chose simply to set the evidence aside. Even that was done in a curious way. He did not conclude his assessment of the accused's testimony with a finding that she was not the least credible or with the observation he did not believe her in crucial respects. Instead, he concluded with the statement that her evidence was "of little assistance or weight on many crucial issues," implying that he accepted at least some of it, but he did not say which parts he accepted and which parts he rejected.

There was a complete absence of independent evidence confirming the children's evidence which in any way implicated the accused in any of the alleged crimes, if they occurred. No independent witnesses suggested that the accused had done anything wrong. None of the exhibits was shown to belong to her or was found in her room or was in any way connected to her. This was not to suggest that there was any requirement in law that there be confirmatory evidence. It was sufficient to say that in a case such as this, where the convictions rest almost entirely on the credibility of the complainants, and their credibility has been called into question by evidence, it is appropriate to take into account the absence of any confirmatory evidence implicating the accused as one of the many factors to be considered in determining whether any reasonable doubt existed as to the guilt of the accused. The failure of the judge to so direct himself was an error.

Even if he did not believe all or any of it, the judge never reviewed the accused's evidence from the point of view of whether it, together with the rest of the evidence, raised a reasonable doubt as to her guilt. Instead, he treated the case throughout as being a matter of choice between the complainants' evidence on the one hand and the accused's evidence on the other. He failed to direct himself properly as to the law.

Each of these misdirections tended to diminish, to some extent, the credibility of the evidence of the children. Any one of the factors, taken in isolation, might not be sufficient to render the verdict unreasonable, and it was to be noted that the judge, if and when he dealt with one of the factors, dealt with it in isolation. But even after extending the substantial deference which an appellate court is obliged to extend to the findings of the trial judge because of his advantage in actually hearing and seeing the witnesses, when all of these factors were taken together, and when their effect was considered cumulatively, the result was that there were real and serious doubts as to the credibility of the evidence of the children and as to the guilt of the accused. On the evidence adduced at trial, a properly instructed jury, acting judicially, could not have rendered a verdict of guilty.

Annotation

The controversy surrounding the allegations of child sexual abuse at the unlicensed day care centre in Martensville, Saskatchewan operated by R.S. and L.S. provides prosecutors, the judiciary, police, child care workers and mental health professionals with a sobering reminder about the importance of carrying out objective and careful investigations, using trained personnel. Many of these lessons were already "known", and many of the investigative errors made in Martensville were made in similar, earlier cases in the United States,[1] England and Western Europe.

[1]See e.g., *New Jersey v. Michaels*, 642 A.2d 1372 (1994), an American case with disturbing investigative similarities.

Some aspects of what occurred in Martensville are still controversial, and may never be known with certainty. However, it is apparent that inappropriate interviewing by untrained investigators resulted in some children making false allegations of abuse. It has been found that at least one child was, in fact, sexually abused at the day care centre by the S.'s son T.[2] However, as a result of inappropriate interviewing of children by police and other investigators, it is now apparent that a number of other children were led to make false allegations against a large number of adults. The Saskatchewan Court of Appeal's finding that the experienced trial judge in this case made several errors in assessing credibility should serve as cautionary advice to other judges presiding over such difficult trials involving young complainants.

One of the primary police investigators was in her first month on the police force in Martensville, and had no training in this challenging type of investigation. She, herself, testified that as a result of later training, she would have conducted the interviews differently. The other primary police investigator had experience, but was largely a "self-taught expert". The failures of the Martensville investigation should not be laid solely, or even largely, at the feet of those with primary front line responsibility, but rather must be more widely shared among all those responsible for the training, supervision and support for those doing this type of investigative work. Even among experts in this field, more is known now about conducting this type of investigation than was the case in 1991.

A few of the specific lessons of Martensville:

- Child sexual abuse investigators must have appropriate training, up-to-date resources and adequate support, so that they can understand the nature of child sexual abuse and the process for interviewing children about abuse allegations.

- Investigators must always approach child abuse allegations with objectivity and an "alternate hypothesis". Although *most* allegations are true, some are not. Each child or adult who reports abuse is entitled to respect and support, but investigators cannot uncritically assume that all reports are well-founded.

- Investigators who are interviewing children, especially younger children, must be very careful about asking leading or suggestive questions. While sometimes it is necessary to suggest a possible answer to a child, especially a young child, it should always be clear to the child that there are alternative possible responses.

- Investigators should be very careful about repeatedly interviewing children, or repeatedly asking the same questions. While children will rarely spontaneously disclose false allegations of abuse, if persistently asked questions by authority figures (like police or parents), some children will begin to develop false stories of abuse which they perceive the interviewers "want" to hear. The stories may be based on the questions posed, or even on archetypical images of abuse ("I was put in a cage"; "My abuser wore black").

[2]One conviction against T.S. for sexual assault was upheld on May 8, 1995 by the Saskatchewan Court of Appeal.

• Interviewers should not provide subtle (or overt) rewards to obtain answers, nor should they make subtle (or overt) threats or negative comments if children fail to answer questions.

• Investigators should be very careful about placing much weight on a child's apparently "inappropriate" sexual knowledge as an indicator of abuse, especially if the knowledge is general (i.e., the child describes touching or kissing genitalia) and not graphic (e.g., relating to specific smells or tastes, or to orgasms).

• Investigators should be very conscious of alternative explanations for physical conditions of children. In this case, medical examination revealed that one of the boys had "anal gaping", but this was equally consistent with sexual abuse and constipation, a condition which he in fact had.

• Investigators should be very careful to assess the consistency of allegations with physical evidence. In this case, the children, after suggestive questioning, identified exterior photos of a particular building as the place where the abuse occurred. In fact, the owners of the building substantially changed the outside appearance (i.e., different colour) between the time of the alleged abuse and the time the photo was taken. Some of the children described being taken to and abused in a building which the police thought they had located, but it was virtually impossible that anyone other than the owners had occupied the building.

• Evidence of mental health experts about child sexual abuse may assist a trier of fact, but it is never conclusive that abuse has occurred.

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Cases considered

Director of Public Prosecutions v. Kilbourne, [1973] A.C. 729, 57 Cr. App. R. 381, [1973] 1 All E.R. 440 (H.L.) – applied.

R. v. B. (G.) (1988), 65 Sask. R. 134 (C.A.), affirmed [1990] 2 S.C.R. 30, 77 C.R. (3d) 347, 56 C.C.C. (3d) 200, (sub nom. *R. v. B. (G.) (No. 2)*) 111 N.R. 31, 86 Sask. R. 111 – considered.

R. v. B. (G.), [1990] 2 S.C.R. 30, 77 C.R. (3d) 347, 56 C.C.C. (3d) 200, (sub nom. *R. v. B. (G.) (No. 2)*) 111 N.R. 31, 86 Sask. R. 111 – considered.

R. v. B. (R.H.), [1994] 1 S.C.R. 656, 29 C.R. (4th) 113, 165 N.R. 374, 42 B.C.A.C. 161, 67 W.A.C. 161, 89 C.C.C. (3d) 193 – referred to.

R. v. Brown (1994), 91 C.C.C. (3d) 89, 132 N.S.R. (2d) 224, 376 A.P.R. 224 (C.A.) [leave to appeal to S.C.C. refused (1994), 93 C.C.C. (3d) vi (note), 137 N.S.R. (2d) 80 (note), 391 A.P.R. 80 (note)] – referred to.

R. c. Cedras (1994), 32 C.R. (4th) 305, 63 Q.A.C. 241 – referred to.

R. v. François, [1994] 2 S.C.R. 827, 31 C.R. (4th) 201, 169 N.R. 241, 73 O.A.C. 161, 91 C.C.C. (3d) 289, 116 D.L.R. (4th) 69 – referred to.

R. c. Jones, [1992] R.J.Q. 918, 46 Q.A.C. 121, 74 C.C.C. (3d) 377 – referred to.

R. v. Marriott (1993), 79 C.C.C. (3d) 346, 105 Nfld. & P.E.I.R. 21, 331 A.P.R. 21 (P.E.I. C.A.) – referred to.

R. v. S. (P.L.), [1991] 1 S.C.R. 909, 5 C.R. (4th) 351, 64 C.C.C. (3d) 193, 122 N.R. 321, 90 Nfld. & P.E.I.R. 234, 280 A.P.R. 234 – followed.

R. v. S. (W.) (1994), 29 C.R. (4th) 143, 18 O.R. (3d) 509, 90 C.C.C. (3d) 242, 70 O.A.C. 370 (C.A.) [leave to appeal to S.C.C. refused (1994), 35 C.R. (4th) 402 (note), 20 O.R. (3d) xv (note), 93 C.C.C. (3d) vi (note)] – referred to.

R. v. W. (D.), [1991] 1 S.C.R. 742, 3 C.R. (4th) 302, 122 N.R. 277, 63 C.C.C. (3d) 397, 46 O.A.C. 352 – followed.

R. v. W. (R.), [1992] 2 S.C.R. 122, 13 C.R. (4th) 257, 137 N.R. 214, 54 O.A.C. 164, 74 C.C.C. (3d) 134 [application for re-hearing refused (November 18, 1992), Doc. 21820 (S.C.C.)] – considered.

R. v. Yebes, [1987] 2 S.C.R. 168, 59 C.R. (3d) 108, [1987] 6 W.W.R. 97, 17 B.C.L.R. (2d) 1, 78 N.R. 351, 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424 – considered.

Statutes considered

Criminal Code, R.S.C. 1985, c. C-46 –
s. 686(1)(*a*)(i)
s. 686(1)(*a*)(ii)

Young Offenders Act, R.S.C. 1985, c. Y-1.

APPEAL from convictions for sexual offences.

C. Ruby and *D. Labach*, for appellant.
C. Snell, Q.C. and *G. Mitchell*, for the Crown.

(Doc. 6017

May 2, 1995. The judgment of the court was delivered by

1 SHERSTOBITOFF J.A.: – This is an appeal from the following convictions imposed under the provisions of the *Criminal Code* and the *Young Offenders Act*: that the appellant did, between May 1, 198 and July 31, 1991: commit a sexual assault on C.L.; for a sexual pur pose, touch C.L.; without lawful authority, confine C.L.; commit sexual assault on S.H.; for a sexual purpose, touch S.H.; in commit ting a sexual assault on S.H. threaten to use a weapon; commit an as sault on S.H.

2 The grounds of appeal are best summarized by listing the title or headings of the various sections in the appellant's factum:

A. Error in Application of Reasonable Doubt

B. Misapprehension of Evidence

C. Improper Cross-Examination of the Appellant