

R. v. C.B., [2019] O.J. No. 2425

Ontario Judgments

Ontario Court of Appeal

D. Watt, G. Huscroft and J.M. Fairburn JJ.A.

Heard: August 22, 2018.

Judgment: May 9, 2019.

Dockets: C62631 and C63191

[2019] O.J. No. 2425 | 2019 ONCA 380

Between Her Majesty the Queen, Respondent, and C.B. and A.C., Appellants

(148 paras.)

Case Summary

Appeal From:

On appeal from the convictions entered by Justice D.K. Kirkland of the Ontario Court of Justice on September 4, 2015, and from the sentence imposed on C.B. on September 1, 2016 by Justice Catherine A. Kehoe of the Ontario Court of Justice.

Counsel

Michael Lacy and James Harbic, for the appellant C.B.

Matthew Gourlay, for the appellant A.C.

Jessica Smith Joy, for the respondent Crown.

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

- (a) any of the following offences;
 - (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
 - (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
 - (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
 - (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
- (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
- (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
 - (b) on application made by the victim, the prosecutor or any such witness, make the order.
- (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.
- (2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
- (a) as soon as feasible, inform the victim of their right to make an application for the order; and
 - (b) on application of the victim or the prosecutor, make the order.
- (3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

- (2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of

information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

The judgment of the Court was delivered by

D. WATT J.A.

1 D.P. and G.D. were friends. They were 16, attended high school and lived at home with their parents with whom each was in conflict. About truancy. And about drinking and drug use.

2 C.B. was 20. She also lived at home with her parents. She had a boyfriend, A.C. He was 31. Drugs and alcohol were readily available when C.B. and A.C. were together.

3 D.P. and G.D. spent a lot of time at C.B.'s house. School time. Weekend time. Drinking and smoking. Alcohol and marijuana.

4 One evening in May a few years ago, D.P. went to C.B.'s house. A.C. was there. D.P. smoked some marijuana and drank some alcohol. D.P. claimed that something else happened during this visit, something that took place without her consent: a sexual assault on her by both C.B. and A.C.

5 A few days later, D.P. returned to C.B.'s home. This time, she brought her friend, G.D., with her. A.C. was there. The same thing happened again. Marijuana. Alcohol. And a sexual assault. This time the victim was not D.P., but her friend, G.D.

6 C.B. and A.C. were jointly charged with several offences in relation to both D.P. and G.D. Assault. Sexual assault. Unlawful confinement.

7 After a joint trial before a judge of the Ontario Court of Justice, C.B. and A.C. (the appellants) were convicted on all counts. Each appeals conviction. C.B. also appeals sentence.

8 The reasons that follow explain why I have decided that errors in the course of the trial require that the convictions be set aside and a new trial ordered. In these circumstances, I do not reach the sentence appeal by C.B.

The Background Facts

9 The grounds of appeal advanced do not require a detailed recital of the circumstances of the offences of which the appellants were convicted. A brief outline is sufficient.

The Principals and Their Relationship

10 D.P. and G.D. were friends. Each was 16 and at odds with her parents about truancy, drinking and drug use. Each appears to have chafed at parental discipline.

11 C.B. was 20 years old and lived with her parents. She occupied the basement of her parents' home. Her boyfriend, A.C., was 31 years old and often at C.B.'s home.

12 D.P. and G.D. were recurrent visitors to C.B.'s home, especially during the month preceding

the offences charged. While there, D.P. and G.D. smoked marijuana and drank alcohol supplied by the appellants.

The D.P. Incident

13 On the Saturday of a Victoria Day weekend a few years ago, D.P. went to a local fireworks show with several friends. After the show, D.P. went back to a friend's house with several others. There, by her own admission, she had a lot to drink.

14 Around midnight, D.P. went to the appellant C.B.'s home where she drank more alcohol and smoked some marijuana. She was intoxicated. She could not speak or stand properly. The appellants prevented her from going to bed.

15 D.P. recalled that at some point she was lying face down on the couch. Her tights had been pulled down. Her buttocks were exposed. The appellant C.B. took out a long ruler, started hitting D.P. across her buttocks with the ruler and her hand, and told her that she was a "bad girl" who deserved these "spankings", as the appellant C.B. termed them. The appellant A.C. watched, then held down D.P.'s arms as she tried to move away. The appellant C.B. occasionally groped D.P. as the spankings continued.

16 D.P. also recalled lying on the floor with her ankles and hands bound together with purple latex tape. She was blindfolded and gagged. The striking continued not only across her buttocks, but also on her thighs, breasts and vagina. Both appellants participated, but the appellant C.B. more so than the appellant A.C.

17 As the assaults continued, the appellant C.B. produced a dildo and nipple clamps. The appellant C.B. poured lubricant on D.P.'s buttocks and vagina and began to hit D.P. with the dildo in those areas. Then, the appellants applied the nipple clamps to D.P.'s breasts, but removed them when D.P. complained of pain. Then, after pouring more lubricant on her, the appellants penetrated D.P.'s anus, then her vagina with the dildo, while they were laughing, kissing and touching each other as they did so. The appellant A.C. also penetrated D.P. digitally. To get them to stop, D.P. faked an orgasm. The appellants complimented D.P. on being a "perfect sex slave".

18 D.P. repeatedly told the appellants to stop what they were doing to her. Their conduct took place over somewhere between three to four hours. Following the assaults, D.P. slept upstairs at the appellant C.B.'s home.

The G.D. Incident

19 The next Wednesday, D.P. and G.D. met at school. They went with others over to a friend's house. G.D. was drinking alcohol. Then, they went with a friend to the appellant C.B.'s house for tacos. Marijuana and alcohol were made available. D.P. and G.D. took advantage of them.

20 As time passed, what had happened on the previous Saturday began to unfold again. But this time with G.D. The appellant C.B. grabbed G.D.'s legs. The appellant A.C. retrieved the purple tape. They held G.D.'s arms and legs despite her protests. They told her to "just go with it." They said that she would be let go after 50 spankings. The appellant C.B. claimed that the spankings were a punishment for G.D.'s late school attendance. Afraid that the appellants might use whips on her, G.D. agreed to the spankings.

21 G.D. recalled that the appellants let go of her arms and flipped her over. As the appellant A.C. held G.D.'s arms, the appellant C.B. hit her buttocks 50 times with her hands and a wooden stick. The entire incident lasted about five minutes.

22 After the "spankings" had concluded, D.P. and G.D. went into the bathroom together. There, D.P. apologized for not intervening. She also told G.D. about what had happened to her on the previous Saturday. They agreed to leave, but remained at G.D.'s residence as the alcohol "took over". G.D. continued to drink. She blacked out. Her next memory was waking up the following morning in her own bed.

The Rescue of G.D.

23 G.D.'s parents learned from D.P.'s parents that G.D. was at the appellant C.B.'s house. Since their daughter had not returned home, G.D.'s parents drove over to the appellant C.B.'s home to retrieve G.D. After repeated knocks, the appellant A.C. answered the door. He said that G.D. had passed out downstairs. G.D.'s father went downstairs, a place that smelled of marijuana. He slapped G.D. to awaken her. Then, with some help, he carried her upstairs. As he did so, G.D.'s skirt flipped up revealing that her buttocks were red.

24 G.D.'s mother confirmed her husband's account of finding G.D. unresponsive in the basement of the appellant C.B.'s home and of their attempt to rouse her. She and her husband questioned the appellant A.C. about whether G.D. had been drinking there. The appellant A.C. said that neither he nor the appellant C.B. supplied drugs or alcohol to the neighbourhood kids who hung out there. When awakened the following morning, G.D. was "very distraught" and "tearful".

The Initial Disclosure

25 The morning after the incident with G.D., D.P.'s mother yelled at D.P. for having left G.D. alone at the appellant C.B.'s home. Later that morning, D.P. and G.D. met. They discussed what had happened. When D.P.'s mother heard G.D. crying in the background as she spoke to her daughter on the telephone, D.P. "just told her [mother] everything." The parents of both daughters took D.P. and G.D. for sexual assault examinations.

The Forensic Evidence

26 Samples taken from both complainants' internal and external genitalia disclosed neither male DNA nor foreign DNA profiles. A minor amount of DNA detected on G.D.'s right buttock was insufficient for testing.

27 A toxicologist found ethanol, Clonazepam and amphetamine, but no THC in samples taken from G.D. A sample from D.P. was unsuitable for testing because of the lapse of time between the alleged offence and the taking of the sample. When G.D.'s sample was analyzed to determine blood alcohol concentration, the sample contained a concentration of 90 milligrams of alcohol in 100 millilitres of blood.

The Positions of the Parties at Trial

28 Neither appellant testified.

29 The appellant C.B. sought an acquittal on all counts in the information. She contended that the Crown had failed to establish her guilt of any offence beyond a reasonable doubt. D.P. and G.D. were incredible; their evidence, unbelievable. The testimony of each was replete with inconsistencies.

30 The appellant C.B. argued that D.P.'s text messages, sent contemporaneously with the alleged incident, belied her account of unwanted sexual activity and controverted her claim about the degree of her intoxication. Her credibility was further compromised, as was the reliability of her evidence, when she returned the next day to smoke a joint at the appellant C.B.'s house, then brought her friend, G.D., along a couple of days later.

31 The appellant C.B. acknowledged that G.D. was a more credible witness than D.P. but her testimony was equally unreliable as an account of what had taken place. This was so because the group photos taken of the complainants on the basement couch were indicative of the parties "horsing around" rather than engaging, as G.D. alleged in her evidence, in non-consensual conduct. Neither complainant was so intoxicated as to be incapable of consenting to what occurred. What is more, the complainants colluded on their accounts before being interviewed by police and providing the statements adduced as part of their evidence in-chief at trial.

32 The appellant A.C. adopted the submissions of the appellant C.B. about the credibility of each complainant and the reliability of each of their accounts. He also invoked the text messages as evidence that tolled heavily against the credibility of D.P. and emphasized the collusive nature of the allegations that emerged from the complainants' meeting shortly after the alleged offences against G.D.

33 The Crown advanced the complainants as candid, credible witnesses who provided a reliable rendition of relevant events corroborated by other evidence adduced at trial. The text messages, far from putting the lie to the complainants' accounts, were "barely worth the paper they [were] printed on." They had not been properly authenticated by direct or expert evidence, and thus were valueless as evidence.

34 The Crown also disputed the defence submission that the accounts of the complainants were the product of collusion. The evidence at trial simply could not support such an inference. There was no "cooked-up" story.

THE GROUNDS OF APPEAL

35 On the appeal from conviction, the appellants advance two grounds of appeal and seek to introduce fresh evidence about the authenticity of text messages that trial counsel sought to use to challenge the credibility of D.P. and the reliability of her account.

36 As I would paraphrase their common grounds of appeal against conviction, the appellants say that the trial judge erred by:

- i. finding the text messages counsel put to D.P. in cross-examination had not been properly authenticated; and

- ii. misapprehending the evidence about photos taken (and text messages sent) shortly after the alleged assault on G.D.

37 Counsel tenders for reception as fresh evidence the report of Marty Musters, a certified forensic examiner, concerning his examination of a cellphone produced by the appellant C.B.'s mother and his opinion about the origins and authenticity of text messages and photographs extracted from that phone. Counsel also tenders an affidavit prepared by C.B.'s trial counsel detailing the circumstances giving rise to the manner in which she produced the photographs and text messages at trial and reasons for producing them the way she had.

38 The appellant C.B. also appeals her sentence. She says that the trial judge overemphasized the objectives of denunciation and deterrence, failed to recognize the individualized nature of the sentencing process by neglecting to sufficiently distinguish her sentence from that imposed on the appellant A.C., and imposed a sentence that was grossly disproportionate to her moral culpability.

THE APPEAL FROM CONVICTION

Ground # 1: The Authentication Issue

39 This ground of appeal arises out of a finding made by the trial judge that certain text messages and photographs put to the complainants in cross-examination had not been properly authenticated, and thus were of no probative value.

40 A brief canvass of what occurred at trial will provide a suitable frame of reference for the discussion that follows.

The Essential Background

41 At trial, Crown counsel did *not* introduce evidence of any electronic communications between the parties, in particular, between D.P. and the appellant C.B., contemporaneous with the events alleged to constitute the offences charged. Nor did the Crown tender any photographs of any activities that preceded, accompanied or followed the relevant events.

The Text Messages

42 At trial, counsel for the appellant C.B. (not Mr. Lacy) cross-examined D.P. on text messages she allegedly exchanged with C.B. contemporaneous with the offences alleged to have been committed upon her.

43 The trial Crown (not Ms. Smith Joy) asked whether the cellphone used to record or send these texts was available for examination. Defence counsel demurred but said she would tender the evidence of the person who "extracted" the messages, as well as some photographs, from the cellphone as part of the defence case.

44 During cross-examination, D.P. acknowledged that the phone number from which various texts were sent and at which other texts were received was her cellphone number. She also explained that the subject-matter of one of the texts related to her then-boyfriend. She did not deny the authenticity of these texts associated with her phone. She explained that after the alleged assault, she was "too scared" to tell anyone about what had happened.

45 When cross-examination resumed the following day, D.P. explained that the appellant C.B. had her (D.P.'s) cellphone and had downloaded an Application ("App") to it so that C.B. could track the whereabouts of D.P.'s phone. D.P. claimed that her step-father had found the App on her phone. She explained that she could not recall having sent the several messages. Their contents did not sound like something she would have said because she does not "talk like that". She did not believe that she had sent the texts associated with her cellphone number.

46 Counsel for the appellant A.C. suggested to D.P. that the texts showed her joking about sex and dildos around the time she alleged that she had been sexually assaulted. D.P. explained, "[t]hat's what it shows, yeah." But the term "LMFAO", which was included in her text, could mean several things. It could mean what it says. Or it could mean that somebody is uncomfortable with the situation and is just laughing about it to show them that. It is undisputed that the term "LMFAO" is a common acronym used in text messaging for "laugh my fucking ass off".

47 At trial, defence counsel for the appellant C.B. called a private investigator who explained that he had "extracted" the messages and certain photos from a cellphone provided to him by the appellant C.B.'s mother. He photographed the data he located on the cellphone and incorporated it into a written report he provided to counsel. He did not analyze or authenticate the underlying data. The report was filed as an exhibit at trial.

48 In reply, the Crown tendered the agreed fact that an officer from the local police service would have been available to do a "full forensic examination" of the cellphone produced to determine whether any of its contents had been altered. It was also admitted that it was possible to create "spoof" telephone calls coming from persons other than those identified as the caller.

49 The Crown did not seek an order to gain access to the cellphone for forensic analysis.

The Photographs

50 G.D. was cross-examined on a photograph of a photo located on the cellphone provided by the appellant C.B.'s mother. G.D. identified the persons in the photograph (the two complainants and two appellants), which she acknowledged appeared to have been taken in the basement of the appellant C.B.'s home after the assault upon her (G.D.). G.D. agreed that the group appeared to be happy and "horsing around". The copy counsel produced was taken from the private investigator's report filed as an exhibit at trial. The photograph shown to the witness was not filed as a numbered exhibit.

The Positions at Trial

51 At trial, the defence contended that the text messages said to have originated from or been received by C.B.'s cellphone had been properly authenticated. D.P. admitted that the relevant cellphone number was hers. That she did an about-face the next day in cross-examination was of no moment in light of the modest threshold for authentication. The testimony of G.D. authenticated the photograph.

52 The trial Crown characterized the text messages as unauthenticated and worthless as evidence.

The Decision of the Trial Judge

53 In his reasons for judgment delivered after a luncheon recess immediately following the conclusion of argument, the trial judge described his recollection of the evidence about the text messages and his conclusion about their probative value in these terms:

Crown counsel takes the position that this is material that was gathered well over a year after the alleged events took place, and cannot be seen as having any probative value for reasons that I just expressed, that is, the lateness, the inability of any forensic information to be obtained to verify whose phone it was, whose messages are on there, and I might say, I forgot to mention this earlier, that one of the statements that [D.P.] made was that [C.B.] had taken her phone and put an App into it, and she said: She would know where I was all the time, because [C.B.] put an App into my telephone.

When shown the messages, the text messages, some of which were shown to her, two pages of messages, she denied making those statements. She said she didn't recognise it, and then she added: "I don't talk that way." That was a direct quote from her, and then she went on to say that [C.B.] had put an App in her phone and knew where she was all the time.

I'm coming to the conclusion that there's really no probative value to that evidence. There's no evidence as to whose phone it was, who put those messages in the phone, or who was depicted in the photographs.

54 The trial judge set out his findings in connection with the photographs in this passage of his reasons:

With respect to the photos [taken] of the photos, as I said, there were quite a number there. I have no idea who is in the photos. There was no evidence telling me this is so-and-so. It could be anybody. Those are pictures, in most cases, of three people. I don't know who any one of them is, so I can't possibly identify who was being depicted in the photos. The photos are blurry, as well, but that doesn't matter. There was no evidence to tell me who was depicted in the photos.

Also, those photos were not shown to either of the two complainants, and asked if they had, in fact, been photographed, which could have been done, but they didn't have an opportunity to say "that's me" or "that's not me".

The photos were taken, according to the booklet that was filed, between 8:26, that would be p.m., I understand, and 8:32 on the 21st of May. There's no indication of where the photos were taken, either.

The Arguments on Appeal

55 Setting to one side the issue of misapprehension of evidence which is the subject of a separate ground of appeal, the appellants say that the trial judge erred in failing to find that the text messages had been properly authenticated. Accepting the urgings of the trial Crown, the trial judge erroneously concluded that the text messages could only be authenticated by direct forensic analysis.

56 The appellants acknowledge that the trial judge did *not* use the terms "authenticate" or "authentication" in his reasons. But his finding of "no probative value", when his reasons are

reviewed as a whole, amounts to a finding that the messages were not properly authenticated. This, the appellants say, amounts to legal error.

57 Authentication of electronic documents, such as printouts of things like emails and texts, are governed by s. 31.1 of the *Canada Evidence Act*, R.S.C. 1985, c. C-85 (*CEA*). This provision simply codifies the common law's standard for authentication of documents. The threshold imposed, the appellants submit, is a modest one -- the introduction of *some evidence* that the document or thing is what it purports to be. This burden may be discharged by direct or circumstantial evidence. Neither the common law nor s. 31.1 imposes any limitations on the manner of proof.

58 In this case, the appellants continue, there was ample evidence, both direct and circumstantial, to authenticate the text messages and make them available for use at trial. D.P. acknowledged that the number to or from which the texts appeared to have been sent was her phone number. She explained the content of one of the texts. The private investigator who testified as a defence witness linked the receiving phone to the appellant C.B. and the content of the messages themselves attested to their authenticity.

59 In addition, the appellants say, the possibility that the integrity of the cellphone having been compromised by a phantom App was sheer speculation. There was no air of reality to this prospect, hence no basis upon which to deny authentication.

60 The respondent concedes that the threshold to establish authenticity is low, satisfied by some evidence capable of supporting a finding that a document is that which, it purports to be. In the end, whether a document is what it purports to be is a question of fact for the trier of fact to decide on all the evidence adduced at trial, not by the trial judge as a preliminary issue of admissibility.

61 In this case, the respondent contends, as trial counsel argued, the trial judge received the evidence of text messages and arguments advanced about whether those messages were what they purported to be. It then fell to the trial judge to decide the weight to attribute to this evidence. The judge decided that there was not a sufficient evidentiary basis to conclude that the evidence was what it purported to be: a text message exchange between D.P. and the appellant C.B.

62 The appellants' complaint, as the respondent sees it, is about how the trial judge weighed the evidence. This is a factual assessment entitled to deference in this court.

The Governing Principles

63 To determine this ground of appeal requires consideration of what is involved in the process of authentication; how it may be established, especially with respect to the subject-matter in issue here; and the roles of the trier of law and the trier of fact in the authentication process.

64 The requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the evidence that the thing or item proffered really is what its proponent claims it to be: Kenneth S. Broun, ed., *McCormick on Evidence*, 7th ed., vol. 2 (Thomson Reuters, 2013), at §S 212, pp. 4-5.

65 Authentication is the process of convincing a court that a thing matches the claim made

about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.

66 At common law, authentication requires the introduction of *some* evidence that the item is what it purports to be: *R. v. Donald* (1958), 121 C.C.C. 304 (N.B.C.A., at p. 306; *R. v. Staniforth* (1979), 11 C.R. (3d) 84 (Ont. C.A.), at p. 89; *R. v. Hirsch*, 2017 SKCA 14, 353 C.C.C. (3d) 230, at para. 18. The requirement is not onerous and may be established by either or both direct and circumstantial evidence.

67 For electronic documents, s. 31.1 of the *CEA* assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet this burden, the party must adduce evidence *capable* of supporting a finding that the electronic document is what it purports to be. Section 31.8 provides an expansive definition of "electronic document", a term which encompasses devices by or in which data is recorded or stored. Under s. 31.1, as at common law, the threshold to be met is low. When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.

68 To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does *not* limit how or by what means the threshold may be met. Its only requirement is that the evidence be *capable* of supporting a finding that the electronic document "is that which it is purported to be." That circumstantial evidence may be relied upon is well established: *Hirsch*, at para. 18; *R. v. Colosie*, 2016 ONSC 1708, at para. 25; *R. v. Bulldog*, 2015 ABCA 251, 326 C.C.C. (3d) 385, at para. 35; see also *R. v. Evans*, [1993] 3 S.C.R. 653, at p. 663. This accords with general principles about proof of facts in criminal proceedings, whether the facts sought to be established are preliminary facts on an admissibility inquiry or ultimate facts necessary to prove guilt.

69 At common law, correspondence could be authenticated by the "reply letter" doctrine: to authenticate correspondence as having been sent by one individual to another, evidence is adduced to show it is a reply to a letter sent to that person. As a matter of logic, the same should hold true for text messages and emails. Evidence that A sent a text or email to B whom A believed was linked to a specific address, and evidence of a response purportedly from B affords some evidence of authenticity: David Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013) 11 C.J.L.T. 181, at pp. 197-8 (*Paciocco*).

70 In a similar way, text messages may be linked to particular phones by examining the recorded number of the sender and receiving evidence linking that number to a specific individual, as for example, by admission: *Paciocco*, at p. 198.

71 But what of the prospect of tampering? Does it have to be negated before digital evidence can be properly authenticated?

72 As a matter of principle, it seems reasonable to infer that the sender has authored a message sent from his or her phone number. This inference is available and should be drawn in the absence of evidence that gives an air of reality to a claim that this may not be so. Rank speculation is not sufficient: *R. v. Ambrose*, 2015 ONCJ 813, at para. 52. And even if there were an air of reality to such a claim, the low threshold for authentication, whether at common law or

under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight.

The Principles Applied

73 I would give effect to this ground of appeal. In my respectful view, the trial judge erred in concluding that the text messages had no probative value because they had not been properly authenticated by direct evidence.

74 To begin, recall how the use of the text messages arose. Counsel for the appellant C.B. sought to cross-examine D.P. on her text message exchange with C.B. at times reasonably proximate to the alleged offence. The purpose of this cross-examination was to challenge the veracity of D.P.'s account of relevant events as having occurred without her consent.

75 In the cross-examination of D.P., defence counsel produced photographs of screenshots of messages located on the cellphone provided by the appellant C.B.'s mother. The photographs of the text messages had been taken by a private investigator who would later testify as a defence witness and explain what he had done to "extract" these contents from the cellphone. No evidence was called to link the cellphone to the appellant C.B., although a review of the contents of the messages would support an inference that the phone was hers, an issue not disputed by the respondent.

76 During the course of the cross-examination of D.P. about the text messages, she acknowledged that the number from or to which the messages were sent was in fact her cellphone number, and that she had her phone with her during the relevant time. She also explained the meaning of one of the texts sent from that cellphone. The content of the messages is consistent with relevant events involving D.P. and the appellant C.B. Even if we accept D.P.'s claim that the appellant C.B. installed an App on D.P.'s cellphone, the App, she said, allowed the appellant to trace her movements. Such an assertion falls well short of furnishing an air of reality to a claim of tampering and would not affect authentication.

77 In the result, I am satisfied that these various strands of evidence were capable of supporting a finding that the text messages were what they purported to be: an exchange of communications between D.P. and the appellant C.B. The trial judge erred in holding, as he appears to have done, that the authenticity threshold could only be met by direct evidence from the sender or expert opinion evidence from a forensic examiner.

78 Satisfaction of the evidentiary threshold for authentication under s. 31.1 of the *CEA* or at common law renders the evidence admissible; in other words, available to the trier of fact for ultimate evaluation. It does not follow from admissibility that the trier of fact must find that the evidence is in fact what it claims to be. What remains of the dispute after admissibility has been established relates to the weight to be assigned to the evidence. And that issue is left to the trier of fact to decide.

79 At first blush, as the respondent contends, the conclusion of the trial judge could be seen as a determination of the weight to be assigned to this evidence. But even if it were to be characterized in this way, it is equally flawed. This is so because the trial judge's conclusion that the text messages had no probative value was inextricably intertwined with his insistence on direct evidence, a particular species of proof, to establish authentication. In the absence of any such requirement, his conclusion on the weight to be assigned to the text messages cannot stand.

Ground # 2: Misapprehension of Evidence

80 The second ground of appeal alleges that the trial judge misapprehended evidence relating to the text messages and photographs upon which the complainants were cross-examined.

The Background Facts

81 Trial counsel for the appellant C.B. cross-examined G.D. on a photograph alleged to been taken around 8:30 p.m. in the basement of the appellant C.B.'s home. According to G.D.'s testimony about the assault on her, the time stamp on the photo would have been *after* the assault had been committed. As with the text messages, the document on which the cross-examination was based was a photograph of a photo located on the cellphone provided by the appellant C.B.'s mother to a private investigator retained by defence counsel.

82 In cross-examination, G.D. identified the individuals depicted in the photograph including herself, D.P., and the appellant C.B. She agreed with the suggestion that the photo had been taken with the participants on the couch in the basement of the appellant C.B.'s home. The copy of the photograph, removed from the report of the private investigator, was filed as a lettered exhibit. The report, without this photograph, was filed as an exhibit during the defence case.

The Positions of Trial Counsel

83 At trial, defence counsel contended that the photograph of the principals on the couch, taken after the alleged assault on G.D., was an item of real evidence that tended to impeach the reliability of G.D.'s account and support the position that the "spanking" was part of "horsing around" among friends.

84 The trial Crown assailed the evidence "extracted" from the cellphone. Its origins and the integrity of its contents had not been established. It only emerged about ten days before the introduction of the evidence, and over a year after the communications and photographs "extracted" from it had been recorded. This untested material was of no evidentiary value in assessing the credibility of the complainants or the reliability of their testimony.

The Reasons of the Trial Judge

85 The trial judge's reasons with respect to the photographs are excerpted above at paragraph 54 of these reasons.

The Arguments on Appeal

86 In this court, the appellants advance two arguments about the evidence of these photographs.

87 First, the trial judge misapprehended the evidence, and as a result, failed to properly factor it into his assessment of the testimony of G.D.

88 The misapprehensions, the appellants continue, were several in number and amount to palpable and overriding errors. Contrary to the findings of the trial judge, G.D. was shown the photograph. She identified the people depicted in it. Although she did not recall the photograph

having been taken, she agreed that the location depicted appeared to be the area around the basement couch in the appellant C.B.'s home. The series of photos entered into evidence were time stamped between 8:26 and 8:32 p.m. on the day that G.D. said she was assaulted. If the time stamps were accurate, the photos were taken after the alleged assault occurred.

89 The appellants argue that this misapprehension of evidence was material in that it resulted in the failure of the trial judge to consider the after-incident conduct of G.D. as depicted in the photos in assessing her credibility and the reliability of her testimony, both of which were issues residing at the heart of the case.

90 Second, the appellants fault the trial judge for failing to apply the principles laid down in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 in his assessment of the photographs put to G.D. in cross-examination. These principles permitted the trial judge to compare the persons depicted in the photographs with those who testified or otherwise appeared at trial to determine their identity. This too resulted in a failure on the part of the trial judge to consider evidence relevant to the credibility of G.D. and the reliability of her testimony.

91 The respondent concedes that the trial judge's approach to the cellphone photos involved a misapprehension of evidence. But not every misapprehension of evidence amounts to a fatal flaw in the determination of guilt. The misapprehension must be one of substance. And it must form an essential part of the trial judge's reasoning in reaching a conclusion of guilt.

92 In this case, the respondent submits, counsel for the appellant C.B. focused her submissions on the text messages, referring to the photo only as being at odds with G.D.'s testimony that after the assault she did not go near C.B. for the rest of the evening and her claim of being traumatized by what occurred. Counsel for the appellant A.C. did not refer to the photos at all in closing submissions.

93 The respondent says that a review of the trial record as a whole reveals that the photos were not central to an assessment of the credibility of G.D. or the reliability of her evidence, and thus were not material to the outcome of the case generally or insofar as it related to the offences alleged by G.D. What is more, the potential use of the evidence suggested by the appellants engages myth-based reasoning, and thus, cannot be invoked as a pathway to proof of guilt.

The Governing Principles

94 A claim of misapprehension of evidence takes in failures to consider evidence relevant to a material issue, mistakes as to the substance of evidence, and failures to give proper effect to evidence: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218.

95 Where a misapprehension of evidence is advanced as a ground of appeal, an appellate court must consider first whether the verdict from which the appeal is taken is unreasonable: *Morrissey*, at p. 219. Provided the verdict is not unreasonable, we are required next to determine whether the misapprehension of evidence caused a miscarriage of justice within s. 686(1)(a)(iii) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. An appellant who succeeds on this ground will have the underlying conviction quashed and, in most cases, a new trial ordered: *Morrissey*, at p. 219.

96 The expansive scope of s. 686(1)(a)(iii) includes errors involving a misapprehension of evidence. Such an error, like other errors that fall within the section's compass, is assessed by

reference to its impact on the fairness of the trial. When an error involving the misapprehension of evidence renders a trial unfair, s. 686(1)(a)(iii) demands that the conviction be quashed: *Morrissey*, at p. 221.

97 Whether a misapprehension of evidence rendered a trial unfair and resulted in a miscarriage of justice depends upon the nature and extent of the misapprehension and its significance to the verdict rendered by the trial judge. This is so because we insist that a verdict be based exclusively on the evidence adduced at trial: *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 1; *Morrissey*, at p. 221.

98 The standard applied to misapprehensions of evidence advanced in support of a claim that a miscarriage of justice has occurred is a stringent one. The misapprehension of the evidence must go to the *substance* of the evidence, not simply to its detail. And the misapprehension must be *material* rather than peripheral to the reasoning of the trial judge. But there is more. And that is that the errors must play an essential part, that is to say, a role in the reasoning process resulting in a conviction, not just in the narrative of the judgment: *Lohrer*, at para. 2. Said in another way, a misapprehension of evidence amounts to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on unsteady ground: *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 56; *R. v. Bains*, 2012 ONCA 305, 291 O.A.C. 135, at para. 15.

99 Something should also be said about the principles that govern use by the trier of fact of real evidence, in particular, video images, as evidence of a person's identity.

100 Photographs, video recordings and other video images are real evidence, that is to say, evidence that conveys a relevant first-hand sense impression to the trier of fact. They are also, to a certain extent, testimonial evidence: *Nikolovski*, at para. 28.

101 It is well-settled that a trier of fact, in particular, a judge sitting without a jury, may identify a person depicted in a photographic image as an individual who appears in the courtroom. That person may be an accused: *Nikolovski*, at para. 30; *R. v. Slater*, 2010 ONCA 376, at para. 3. But there would seem to be no reason in principle to limit this authority to identification of an accused as the person responsible for the commission of an offence.

102 Caution is required when a trial judge considers visual images as evidence of identification. The clarity and quality of the image may not be good. There may be changes or differences in the appearance of the persons involved: *Nikolovski*, at paras. 30, 32.

The Principles Applied

103 I would give effect to this ground of appeal.

104 The respondent concedes that the trial judge misapprehended the evidence about the photograph on which G.D. was cross-examined. The photograph was in fact put to G.D. in cross-examination and was part of a series of related photos entered into evidence through the private investigator's report. In the photo put to G.D., she identified the persons depicted there. She acknowledged that the photo appeared to have been taken in the basement of the appellant C.B.'s home.

105 Central to the findings of guilt in this case were the trial judge's conclusions that D.P. and G.D. were credible witnesses who gave reliable evidence.

106 Counsel for the appellant C.B. challenged the veracity of G.D.'s account on the basis that the photographs taken after the alleged offence belied G.D.'s description of those events. It was essential that in reaching his conclusion on these issues he based his findings on a correct version of the evidence adduced at trial. He failed to do so.

107 The trial judge also appears to have rejected the evidence of the photos on the basis that they were not disclosed by the defence until well over a year after the relevant events. In the absence of any obligation on the defence to provide disclosure or turn the cellphone over to the police for forensic examination, these were not factors relevant to the veracity of G.D.'s evidence.

Ground # 3: The Fresh Evidence

108 The appellants seek leave to introduce as fresh evidence on the hearing of the appeal, affidavits from Marty Musters, a computer forensic examiner, and from C.B.'s trial counsel. Each relates to the text messages and photos on which the complainants were cross-examined at trial and, more particularly, to the authenticity and integrity of those electronic documents.

109 The respondent cross-examined C.B.'s trial counsel on her affidavit but did not cross-examine the forensic examiner.

The Background Facts

110 The trial judge made specific findings of fact about the text messages on which D.P. was cross-examined and the photo on which G.D. was cross-examined. The relevant passages of the trial judge's reasons on these issues have already been excerpted. No useful purpose would be served by their repetition here. Suffice it to say that the trial judge considered both the text messages and photos to have no probative value.

The Affidavit of the Forensic Examiner

111 Marty Musters, a person qualified to conduct forensic analysis of digital and electronic devices, examined the cellphone said to have been used by the appellant C.B. in communications with the telephone number of D.P. He was asked to extract and extracted these communications and any photographs and accompanying metadata for the date on which the offences were alleged to have occurred. He provided an opinion about whether any of the data or photographs had been altered or changed in any way.

112 Mr. Musters deposed that the calls and messages he extracted from the cellphone are authentic. The messages are continuous and joined. No "spoofing" service was employed.

113 Mr. Musters also examined 31 photos taken with the camera feature of the cellphone on the date of the alleged offence against G.D. The images, with one exception, were unaltered and authentic. In his opinion, the altered image was a "touched up" copy of an original photo taken about 10 minutes earlier.

The Evidence of Trial Counsel

114 In her affidavit, C.B.'s trial counsel deposed that when she learned about text messages and photos contemporaneous with the alleged offences, she retained a private investigator to "extract" those messages and photos from the cellphone. The photographs of the text messages revealed an exchange with the cellphone of D.P. The photos were all taken on the date of the alleged offence against G.D.

115 Trial counsel called the private investigator as a witness at trial and entered his report as an exhibit in the proceedings. Counsel considered that this report, coupled with D.P.'s testimony that she communicated with the appellant C.B. by text message and that the phone number displayed on the text messages was her number, was sufficient to support a reasonable inference that D.P. wrote the relevant messages and that the photos were taken at the dates and times depicted on the phone.

116 Trial counsel also relied on D.P.'s evidence that no one else had her phone at the relevant time. She did not consider D.P.'s evidence that the appellant C.B. had installed an App on her phone as credible because it only emerged on the second day of her testimony after having at least implicitly acknowledged on the first day that she sent one of the messages. Trial counsel did not consider retaining anyone to do a more sophisticated extraction and analysis of the contents of the cellphone and sought no instructions from the appellant C.B. to do so.

117 In cross-examination, trial counsel acknowledged that the case against the appellant C.B. turned on the credibility of the complainants and the issue of consent. Her trial strategy was to challenge the credibility of both complainants and the reliability of their accounts of non-consensual conduct. An important part of her strategy, which was discussed several times with her client, was to use the text messages and photos to challenge the complainants' credibility and support the defence position.

118 Trial counsel agreed that when she cross-examined D.P. using the photographs of the text messages, no evidence had been adduced to establish that the cellphone was that of the appellant C.B., apart from counsel's assertion in her questioning to that effect. But D.P. did agree that she had her cellphone that night, acknowledged the number as it appeared on the photographs of the texts, had texted the appellant C.B. that night and "sort of" adopted one of the messages, the meaning of which she explained. No decision had been made at this point in the trial about whether the appellant C.B. would testify.

119 The effect of the private investigator's evidence, trial counsel accepted, was that he had picked up the phone from the appellant C.B.'s mother. No phone number was associated with it. Counsel acknowledged that the appellant C.B. could have been a source of getting the text messages and photos filed as numbered exhibits. In the end, counsel left it to the trial judge to determine the weight to be assigned to the text messages and photos in the credibility/reliability analysis.

The Arguments on Appeal

120 The appellants say that the proposed fresh evidence, in particular, the affidavit of Marty Musters, should be admitted in this case. The evidence satisfies the conditions precedent to admissibility. The opinion advanced is admissible under the rules of evidence, cogent and not excluded for want of due diligence.

121 No dispute arises about the admissibility of the evidence of Marty Musters were it to be tendered at trial. He is a duly-qualified expert entitled to conduct an analysis on the contents of the cellphone. His evidence is relevant to a material issue: the origins and authenticity of the text messages and photographs used in cross-examination.

122 The appellants contend that the proposed evidence is well capable of belief; is related to a material issue at trial, being the credibility of the complainants and the reliability of their evidence; and, if given there, might well have affected the trial judge's conclusion about the veracity of the complainants' evidence, and thus the verdict at trial.

123 As for due diligence, the appellants begin with a submission that due diligence is *not* a condition precedent to the admissibility of this evidence. That this evidence, or evidence to the same effect, was not called at trial was not the product of a strategic or tactical decision not to do so. Counsel had a well-grounded belief that the text messages and photos had been properly authenticated to permit their use in cross-examination of the complainants. The combined effect of D.P.'s testimony that she believed no one else had possession of her cellphone at the relevant time, together with its number and admitted text exchanges with the appellant C.B., as well as the continuity of those messages, satisfied the low threshold required for authentication. Additionally, the private investigator explained the photographs of the texts and the photos taken and their origins.

124 The decision of trial counsel was not a tactical decision, one made to gain some sort of strategic advantage. It reflected considered judgment informed by heed of correct principles. The alleged failure of due diligence should not be permitted to defeat the reception of this cogent evidence directed to a material issue on appeal. The interests of justice require its reception.

125 The respondent rejects the appellants' claim that the cogency requirement has been satisfied and that the due diligence factor does not warrant exclusion of the proposed evidence.

126 The respondent reminds us of the three-pronged focus of the cogency requirement. The proposed evidence must be relevant to a potentially decisive issue at trial. It must be credible. And it must be sufficiently probative that, when taken with the rest of the evidence received at trial, it could reasonably be expected to have affected the result.

127 The due diligence factor, the respondent concedes, is not a condition precedent to the admissibility of fresh evidence on appeal. It is concerned with the broader integrity of the criminal justice system, including the need for finality in the trial process. Due diligence requires an analysis of the reasons why evidence tendered for reception on appeal was not adduced at trial. It is a factor to be taken into account, along with the requirement of cogency, in deciding whether the "interests of justice" warrant admission of the evidence.

128 The respondent says that we should not receive as fresh evidence the affidavit of C.B.'s trial counsel. As a general rule, apart from appeals in which ineffective assistance is advanced as a ground of appeal, affidavits of trial counsel explaining trial strategy are not received as fresh evidence. Moreover, the trial judge permitted the cross-examination, admitted the report of the private investigator and considered the impact of the cross-examination on the weight he assigned to the complainants' testimony. This was as counsel agreed at trial.

129 As for the forensic examiner's affidavit and report, the respondent says that it fails to meet the cogency requirement and could have been obtained by the exercise of due diligence at trial. That it was not adduced there was a tactical decision made by competent trial counsel.

130 The respondent submits that the evidence of the forensic examiner is not relevant to the issue of consent or to the credibility of the complainants because its introduction would invite the application of myths and stereotypical reasoning. The respondent does not dispute that the evidence is credible, but says that it could not reasonably be expected to have affected the result of trial if admitted with the rest of the evidence given there. And its availability there with the exercise of due diligence renders it contrary to "the interests of justice" to receive it here.

The Governing Principles

131 The principles governing the reception of fresh evidence on appeal are uncontroversial and in no need of elaborate recitation or discussion. They are expressed in "the interests of justice" standard in s. 683(1) of the *Criminal Code* and described in the decision in *R. v. Palmer*, [1980] 1 S.C.R. 759, at p. 775.

132 The *Palmer* criteria involve three requirements:

- i. admissibility;
- ii. cogency; and
- iii. due diligence.

See *Truscott (Re)*, 2007 ONCA 575, 225 C.C.C. (3d) 321, at para. 92.

133 The precondition that the material tendered for admission on appeal must be *admissible* under the operative rules of evidence permits the reception of fresh evidence for impeachment purposes, as for example, to undermine the basis for findings of fact made at trial: *Truscott*, at paras. 96, 98.

134 The *cogency* requirement involves a qualitative assessment of the evidence tendered for reception on appeal. The evidence must be *relevant* in that it bears upon a decisive or potentially decisive issue at trial. It must be *credible* in that it is reasonably capable of belief. And it must be sufficiently *probative* that, when taken with the other evidence adduced at trial, it could reasonably be expected to have affected the verdict rendered at trial. Provided the fresh evidence considered in this context could reasonably be expected to have affected the result at trial, it is sufficiently cogent to justify its admission on appeal, subject to a consideration of the failure to lead that evidence at trial: *Truscott*, at paras. 99-100.

135 The admissibility and cogency requirements are directed to the admissibility of the fresh evidence under s. 683(1). Not so the due diligence requirement, which is not a precondition to admissibility. Due diligence enters the analysis only if the proposed evidence satisfies the first two preconditions to admissibility -- admissibility under the adjective law and cogency. The explanation offered for the failure to adduce the proposed evidence at trial, or absence of an explanation, can result in the rejection of evidence that would otherwise be admissible on appeal: *Truscott*, at para. 93. Where the proposed fresh evidence was available but not

tendered at trial because of tactical reasons thought justifiable by competent counsel, an additional degree of cogency is necessary before the proposed evidence may be received on appeal: *R. v. McDonald*, 2017 ONCA 568, 351 C.C.C. (3d) 486, at para. 148; *Truscott*, at para. 102.

The Principles Applied

136 As I will explain, I would admit the fresh evidence. In my respectful view, it satisfies the conditions precedent for reception of fresh evidence and should not be excluded for want of due diligence at trial.

137 In this case, the fresh evidence extends beyond evidence whose purpose is to impeach findings of fact made at trial. The expert opinion of Marty Musters is tendered for that purpose, but not so the affidavit and cross-examination of C.B.'s trial counsel. Its target is the issue of due diligence whose failure may result in the exclusion of evidence that satisfies the prerequisites for admissibility.

138 First, the expert opinion of Marty Musters.

139 No dispute arises about the admissibility of the expert opinion of Marty Musters under the operative rules of evidence. He is a qualified forensic examiner whose report would be admissible at the conclusion of the two-step analysis put in place by *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182.

140 A critical issue at trial on which the outcome depended was the credibility of the complainants and the reliability of their account of non-consensual conduct on the part of both appellants, which the Crown alleged constituted proof of the offences charged. This evidence was vigorously challenged by the defence. Among the methods of challenge was cross-examination of the complainants on contemporaneous text messages (D.P.) and photographs (G.D.), which were said to be at odds with the complainants' accounts of relevant events. And essential to impeachment on this basis was the authenticity of those text messages and photographs employed in the impeachment process.

141 The expert opinion of Marty Musters is *relevant* to the authenticity of the text messages and photographs used as impeachment mechanisms. His opinion establishes the nexus between the texting partners, D.P. and the appellant C.B., and the contemporaneity and source of the photographs. It tends to show that D.P.'s denial of authorship could be false.

142 The respondent takes no issue with the substance of the opinion on authenticity provided by Marty Musters, whom counsel did not cross-examine. I am satisfied that his opinion is reasonably capable of belief.

143 The final component of the cogency requirement involves an assessment of whether the opinion evidence, the expert opinion about authenticity, could reasonably be expected to have affected the verdict at trial. In my respectful view, the proposed evidence satisfies this aspect of the cogency requirement.

144 At trial, the case for the Crown depended on the evidence of the complainants. For all practical purposes, their testimony was the case for the Crown. To convict, the trial judge had to be satisfied beyond a reasonable doubt that the complainants were credible, their evidence

reliable and of such persuasive force that it excluded any reasonable doubt about the appellants' guilt.

145 In reaching his conclusion that the complainants were credible and their testimony reliable to such an extent that it excluded reasonable doubt, the trial judge rejected, as of no probative value, the text messages and photographs on which the complainants were cross-examined. The judge's finding of "no probative value", thus the lack of any impeachment value, was grounded on his conclusion that the messages and photographs were not established as authentic or genuine. But casting aside this evidence for want of authenticity, the fresh evidence shows, was wrong. It should have been factored into the credibility/reliability analysis. In the result, I am satisfied that had the expert opinion of Musters been before the trial judge, it could reasonably be expected to have affected the conclusion reached in that analysis, thus the verdict rendered at trial.

146 What remains is an assessment of whether the due diligence criterion should mandate exclusion of the evidence of Musters, despite its satisfaction of the conditions precedent to admissibility.

147 On this issue of due diligence, the evidence of trial counsel is relevant. Doubtless, trial counsel *could* have called the appellant C.B. or Musters, or some other forensic examiner, to authenticate the relevant contents of the appellant C.B.'s cellphone. That said, the decision of trial counsel was informed by her view that the record contained sufficient evidence to authenticate the contents put to the complainants. In this respect, trial counsel, as I have already explained, was correct. This was a reasonable conclusion in the circumstances, not a failure of due diligence that warrants exclusion of the expert opinion of Musters.

CONCLUSION

148 In the result, I am satisfied that the combined force of the errors made at trial and the admission of the fresh evidence demonstrate a miscarriage of justice within s. 686(1)(a)(iii) of the *Criminal Code*. I would allow the appeal, set aside the convictions and order a new trial on all counts contained in the information.

D. WATT J.A.

G. HUSCROFT J.A.:— I agree.

J.M. FAIRBURN J.A.:— I agree.