable in the present case. On a purely procedural level, the Court noted that the legislation contemplates a two stage hearing. At the first stage, the complainant does not yet have standing and the judge only determines whether the evidence is "capable of being admissible" (s. 278.93). At the second stage, the complainant has standing and the judge then determines whether the evidence "is admissible" (s. 278.94). I collapsed these two separate stages into a single hearing on June 29th for a number of reasons. First, there was a need for expedition because the initial date set for the motion had been missed and the trial date was now looming. Second, the calendars of three separate parties had to be accommodated, which caused a substantial risk of further delay. And third, it was fairly obvious that the first stage test would easily be met and that responsible counsel would likely concede it. In this regard, the majority reasons of Wagner C.J.C. and Moldaver J. made it clear that "the presiding judge retains significant discretion to determine the appropriate procedure in each case". See: *R. v. J.J.*, *supra* at para. 90.

[15] In terms of the substantive law arising from this new legislative scheme, the majority reasons in *J.J.* made three points that are particularly applicable in the present case. First of all, the majority held that the focus of the legislation is on the protection of "intimate and highly personal" information. There is no question that the images in the five tapes in the present case fall squarely within these terms, as described by Wagner C.J.C. and Moldaver J. (*R. v. J.J.*, *supra* at paras. 53-4):

> In our view, s. 278.1 presupposes that a certain level of privacy must be engaged; namely, this provision concerns only records that could cause "potential prejudice to the complainant's personal dignity". These factors suggest that the scheme is not intended to catch more mundane information, even if such information is communicated privately. Moreover, given the accused's right to make full answer and defence, mere discomfort associated with lesser intrusions of privacy will generally be tolerated. In this context, a complainant's privacy in open court "will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self" (*Sherman Estate*, at para. 74).
>
> In light of Parliament's intent, the relevant jurisprudence and the statutory scheme, a non-enumerated record will fall within the definition of s. 278.1 if it contains information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity. As previously stated, this interpretation is specific to the record screening regime. To determine whether a record contains such information, a presiding judge should consider both the content and context of the record. [Emphasis added].

[16] The second point of substance to note, emerging from *J.J.*, is that "surreptitiously" creating a record makes it "more likely" that the proffered evidence will engage the protective purposes of

the legislation. In this regard, Wagner C.J.C. and Moldaver J. stated the following (*R. v. J.J.*, *supra* at para. 60):

> Third, courts may consider where the record was shared and how it was created or obtained. Records produced in the private domain (e.g., one-on-one communications between the complainant and accused) may attract an enhanced reasonable expectation of privacy; records created or obtained in the public domain, where they could be accessed by multiple people or the general public (e.g., social media or news media), are less likely to attract a reasonable expectation of privacy. ... Similarly, the fact that a record was created or obtained surreptitiously by the accused, without the complainant's knowledge, would also be relevant as part of the contextual analysis. Such a record would be more likely to attract a reasonable expectation of privacy. [Emphasis added].

[17] The third point of substance to note, emerging from *J.J.*, is that records of an "explicit sexual nature", that depict the alleged offence, fall outside s. 276 but fall within s. 278.1. In this regard, Wagner C.J.C. and Moldaver J. stated the following (*R. v. J.J.*, *supra* at paras. 65-7):

> One type of non-enumerated record that will often engage a reasonable expectation of privacy is a record of an explicit sexual nature that is not covered by s. 276 (for example, explicit communications, videos or photographs of a sexual nature relating to the subject matter of the charge). Complainants may have a reasonable expectation of privacy in these types of records, given the dignity concerns that can arise.
>
> It is helpful to clarify why evidence of an explicit sexual nature that relates to the subject matter of the charge may be caught by the record screening regime even if it is not s. 276 evidence. In addition to creating the record screening regime for private records, Bill C-51 also added s. 276(4), which specifies that sexual activity "includes any communication made for a sexual purpose or whose content is of a sexual nature". This provision applies to sexual activity *other than* the sexual activity that forms the subject matter of the charge (s. 276(2)). Any communication regarding such sexual activity would fall within the s. 276 regime.
>
> Accordingly, the only records of an explicit sexual nature that could be subject to the record screening regime outside of the s. 276 context would be records pertaining to the complainant, in the possession or control of the accused, that relate to the sexual activity which forms the subject matter of the charge. For clarity, "subject matter of the charge" refers to the components of the *actus reus* of the specific charge that the Crown must prove at trial. These types of records are likely to engage the complainant's reasonable expectation of privacy under the content and context framework described above. [Italics in the original, underlining added for emphasis].

[18] In light of the above guidance from *J.J.*, I was reinforced in my original view that the five tapes have "significant probative value" but they would also cause substantial damage to the privacy and dignity interests that s. 278.92 protects. As a result, the five tapes could only become admissible if significant steps were taken by the parties to reduce and limit the prejudice. It was in this context that the hearing of the motion resumed before me on July 22, 2022.

[19] When the hearing of the motion resumed on July 22, 2022, counsel reaffirmed their broad agreement with the seven suggested ways of limiting prejudice to the complainant's privacy and dignity. There were only two issues on which counsel requested some further assistance from the Court. First, the drafts of an agreed statement of fact that had been exchanged between counsel became the subject of some discussion and negotiation in open court. Second, the accused requested further time with counsel in order to discuss a re-election. I recessed court to allow counsel and the accused time to resolve these two issues. Upon resuming in open court, the agreed statement of fact was finalized and signed by counsel, and the accused Hwang re-elected trial by judge alone. I reviewed the other five proposed ways of reducing prejudice to J.N.'s privacy and dignity, as set out above at para. 11. Counsel confirmed their agreement with all of these proposals.

[20] In light of the above developments, I am satisfied that the five video tapes are admissible. They have "significant probative value", for the reasons explained above (at para. 9), and counsel have substantially reduced the prejudice to the complainant's privacy and dignity by agreeing to the seven proposed limits on the use of the evidence set out above (at para. 11). As a result, the test for admissibility of the evidence set out in s. 278.92 has been met, subject to the terms and limits set out above in para. 11.

[21] If counsel need to reappear before me in relation to any further case management issues, prior to trial, I will make myself available on short notice. I commend all counsel for the responsible way in which they have approached this difficult and sensitive motion.

M.A. Code J.

M.A. Code J.

**Released: July 22, 2022**

**CITATION:** R. v. Hwang, 2022 ONSC 4323
**COURT FILE NO.:** CR-21-30000410-0000
**DATE:** 20220722

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

HER MAJESTY THE QUEEN

Respondent

**– and –**

HANWOOL HWANG

Applicant

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**ENDORSEMENT**

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M.A. Code J.

**Released:** July 22, 2022

# TAB B

**CITATION:** R. v. Hwang, 2023 ONSC 2897
**COURT FILE NO.:** CR-21-30000410
**DATE:** 20230512

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| HIS MAJESTY THE KING | ) | *Jake Humphrey*, Counsel for the Crown |
| | ) | |
| **– and –** | ) | |
| | ) | |
| HANWOOL HWANG | ) | *Robert Geurts* and *James Gilbert*, Counsel for Hanwool Hwang |
| Accused | ) | |
| | ) | |
| | ) | |
| | ) | **HEARD: May 9, 2023** |
| | ) | |

**M.A. CODE J.**

## REASONS FOR JUDGEMENT ON A PRE-TRIAL MOTION

## A. HISTORY OF THE PROCEEDINGS

[1] The accused Hanwool Hwang (hereinafter Hwang) is presently awaiting trial in this Court on an Indictment alleging three offences: sexual assault (s. 271); surreptitiously making a visual recording of sexual activity (s. 162); and administering a drug to assist in an indictable offence (s. 246). The trial is scheduled to proceed in about two weeks time, on May 23, 2023. The three offences are all alleged to have taken place on the evening of July 11, 2019. In other words, the trial is scheduled to proceed almost four years after the relevant events.

[2] The main issue at trial will be whether the complainant JN was sufficiently conscious and aware to give a valid consent to the undoubted sexual activity that occurred with Hwang on the night in question. She had been drinking with Hwang that evening, there is toxicology evidence of ketamine found in her system the next day, and she is depicted in video surveillance at a hotel in a state of apparent unconsciousness shortly before the alleged offences. Hwang had booked a room at the hotel and he is seen in the hotel lobby and elevator with a taxi driver and with JN, who is apparently passed out and is being carried and dragged by the taxi driver and Hwang.

[3] I am not the trial judge in this case. My involvement began on July 19, 2021, when I conducted the first Judicial Pre-Trial (JPT), once the case had arrived in this Court. In particular, I made an order at the JPT that the defence must bring a s. 278.92 Motion well in advance of trial.

That pre-trial Motion related to five video and audio tapes, apparently depicting the alleged sexual assault. The Crown and the complainant JN were already in possession of one of these tapes, which Hwang had admittedly sent to JN shortly after the alleged sexual assault. That tape formed the basis for Count Two which alleges an offence contrary to s. 162. The other four tapes were in the possession of the defence and were subject to the reciprocal disclosure regime set out in s. 278.92. See *R. v. J.J.*, 2022 SCC 28.

[4] The trial date was set for October 11, 2022. The accused's election at this point was trial by jury. The pre-trial Motion concerning the five tapes was scheduled for a date in June 2022 which, as I had ordered, was well in advance of the trial. However, the Motion was never perfected by the defence. On June 7, 2022, Hwang applied to adjourn the October 11, 2022 trial date. The toxicology expert who the defence was instructing and trying to retain had not been provided with a sufficient retainer. He eventually declined to act. In addition, a further retainer was required for a private investigator in order to find and interview certain potential witnesses. On June 7, 2022, my colleague Presser J. heard the adjournment application and denied it. She was critical of the failure of the defence to prepare the case for trial and to provide any satisfactory explanation for Hwang's apparent failure or inability to set aside sufficient funds for the defence. I subsequently reviewed a transcript of Presser J.'s oral reasons and agreed entirely with her analysis of the merits of the adjournment application.

[5] On June 23, 2022, two weeks after the unsuccessful adjournment application, the parties attended before me in chambers for a further JPT. They sought direction concerning the s. 278.92 pre-trial Motion, which I had ordered and which had not yet proceeded. In light of the looming October 11, 2022 trial date, I ordered that the s. 278.92 Motion was to proceed before me on short notice on June 29, 2022. The parties complied with that order and its filing deadlines and the Motion commenced on June 29, 2022. I made certain interim findings about the potential probative value and prejudicial effect of admitting the five tapes into evidence. I also made suggestions to the parties as to how the significant prejudicial effect of admitting the tapes in evidence could be lessened. I gave the parties about three weeks to consider their positions. This early history of the pre-trial Motion is set out in greater detail in my written endorsement, eventually allowing the Motion on certain terms. See *R. v. Hwang*, 2022 ONSC 4323.

[6] When the Motion resumed before me on July 22, 2022, the parties adopted my suggestions as to how the prejudicial effect of admitting the five tapes could be lessened. In particular, they had reached agreement about the time, place, date, and authenticity of the tapes and had signed an Agreed Statement of Fact to this effect. In addition, the accused re-elected trial by judge alone, various orders were made about custody and control of the tapes, and the scope of any questioning of the complainant at trial was agreed to in relation to the five tapes. See *R. v. Hwang*, *supra* at paras. 11 and 18-20. In the result, I ruled that the five tapes were admissible, on certain terms and conditions set out in my written endorsement.

[7] This did not end my pre-trial involvement in the case. On September 6, 2022, just over one month before the October 11, 2022 trial date, Hwang renewed his application seeking to adjourn the trial. I heard that adjournment application. Some progress had been made in finding and interviewing potential defence witnesses and a new toxicology expert had been provided with an initial retainer. In addition, counsel was fully retained for trial. However, further funds were required in order to complete the toxicology expert's work, which included reviewing the Crown

expert's report, examining the five tapes of the alleged sexual assault, and examining the surveillance video from the hotel of the events shortly before the alleged sexual assault. I made a number of interim orders, requiring further steps to be taken in relation to Hwang's financial resources and in relation to management of the pending trial. The adjournment application resumed before me on September 16, 2022. The parties had complied with the various interim orders that I had made and the defence toxicologist was now fully retained. She required a few "weeks" to complete her work. In these circumstances, I granted the adjournment. The earliest date available to the defence was May 23, 2023 and that date was set as the new trial date.

## B. FACTS RELATING TO THE PRESENT PRE-TRIAL MOTION

[8] The case has now come back before me for a fourth time. On April 19, 2023, about one month before the new trial date, the parties attended in my chambers late in the day for another JPT. At that time I was in the process of completing a murder trial with a jury. The parties advised me of a new issue that had arisen. It concerned the admissibility of some relatively complex evidence that had been discovered by the defence. Counsel sought direction as to how best to raise the issue and when to raise it. This new issue was not easy to resolve, given its relative complexity and given the parties' opposing positions. I was not sure as to how best to address the matter and I was in the midst of a serious jury trial. In these circumstances, I ordered the parties to file written records, with the defence raising the issue and the Crown responding to it, and to make a Motion for Directions returnable before me on a date two weeks in advance of the May 23, 2023 trial date. The parties complied with this timetable and filed written materials last week relating to this new issue. I then heard oral argument on May 9, 2023 and reserved judgement.

[9] In brief summary, the Motion concerns the following body of evidence which the defence seeks to adduce:

- When defence counsel were first retained (presumably in 2019), Hwang advised counsel that he first met the complainant JN through her family. Hwang further advised counsel that JN's family – the "N" family – is involved in "serious and organized criminal activity, such as drug importation, kidnappings, and weapons dealing, and have been the subject of homicide investigations." Presumably as a result of the charges involving JN and this family's involvement in serious criminal activity, Hwang advised counsel that he is concerned for his own safety and for his family's safety;

- Hwang went on to advise counsel that he had been introduced to the "N" family through a friend named Dula, who is "a close associate/agent of the complainant's family". This was presumably how Hwang first met JN, although this was not explicitly stated in the materials filed on the Motion. JN's older brother Jimmy is said to be the "boss" of the "N" family;

- Hwang had not spoken to Dula for three years, that is, since JN went to the police and since Hwang was charged with the present offences. Presumably, Hwang had also not spoken to any member of the "N" family;

- Between August 26 and September 9, 2022, Hwang began making efforts to contact Dula by sending text messages to an intermediary named Aboutaha. In these texts, Hwang stated that "it is very urgent" that he be able to contact Dula, and a telephone number was provided where Dula could reach Hwang. The time period of these texts was shortly before the first trial date and before I had granted the adjournment of that first trial date on September 16, 2022. The texts between Hwang and Aboutaha have been disclosed in the materials filed before me;

- On September 9, 2022, Dula phoned Hwang, presumably as a result of Aboutaha giving Hwang's phone number to Dula. Over the ensuing eleven days, there were a number of phone calls and texts between Hwang and Dula. The texts have been produced in the materials filed before me. The phone calls have been summarized in an affidavit that is based on information and belief from Hwang. The affidavit is sworn by a lawyer in defence counsel's office. These text and phone communications between Dula and Hwang culminated in a meeting between them on September 20, 2022. At that meeting, held at a shopping mall in Calgary, they spoke in person. The conversation is summarized in the lawyer's affidavit, once again on the basis of information and belief from Hwang;

- The content or subject matter of the text messages between Hwang and Dula include the following exchanges, which concern Hwang's efforts to speak to Jimmy:

  Hwang: I know you don't want to speak to me and I totally understand. If I could just please ask you to give a message to tatts [Jimmy] for me, it would help out a lot for both sides. I'm just asking for 2 minutes of your time.
  . . .

  Dula: He said soon as u pass the files [money] he will talk to you

  Hwang: I'm just waiting on someone to bring it. Just wait til I actually have it in my hands before we set a time and place. I'd prefer if we could meet at the food court at chinook mall if that is okay with you?

  Did you already give him my #? He doesn't have to talk to me. I just wanted him to have my # just in case we don't get it all done before you go in [to the penitentiary].

  It'll take me a little bit of time to get the remainder too but I can forsure have everything by this month bro 100%. It's just a large amount so I need some time to put it together, you know?
  . . .

  Dula: Ya bro just as long as u pass the first amount you'll be good I'll setup everything for you before I'm gone

  I just wanna show them ur serious

I'll meet u where ever u want

Hwang: Okay perfect. Thank you so much bro. I'm grateful for you and for Jimmy to even give me the opportunity to speak to him. If you need anything or need something done, you tell me right away.

Dula: My word I'm just doing this as a good deed hopefully I get some good karma back for it, but there's only so much I can do bro the rest is on you if you come thru with half the files [money] you have my word I'll resolve this for you, and then you and buddy will talk direct I just wanna show them ur not talking shit

Hwang: Yeah 100% bro, I'm serious. I told you I only have 3 options here. I'd rather we all resolve this and move on with our lives.

Dula: You better send me some canteen when I'm in there bro, and I want a gift when I'm out [of the penitentiary].

. . .

Hwang: Yeah of course, just let me know what pen you end up in. What day are you going in?

- The content or subject matter of the phone calls and the eventual meeting between Hwang and Dula, according to counsel's affidavit on information and belief, is summarized as follows:

> On September 9, 2022 … Mr. HWANG wanted the N brothers to know his side of the story in an attempt to resolve any animosity they had toward him. During their conversation, Mr. HWANG told Dula that he did not sexually assault JN, and that the Courts have video evidence to support this. Dula told Mr. HWANG that he believed him and would help him fix the situation.
>
> On September 15th, 2022, Dula contacted Mr. HWANG to inform him that Jimmy does not believe his narrative. Further, Jimmy told Mr. HWANG that the police told JN that Mr. HWANG had been accused of another sexual assault.
>
> Dula informed Mr. HWANG that she understands the Crown Attorney told JN that it was a "slam dunk" case against him, and Mr. HWANG would be convicted. Dula informed Mr. HWANG that because the N family did not believe Mr. HWANG, the only way of resolving this matter was to pay a sum of ($250 000) two hundred and fifty thousand dollars in exchange a favorable outcome in the criminal proceedings. Mr. HWANG had told our office that this sum is the same quantum of money that Jimmy thinks Mr. HWANG stole from him in the past.

Dula told Mr. HWANG that he had three options: firstly, to be convicted of these criminal allegations, secondly, to go on the run and flee, or lastly, to pay the sum of money demanded. If you go to jail, Jimmy will have you killed. And even if you beat the charges, Jimmy will have you killed. Mr. HWANG and Dula make arrangements to meet up in the food court of the Chinook mall on September 20th 2022 to discuss further.

On September 20th 2022, Mr. HWANG and Dula meet in the food court of the Chinook Mall in Calgary. During the meeting, they shook hands and gave each other a hug and started by making small talk for 10 minutes since it had been 3 years since they last saw each other. The conversation then turns to the extortion. Dula tells Mr. HWANG that he is doing this as a favour and is not profiting from the extortion. He says that the money is going straight to JN and Jimmy is making millions now and Jimmy does not need the money. Dula tells Mr. HWANG that if you give JN the $250 000, then she will not participate your prosecution and you are making it right with her.

Dula told Mr. HWANG that Jimmy was fearful that Mr. HWANG was recording the conversations and that he should be careful.

- Counsel's affidavit, on information and belief, summarized the following basis for believing that JN was to some extent involved in the above communications between Dula and Hwang:

  Mr. HWANG believes that JN was involved with the extortion for at least four reasons:

  a. Dula told Mr. HWANG that he personally spoke to JN twice. The first time to discuss the charges and the second time to speak to her about the $250 000 payment to drop the case.
  b. Dula knew about the other sexual assault allegations and told Mr. HWANG that the police told JN about them.
  c. Dula told Mr. HWANG that JN was recently married and that she wanted to put this behind her.
  d. Dula told Mr. HWANG that JN was talking about commencing a civil suit against the taxi company, the hotel, the nightclub and Mr. HWANG for millions of dollars, but that the $250 000 would suffice.

[10] The relief sought in the present pre-trial motion is a ruling concerning the admissibility of the above body of defence evidence. In particular, defence counsel seeks to put the above evidence to JN in cross-examination. In addition, the defence seeks a ruling that Dula's statements to Hwang are independently admissible under exceptions to the hearsay rule, in the event that JN denies the alleged extortion scheme in cross-examination. The Crown initially opposed the admissibility of the evidence, both through cross-examination of JN and if adduced extrinsically as part of the defence case.

## C. ANALYSIS

[11] In my view, this pre-trial Motion raises at least five distinct issues, as follows:

- The first issue is whether a pre-trial Motion judge should be ruling on admissibility of the evidence in question, or whether that issue should be reserved to the trial judge;
- The second issue is whether there is a "good faith" basis for the proposed cross-examination of JN about the matters discussed between Dula and Hwang (that is, about the alleged extortion scheme);
- The third issue is whether the collateral facts rule prevents the defence from tendering extrinsic proof of the matters discussed between Dula and Hwang, in the event that JN denies knowledge or involvement in these matters;
- The fourth issue is whether the hearsay rule prevents the defence from tendering extrinsic proof of the matters discussed between Dula and Hwang, in the event that JN denies knowledge or involvement in these matters and in the event that the defence does not call Dula as a witness; and
- The fifth issue is whether the power to exclude defence evidence, where its legitimate probative value is substantially outweighed by its prejudicial effects, is a further basis preventing admission of the matters discussed between Dula and Hwang, even if the evidence is not excluded by the collateral facts rule or the hearsay rule.

### (i) The first issue: the role of the pre-trial judge

[12] The parties agree that the issues raised on this Motion had to be the subject of a further JPT. None of these issues had been addressed at the earlier JPTs and Rule 28.04(11), therefore, required a further JPT. At that further JPT, I ordered that a formal written Motion should be filed and heard in open court. The purpose of this Motion, at a minimum, was to give some direction to the parties and some assistance to the trial judge. In addition to giving direction, the defence seeks rulings, at this pre-trial stage, as to the proposed cross-examination of JN and as to the independent admissibility of the discussions between Dula and Hwang. However, the defence is content if I simply offer guidance and assistance to the parties, without purporting to bind the trial judge. The Crown agrees with this latter more modest role of the pre-trial judge, in the particular circumstances of this case.

[13] I have not been formally appointed as "the case management judge" for this matter, pursuant to s. 551.1 of the *Criminal Code*. As a result, I have no power to make binding pre-trial rulings, absent consent from the parties. See, in this regard: LeSage and Code, *Report of the Review of Large and Complex Criminal Case Procedures*, Queen's Printer for Ontario 2008, at pp. 57-70. In addition, the four evidence law issues raised in the present Motion (summarized in para. 11 above) are all related to and depend upon the proposed cross-examination of JN about the discussions between Dula and Hwang. The scope of cross-examination is classically a matter that falls within the trial management power and, for good reason, it is a power that is exercised by the trial judge. See, e.g. *R. v. Samaniego*, 2022 SCC 9 at paras. 19-43.; *R. v. John* (2017), 350 C.C.C.

(3d) 397 at paras. 52-65. Finally, some of the issues raised on the Motion have not yet been fully considered or prepared and they are simply not ready for a binding ruling. This is particularly true of the fourth issue, which relates to the hearsay rule.

[14] For all these reasons, I do not purport to make any binding rulings. These reasons are only intended to guide the parties in their trial preparation and, hopefully, to assist the trial judge.

**(ii) The second issue: the proposed cross-examination of JN**

[15] The Crown was initially concerned that there was no proper basis for cross-examining JN on the discussions between Dula and Hwang that allegedly occurred in September 2022. However, after the defence had filed its Record, and after hearing Mr. Geurts' submissions in court, the Crown conceded that the "good faith" standard for cross-examination on this issue had been met. I agree with the Crown's concession on this point.

[16] The "good faith" test emerged from the Supreme Court's unanimous decision in *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 at paras. 46-52 (S.C.C.) where Major and Fish JJ. stated:

> This appeal concerns the constraint on cross-examination arising from the ethical and legal duties of counsel when they allude in their questions to disputed and unproven facts. Is a good faith basis sufficient or is counsel bound, as the trial judge held in this case, to provide an evidentiary foundation for the assertion?
>
> Unlike the trial judge, and with respect, we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it *otherwise than by cross-examination*; nor is it uncommon for reticent witnesses to concede suggested facts — in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge.
>
> In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.
>
> In *Bencardino*, *supra*, at p. 347, Jessup J.A. applied the English rule to this effect:
>
> > . . . whatever may be said about the forensic impropriety of the three incidents in cross-examination, I am unable to say any illegality was involved in them. As Lord Radcliffe said in *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017 at p. 1023:

> "An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth."

More recently, in *R. v. Shearing* (2002), 165 C.C.C. (3d) 225 (SCC), while recognizing the need for exceptional restraint in sexual assault cases, Binnie J. reaffirmed, at paras. 121-22, the general rule that "in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness". As suggested at the outset, however, wide latitude does not mean unbridled licence, and cross-examination remains subject to the requirements of good faith, professional integrity and the other limitations set out above (paras. 44 and 45). See also *Seaboyer*, *supra*, at p. 598; *Osolin*, *supra*, at p. 665.

A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that "counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box". See *Michelson v. United States*, 335 U.S. 469 (1948) at p. 481, *per* Jackson J.

Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may properly take appropriate steps, by conducting a *voir dire* or otherwise, to seek and obtain counsel's assurance that a good faith basis exists for putting the question. If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness. [Italics in the original; underlining added for emphasis].

[17] As will be discussed below, I have real doubts as to whether the defence can prove the out of court statements allegedly made by Dula, without calling Dula as a witness. However, the long line of above authority set out in *Lyttle*, *Bencardino*, *Shearing*, and *Fox* makes it clear that the cross-examiner's inability to independently prove certain alleged facts does not prevent efforts to prove those asserted facts through the cross-examination itself. Also see: Sopinka et al, *The Law of Evidence in Canada*, 4th Ed. 2014 (Lexis Nexis Canada Inc.), at pp. 1155-1160; *R. v. Mallory and Stewart* (2007), 217 C.C.C. (3d) 266 at paras. 212-271 (Ont. C.A.); *R. v. Samaniego*, *supra* at paras. 34-37; *R. v. R.V.* (2019), 378 C.C.C. (3d) 193 at para. 39 (S.C.C.).

[18] Mr. Geurts additionally sought guidance as to how he could explore certain areas of the proposed cross-examination, for example, whether he could question JN about facts allegedly asserted by Dula that may have originated with JN (for example, the existence of another sexual assault charge against Hwang, the recent marriage of JN, and a potential civil law suit against certain parties). It seems to me that there are a number of different ways in which Mr. Geurts could approach the proposed cross-examination of JN in relation to the alleged efforts by Dula and others to extort money from Hwang in return for resolving the present case. I do not intend to offer my views about these kinds of tactical details. I am simply indicating that, in my view, the defence is entitled to question JN about the existence of any such extortion scheme, about her involvement

in it, and about any discussions that she had with Dula and/or Jimmy about it. In other words, I am satisfied that this subject is relevant to JN's credibility and that the defence has a "good faith" basis, as explained in *Lyttle*, for exploring the subject. As noted before, these views are offered for guidance and assistance and they are not binding on the trial judge. However, the Crown is not opposing the proposed cross-examination so this initial evidentiary issue should not be contentious at trial.

### (iii) The third issue: the collateral facts rule and extrinsic proof of the alleged extortion scheme

[19] In the event that JN denies any knowledge of, or involvement in, a scheme to extort money from Hwang, the defence seeks to independently prove that alleged scheme by calling Hwang as a witness during the defence case. Mr. Geurts made it clear that the defence does not intend to call Dula as a witness. I am told that Dula has now begun serving a four year penitentiary sentence (Dula and Hwang refer to this upcoming development in the text messages). There are a number of potential impediments to this attempt to prove the alleged extortion scheme with extrinsic evidence. The first potential impediment is the collateral facts rule.

[20] The collateral facts rule is one of the more difficult rules in the law of evidence. A helpful summary of the rule is found in Sopinka et al, *The Law of Evidence in Canada*, *supra* at p. 1195 where the learned authors state the following:

> There is a general rule that answers given by a witness to question put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. Without such a rule, there is the danger that litigation will otherwise be prolonged and become sidetracked and involved in numerous subsidiary issues. The rule does permit the use of extrinsic evidence to contradict a witness who has made a statement in cross-examination which is relevant to the substantive issue. However, with respect to questions which are directed solely to impeaching a witness' credibility, the answers must, save for certain common law and statutory exceptions, be accepted as final. McIntyre J., in *Krause v. R.*, described collateral matters as being "not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case". [Emphasis added].

Also see: David Watt, *Watt's Manual of Criminal Evidence*, (2022 Thomson Reuters Canada Ltd.) at p. 355; *R. v. Krause* (1986), 29 C.C.C. (3d) 385 (S.C.C.); *R. v. Rafael* (1972), 7 C.C.C. (2d) 325 at p. 330 (Ont. C.A.); *R. v. Perry and Franks* (1977), 36 C.C.C. (2d) 209 at pp. 213-214 (Ont. C.A.).

[21] The distinction between extrinsic evidence "directed solely to impeaching a witness' credibility" and extrinsic evidence that is "relevant to the substantive issue" can be difficult to apply. However, binding authority has made it clear that evidence related to a motive to lie is not collateral. In particular, in *R. v. G.P.* (1996), 112 C.C.C. (3d) 263 at pp. 275-6 (Ont. C.A.), Rosenberg J.A. (Laskin and Moldaver JJ.A. concurring) stated:

The effect of the collateral fact rule is that, subject to certain exceptions, a party is not entitled to introduce extrinsic evidence to contradict the testimony of an adversary's witness unless that extrinsic evidence is relevant to some issue in the case other than merely to contradict the witness. In *R. v. Aalders* (1993), 82 C.C.C. (3d) 215 (S.C.C.) at page 230 Cory J. summarized the rule against splitting the Crown's case and the collateral fact rule in the following terms:

> It is true that the Crown cannot split its case to obtain an unfair advantage. Nor should the Crown be able to put in evidence in reply on a purely collateral issue. *However, it is fit and proper that reply evidence be called which relates to an integral and essential issue of the case.* In such circumstances, it would be wrong to deprive the trier of fact of important evidence relating to an essential element of the case. [Emphasis added].

Cory J. also pointed out that the proposed reply evidence need not be "determinative" of an essential issue. It was sufficient that it "related" to an essential issue.

The admission of the evidence of Ms. Marcil in reply did not offend the collateral fact rule. As part of the defence case, the appellant was entitled to lead evidence to show that Ms. P. had a motive for falsely testifying and for putting her daughter up to making a false allegation: see *R. v. Busby* (1982), 75 Cr. App. Rep. 79 (C.C.A.); *R. v. Shaw* (1888), 16 Cox C.C. 503. The appellant's evidence, if believed, cast the relationship between him and Ms. P. in an entirely different light. That evidence not only contradicted Ms. P. but provided a motive on the part of Ms. P. to fabricate her evidence. The Crown was then entitled to lead evidence, if it had any, to rehabilitate its witness by showing that she did not have the motive to fabricate alleged against her. The motive of the complainant to falsely charge the appellant was an essential element of the case. It was central to the theory of the defence and as the case was developed by the defence the relationship between Ms. P. and the appellant related to that question. Viewed this way, evidence concerning motive to fabricate could not be collateral: see *R. v. M. (G.W.)* (1990), 58 C.C.C. (3d) 349 at pages 351-2. [Italics in the original, underlining added for emphasis].

Also see: *R. v. Sanderson* (2017), 349 C.C.C. (3d) 129 (Ont. C.A.).

[22] In my view, the alleged scheme to extort money from Hwang in return for resolving the present case, and JN's alleged involvement in that scheme, is potentially relevant to whether she could have a motive to lie when testifying at trial. On that basis, extrinsic evidence that seeks to contradict her on this issue would arguably not contravene the collateral facts rule.

[23] In addition, there are a number of well-established exceptions to the collateral facts rule. See: Sopinka et al, *The Law of Evidence in Canada, supra* at p. 1196; *Watt's Manual of Evidence, supra* at p. 355. One of those exceptions is proof of "bias or partiality" or proof of "bias, interest or corruption." The authors of Sopinka et al describe this exception as follows (*supra* at p. 1196):

> At common law, it was permissible to discredit a witness by introducing contradicting evidence to show that the witness was biased, possessed a real interest in the outcome of the litigation, or was corrupt or unscrupulous in the giving of his

> or her testimony. The introduction of such evidence is predicated on a denial from the witness that he or she is not biased or partial. This exception encompasses extrinsic evidence showing that the witness bears a family, intimate or employment relationship with one of the parties, or evidence that the witness has recently quarrelled with one of the parties, or evidence of conduct which suggests that the witness possesses partisan feelings towards one of the parties, or evidence that the witness has accepted a bribe or that his or her testimony has otherwise been suborned. [Emphasis added].

Also see: *R. v. McDonald* (1959), 126 C.C.C. 1 at pp. 10 and 13-14 (S.C.C.); *R. v. Speid* (1988), 42 C.C.C. (3d) 12 at pp. 29-31 (Ont. C.A.); *R. v. A.S.* (2002), 165 C.C.C. (3d) 426 at p. 435 (Ont. C.A.).

[24] In my view, the alleged scheme to extort money from Hwang, and JN's alleged involvement in that scheme, is potentially relevant evidence that is related to whether she could be a corrupt witness who is seeking a bribe in relation to her testimony. On this basis, extrinsic evidence of the alleged corruption would arguably come within the above-summarized exception to the collateral facts rule.

[25] Once again, I wish to stress that the above views that I have set out in relation to this issue are intended only to guide counsel in their trial preparation and to, hopefully, provide some assistance to the trial judge. The resolution of this issue will depend, to some extent, on the questions that are put to JN in cross-examination in relation to this issue, on her answers to those questions, and on whether the proposed extrinsic evidence is responsive to the answers that she gives. For all these reasons, the final resolution of this issue is properly left to the trial judge.

### (iv) The fourth issue: the hearsay rule and extrinsic proof of the alleged extortion scheme

[26] The main focus of Hwang's written materials, filed in advance of the hearing of this Motion, was on seeking a ruling allowing cross-examination of JN about the alleged extortion scheme. This issue is no longer seriously in dispute, as explained above. Unfortunately, there was only brief mention made in Hwang's written materials of the much more difficult issue, namely, whether the defence can call extrinsic evidence to prove the alleged extortion scheme, in the event that JN denies it during cross-examination. The only mention of this issue in Hwang's written materials was as follows:

> "In the alternative . . . that it be admitted within the exceptions of the hearsay rule."

[27] Hwang's written materials did not go on to identify the particular hearsay exception relied on, did not cite any case law on the point, and did not set out any analysis of Dula's statements explaining how they could satisfy some exception to the hearsay rule. At the hearing of the Motion, it was expressly stated in oral argument that the defence anticipated that JN would deny any knowledge of or involvement in the alleged extortion scheme. In addition, defence counsel expressly stated that Dula was not being called as a witness. At the same time, counsel acknowledged that Dula was now serving a four year sentence in a Canadian penitentiary and he could, therefore, be subpoenaed and required to testify at trial.

[28] Given the above two important developments that took place at the hearing of the Motion, and given my views about the second and third issues (as set out above), this fourth issue concerning the hearsay rule became the most important issue on the Motion. Mr. Geurts tried to address it in oral argument but it was apparent that there had been no preparation of this point. For example, he began by submitting that the co-conspirator exception to the hearsay rule would apply because Dula, Jimmy, and JN were all conspiring to extort money from Hwang. However, there is a fundamental impediment to this submission. The co-conspirator or common unlawful purpose exception to the hearsay rule is based on the related hearsay exception for admissions made by a party. The out of court statements of a co-conspirator are admitted in evidence against an accused on the basis that there is an agency relationship between them. As explained by the authors of Sopinka et al, *The Law of Evidence in Canada*, *supra* at p. 387:

> "Statements made by a representative of a party in his or her capacity as such may be binding as admissions against the party." [Emphasis added].

Also see: *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525 at p. 544 (Ont. C.A.); *R. v. Dawkins* (2021), 399 C.C.C. (3d) 375 at paras. 35 and 49-55 (Ont. C.A.); *R. v. Strand Electric Ltd.*, [1969] 2 C.C.C. 264 (Ont. C.A.); *R. v. Evans* (1993), 85 C.C.C. (3d) 97 at 104 (S.C.C.).

[29] As a result of this doctrinal basis for the co-conspirator exception to the hearsay rule, it has been described as a rule that applies to statements that are tendered against an accused, but only once that accused has been shown to be a probable member of the conspiracy. For example, in *R. v. Parrot* (1979), 51 C.C.C. (2d) 539 at p. 548 (Ont. C.A.), a five member panel of the Court of Appeal described the exception as follows:

> It is elementary that where there is proof of a conspiracy, acts and declarations of co-conspirators in furtherance of the conspiracy are admissible against a defendant who, by evidence directly admissible against him, is shown to be a member of the conspiracy. [Emphasis added].

More recently, in *R. v. Dawkins*, *supra* at para. 55, the Court of Appeal reiterated this basic proposition:

> It is a rule that ensures that before we allow evidence that would not otherwise be admissible against an accused to become a tool in the prosecutor's case against him, there must be proof of the accused's probable membership in the conspiracy, based only on evidence that is "directly admissible against the accused": *Carter*, at p. 947. [Emphasis added].

[30] Applying the above principles to Dula's statements to Hwang, there is no suggestion that Hwang is a member of the alleged extortion conspiracy. Rather it is Dula, Jimmy, and JN who are allegedly conspiring. None of these alleged conspirators are parties to the present litigation, nor are they representatives or agents of a party to the litigation. As a result, the co-conspirator exception to the hearsay rule can have no application to Dula's statements. He is simply a potential witness. This issue was squarely decided by the Supreme Court in *R. v. McDonald*, *supra* at pp. 13-14. In that case, the accused's defence was that a group of five Drug Squad officers were engaged in a conspiracy to frame him by giving false evidence. Two of these officers testified at

trial and were cross-examined. Rather than calling the other officers to testify, the defence sought to tender records in hearsay form of previous statements that they had made. Martland J. stated the following, on behalf of the majority:

> The contention of the appellant was that the Narcotic Squad of the R.C.M.P. in Toronto, consisting of LaBrash, Macauley, Tomalty, Yurkiw and Webster, were "acting in concert" to prepare false reports and give false evidence concerning the appellant and that the evidence above referred to should have been admitted as being relevant to the establishment of a conspiracy among them for that purpose.
>
> It is true that on a charge of conspiracy the acts and declarations of each conspirator in furtherance of the common object are admissible in evidence as against the rest. The same rule has been applied in civil cases. The rule is, however, one which determines the admissibility of evidence as against a person who is a party to legal proceedings.
>
> In the present case what is sought to be done is to introduce evidence of this kind, not as against a person charged with conspiracy or sued in relation to a conspiracy, but in respect of a witness who, it is alleged, was a party to a conspiracy not the subject of these proceedings. In the one case the conspiracy is in issue as a part of the case and the rule determines the kind of evidence which may be adduced in relation to that issue. In the present case it is proposed to lead such evidence for the collateral purpose of attacking the credibility of a witness.
>
> Facts to establish bias on the part of a witness may be elicited on cross-examination and, if denied, may be independently proved. It was open to the defence to cross-examine Macauley and Yurkiw as to whether they were parties to a conspiracy which sought wrongfully to obtain a conviction against the appellant. If denied, evidence which directly implicated either of them as being parties to a conspiracy for that purpose would be relevant because this would relate directly to the establishing of bias. But the evidence sought to be introduced here is not evidence of that kind. It was proposed to lead evidence that two other persons, at other hearings, had given inaccurate evidence, on the basis that such evidence would be admissible because they were members of the same R.C.M.P. squad as the witnesses who gave evidence in this case and were "acting in concert" together. This was proposed to be done, not by calling these two persons themselves, but by putting in evidence of a transcript of their testimony at the other hearings. In my opinion this is not evidence which is properly admissible for the purpose of attacking the credibility of the witnesses in this case. [Emphasis added].

[31] In my view, counsel for Hwang is attempting to do almost exactly what the Supreme Court prevented counsel in the *McDonald* case from doing, namely, attempting to rely on the co-conspirator exception to the hearsay rule in order to attack the credibility of a non-party witness.

[32] When I challenged Mr. Geurts' reliance on the co-conspirator exception, he made an alternative submission and relied on the hearsay exception for declarations against interest. It is unclear to me how Dula's statements to Hwang were contrary to his pecuniary interests or contrary

to his penal interests. In any event, Dula is available to testify and so these common law exceptions have no application. See: *Watt's Manual of Criminal Evidence*, *supra* at pp. 429-430; Sopinka et al, *The Law of Evidence in Canada*, *supra* at pp. 285-295.

[33] Finally, Mr. Geurts made one further alternative submission about the hearsay rule. He submitted that Dula's statements to Hwang could be admitted as non-hearsay because they infer or explain Dula's knowledge and Hwang's knowledge about the alleged extortion scheme. In particular, these statements are said to infer or explain Dula's and Hwang's knowledge about three matters that must have originated from JN (the other sexual assault charge that was pending against Hwang, the recent marriage of JN, and the potential civil law suit against certain parties). In my view, Dula's and Hwang's inferred knowledge about these matters is irrelevant unless these matters are situated within the context of Dula's entire statements about the extortion scheme. In other words, the fact that Dula may have mentioned Hwang's other sexual assault charge, JN's recent marriage, and a potential civil law suit only <u>becomes relevant</u> when they are part of the larger discussion about an extortion scheme. That discussion about an extortion scheme cannot be characterized as non-hearsay because it is being relied on for its truth. Accordingly, a hearsay exception is required before this evidence can be admitted. See *R. v. Baldree* (2013), 298 C.C.C. (3d) 425 at para. 39 (S.C.C.) where Fish J. stated, on behalf of the majority, "The relevance of the statement thus hinges on the truth of the declarant's underlying belief. Any inference that can be drawn from the statement necessarily assumes its veracity." Similarly in the present case, Dula's and/or Hwang's non-hearsay knowledge of three facts (the other charge, the recent marriage, and the potential civil action) depends for its relevance on the truth of the underlying extortion scheme.

[34] In conclusion, it is my view that the defence has not yet advanced any properly prepared argument about the hearsay rule and about how Dula's assertions concerning the alleged extortion scheme can be admitted without calling Dula as a witness.

### (v) <u>The fifth issue: whether the probative value of the extortion scheme evidence is substantially outweighed by its prejudicial effects</u>

[35] I raised this final issue with counsel, in order to suggest some further reflection before they decided whether to attempt introducing extrinsic evidence about the alleged extortion scheme, assuming some way around the hearsay rule was to be developed at trial. As explained above, no such persuasive way around the hearsay rule was advanced before me on the pre-trial Motion.

[36] On my reading of the written record filed on the pre-trial Motion, together with counsel's concessions and clarifications during submissions, there are a number of concerns about the potential probative worth and prejudicial effects of this evidence, as follows:

- First, it was undoubtedly Hwang who initiated contact with Dula and the "N" family. They did <u>not</u> reach out to him;

- Second, Hwang stated that it was "very urgent" that he contact Dula and the "N" family;

- Third, the timing of these efforts by Hwang to contact Dula and the "N" family was between August 26 and September 9, 2022. At this point, Hwang's first trial date was

fast approaching, his first adjournment application had been denied by Presser J., and his s. 278.92 Motion had been heard and allowed by me but only on certain terms. In other words, the trial appeared to be imminent and the issues at trial would now have become apparent to Hwang as a result of the s. 278.92 proceedings;

- Fourth, during this August 26 to September 9, 2022 time period, when Hwang was trying to reach Dula and Jimmy N, there had been no mention of the alleged extortion scheme;

- Fifth, the content of Hwang's initial text message to Dula on September 14, 2022, once they had made contact, is significant. Hwang stated: "I know you don't want to speak to me and I totally understand. If I could just please ask you to give a message to tatts [Jimmy] for me, it would help out a lot for both sides. I'm just asking for 2 minutes of your time" [emphasis added]. In other words, Hwang appeared to believe that his efforts to contact Jimmy N at a time when the trial was fast approaching would somehow be helpful to "both sides";

- Sixth, in the ensuing text messages Dula made it clear that Jimmy N would not talk to Hwang until Hwang paid Jimmy a sum of money [referred to as "the files"]. This sum of money [$250,000] was admittedly "the same quantum of money that Jimmy N thinks Hwang stole from him in the past." When I pressed Mr. Geurts during oral argument, he conceded that it would be open to dispute at trial as to whether the text messages between Dula and Hwang were about an alleged past debt owed by Hwang to Jimmy N or whether they were about the alleged extortion scheme;

- Seventh, counsel advised that the alleged past debt between Hwang and Jimmy N related to a potentially criminal transaction that Hwang was involved in;

- Eighth, the defence conceded that the Crown would be entitled to explore Hwang's past relationship with Jimmy N and the "N" family, in order to resolve this issue summarized above at the sixth bullet point (whether "the files" referred to a past alleged debt owed to Jimmy N or to the alleged extortion scheme). As explained previously, the defence will take the position that Jimmy N and the "N" family were heavily involved in serious criminal activities. I am told that Jimmy N has recently died. I am also told that Hwang has a relatively serious prior criminal record which may or may not emerge if he testifies (depending on a *Corbett* application).

[37] In light of the above eight circumstances, extrinsic proof of the alleged extortion scheme depends heavily on testimony from Hwang about the September 15, 2022 phone call with Dula and the September 20, 2022 meeting with Dula at the Chinook Mall (assuming counsel develops some persuasive argument about the hearsay rule which the trial judge accepts). The text messages with Aboutaha and Dula appear to be ambiguous at best and they may actually harm Hwang. In any event, the entire issue of the alleged extortion scheme may lead the trial into a lengthy and distracting inquiry into Hwang's past relationship with the "N" family, including any past criminal activities. It is important to note that Hwang has now elected trial by judge alone. Therefore, this potential "side show" should be easier to manage and it will be much less prejudicial to Hwang than it would have been with a jury. Nevertheless, the main issue in the trial is whether JN had the

capacity to consent to the undoubted sexual activity with Hwang on the night in question. The video surveillance tapes from the hotel, the ketamine toxicology evidence, the five cell phone videos of the sexual activity, and the testimony of JN and Hwang (assuming he testifies) are likely to provide a proper evidentiary basis for resolving this issue.

[38] In all the above circumstances, it will be open to the trial judge to consider whether the legitimate probative value of evidence of the alleged extortion scheme (in relation to JN's credibility, alleged motive to lie, and alleged corruption) is substantially outweighed by prejudice to the proper conduct of a fair trial. The well known power to exclude such evidence is set out in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at pp. 389-392 (S.C.C.).

## D. CONCLUSION

[39] It can be seen that this case has required repeated and relatively complex case management at a number of ongoing JPTs and pre-trial Motions. I hope that these interventions have provided direction to the parties and assistance to the trial judge.

M. A. Code J.

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**Released**: May 12, 2023

**CITATION:** R. v. Hwang, 2023 ONSC 2897
**COURT FILE NO.:** CR-21-30000410
**DATE:** 20230512

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

HIS MAJESTY THE KING

**– and –**

HANWOOL HWANG

Accused

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**REASONS FOR JUDGEMENT ON A PRE-TRIAL MOTION**

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M.A. Code J.

**Released**: May 12, 2023