REGINA v. POTTLE

49 C.C.C. (2d) 113
CASE-HISTORY: Affirming 39 C.C.C. (2d) 484

Newfoundland Court of Appeal
Furlong, C.J.N., Morgan and Gushue, JJ.A.

SEPTEMBER 27, 1978

Courts — Jurisdiction — Justice failing to conduct inquiry prior to issuing summons — Provisions requiring inquiry while mandatory essentially proce-

dural — Failure to comply with provisions not resulting in Magistrate losing jurisdiction — Even if jurisdiction lost by failure to hold inquiry jurisdiction regained by accused's subsequent Court attendance — Cr. Code, s. 455. 3.

Practice, process and procedure — Summons — Justice failing to conduct inquiry prior to issuing summons — Provisions requiring inquiry while mandatory essentially procedural — Failure to comply with provisions not resulting in Magistrate losing jurisdiction — Even if jurisdiction lost by failure to hold inquiry jurisdiction regained by accused's subsequent Court attendance — Cr. Code, s. 455.3.

[Doyle v. The Queen (1976), 29 C.C.C. (2d) 177, 68 D.L.R. (3d) 270, [1977] 1 S.C.R. 597, 35 C.R.N.S. 1, 10 Nfld. & P.E.I.R. 45, 9 N.R. 285; R. v. Hughes (1879) 4 Q.B.D. 614, refd to]
'Evidence -- Similar facts -- Charge of indecent assault of eight-year-old boy

Evidence — Similar facts — Charge of indecent assault of eight-year-old boy - - Boy giving unsworn evidence that accused committed act of fellatio on him — Older brother testifying under oath that at approximately same time accused asked him to perform act of fellatio on accused — Whether admissible as evidence of similar act — Whether capable of corroborating evidence of victim — Cr. Code, s. 586 — Canada Evidence Act, R.S.C. 1970, c. E-10, s. 16.

Evidence -- Corroboration -- Unsworn evidence of child

Evidence — Corroboration — Unsworn evidence of child — Charge of indecent assault of eight-year-old boy — Boy giving unsworn evidence that accused committed act of fellatio on him — Older brother testifying under oath that at approximately same time accused asked him to perform act of fellatio on accused — Whether evidence capable of corroborating evidence of victim — Cr. Code, s. 586 — Canada Evidence Act, R.S.C. 1970, c. E-10, s. 16.

The accused was charged with indecent assault of an eight-year old boy. Both the boy and his 11-year-old sister gave unsworn evidence pursuant to s. 16 of the Canada Evidence Act, R.S.C. 1970), c. E-10, and testified that the accused while lying in bed with the boy performed an act of fellatio on the boy. The Crown also sought to introduce the evidence of the boy's 14-year-old brother. The brother testified, under oath, that a short time before or after the incident the accused asked him to perform an act of fellatio on the accused. This took place downstairs in the same house. The trial Judge held that the evidence of the older brother was admissible as similar fact evidence and corroborated the unsworn evidence of the complainant and his sister. On appeal by the accused from his conviction, held, the appeal should be dismissed.

Per Furlong, C.J.N.: The evidence of the older brother was properly found to be similar fact evidence, admissible to rebut a defence of innocent association. Further, it was clearly capable of being corroborative and the trial Judge did not err in concluding that it did in fact corroborate the unsworn testimony.

Per Gushue, J.A., Morgan, J.A., concurring: The evidence of the older brother could constitute similar fact evidence notwithstanding it related only to an "invitation" by the accused and was not evidence of an act since the issue is the similarity the testimony bears to the evidence relating to the charge itself. There was a significant nexus in both time and type of act referred to in the evidence of the older brother and the unsworn evidence of his younger brother and sister. The evidence was also relevant and cogent as establishing the accused's state of mind, intent and systematic course of conduct and was therefore properly admitted. Further, the trial Judge properly held that the evidence could corroborate the unsworn testimony, as required by s. 16(2) of the Canada Evidence Act and s. 586 of the Criminal Code. The evidence of the older brother was circumstantial evidence, but such evidence is capable of constituting corroboration. It was obviously material and was independent of the testimony sought to be corroborated. It also met the further requirement of tending to confirm that a crime had been committed and that it was committed by the accused. The evidence of all three witnesses was very strong and was certainly not fabricated nor the result of any conspiracy of the witnesses. The actions of the accused towards the older brother were so closely related in time to the assault charged as perhaps to form part of the same act.

[Boardman v. Director of Public Prosecutions (1974), 60 Cr. App. R. 165; Director of Public Prosecutions v. Kilbourne, [1973] 1 All E.R. 440, [1973] A.C. 729, consd; Makin et al. v. A.-G. N.S.W., [1894] A:C. 57; R. v. Sims (1946), 31 Cr. App. R. 158; Boulet v. The Queen (1976), 34 C.C.C. (2d) 397, 75 D.L.R. (3d) 223, [1978] 1 S.C.R. 332, 40 C.R.N.S. 158, 15 N.R. 541; Leblanc v. The Queen (1975), 29 C.C.C. (2d) 97, 68 D.L.R. (3d) 243, [1977] 1 S.C.R. 339, 8 N.R. 541; R. v. Baskerville (1916), 12 Cr. App. R. 81, refd to]

APPEAL by the accused from the decision of Steele, C.J.D.C., 39 C.C.C. (2d) 484, 16 Nfld. & P.E.I.R. 388, convicting him on a charge of indecent assault.

D. Hurley, for accused, appellant.

E. Shortall, for the Crown, respondent.

FURLONG, C.J.N.

GUSHUE, J.A.

FURLONG, C.J.N.:--The appellant was tried in the District Court Judges' Criminal Court, Judicial District of St. John's for breach of s. 156 [am. 1972, c. 13, s. 70] of the Criminal Code, that is to say, indecent assault, was convicted and sentenced to a term of imprisonment of two years. Briefly, the facts are that the appellant was accused of an indecent assault upon a boy of eight years of age, G. C., at Bell Island on August 28, 1975. The evidence upon which the accused was convicted consisted of the sworn evidence of a juvenile, B.C., aged 14, and the unsworn evidence of three other young persons aged 11, 10 and eight respectively and the unsworn evidence of G. C., the eight-year-old boy who was alleged to have been the victim of the assault and his sister, S. C., 11 years of age, both of whom gave direct evidence of the assault which took place in an upstairs bedroom in the home of the parents of the children.

The evidence of B. C., aged 14 years, was accepted under oath by His Honour Judge Steele who presided at the trial after he had satisfied himself that the young boy understood the nature of the oath and that his sworn evidence could be received [39 C.C.C. (2d) 484, 16 Nfld. & P.E.I.R. 388]. The admission of the evidence of this witness has been objected to by the appellant and forms the principal ground for this appeal.

The learned trial Judge has found that the evidence of F.L. was what has been termed by counsel as "similar fact evidence" and

admissible on the grounds that it was in rebuttal of the defence of innocent association which was implicitly raised by the accused in a voluntary statement which he made to the police and which was in evidence at the hearing. The grounds of appeal are that the evidence of B.C., to the effect that the accused invited him to perform an indecent act, did not disclose any similar fact evidence and that the learned Judge erred in holding that the evidence, which he ruled was similar fact evidence, was admissible; that the learned Judge erred in convicting the appellant on the uncorroborated evidence of unsworn witnesses; and that there was an error in the issue of a summons by a Justice of the Peace to compel the attendance of the appellant which constituted a loss of jurisdiction over the information.

The logical sequence of events prompts me to deal with this final ground first, dealing as it does with the question as to the power of the Justice of the Peace who took the information, to issue a summons without formally holding the inquiry which s. 455.3(1) [enacted R.S.C. 1970, c. 2 (2nd Supp.), s. 5] of the Criminal Code requires.

The learned trial Judge in his judgment deals very fully with this objection and cites authorities in support of his conclusion that the sections of the Code are procedural only and although the inquiry is mandatory, it is simply for the purpose of bringing the accused before the Magistrate. He concluded that the failure of the Magistrate to conduct the inquiry did not result in a loss of jurisdiction over the offence and that in any event the subsequent appearance of the accused

before the Magistrate and at the preliminary inquiry restored the jurisdiction. His Honour Chief Judge Steele dealt with this matter exhaustively, reviewed all the relevant authorities and satisfied himself that there was no loss of jurisdiction over the information. This matter had come before the trial Judge by way of motion by counsel for the appellant to quash the proceedings. He disposed of it after a preliminary argument and adjournment and having rejected the motion proceeded with the trial of the facts.

I am satisfied that Steele, C.J.D.C., was right in thus disposing of the motion and I uphold his conclusions for the reasons which he gave.

The substantial ground of appeal in this case is of course the question as to whether or not the evidence of B.C. was evidence of similar facts and if so whether such evidence was admissible. Reading the transcript of evidence shows us that after the indecent assault upstairs on G.C. the accused went downstairs and

having sent the young boy B.C. off on a message for him, invited him to perform an indecent act in exchange for a present of a small sum of money. The time of the two instances, the one upstairs and the one downstairs, can be regarded as contemporaneous. There seems to have been no significant interruption between the upstairs incident and the downstairs occurrence. My own view is that one of the necessary elements to permit the acceptance of this evidence is whether or not both of them occurred within the same period of time as to make them part of the same general behaviour. It should be emphasized that we are dealing with what has come to be called similar fact evidence which is to be distinguished from evidence of prior or persistent conduct.

The leading authorities have all come to the conclusion on one point and that is that similar fact evidence may always be given in rebuttal to certain lines of defence raised by an accused person. One of these defences has become known as innocent association and consists of an assertion by the accused that he did not commit the offence charged and that relations between him and his alleged victim were wholly innocent. The general conclusion as to admissibility under all circumstances was decided in the leading case of Boardman v. Director of Public Prosecutions (1974), 60 Cr. App. R. 165 (H.L.), the headnote of which reads in part:

There are circumstances in which, contrary to the general rule, evidence of certain acts of the defendant other than those charged is admissible because of their similarity to the acts being investigated and by reason of their probative force. It is for the judge to rule whether such evidence is admissible and in his discretion to decide whether in the circumstances such evidence should be admitted.

That case was an appeal to the House of Lords from the Court of Appeal. The appellant had been convicted of five counts of indecent assault on juveniles and the accused was sentenced to three years on the first count and concurrent terms of 18 months on each of the other four counts. The appellant was successful in part in that conviction on count three was dismissed but the convictions on the first and second counts of the indictment were affirmed. Leave to appeal was refused but as the Court of Appeal certified that a point of law of general public importance was involved, the appeal committee of the House of Lords gave leave to appeal to the House. This Court constituted by five law Lords, were unanimous in rejecting the appeal.

One of the conclusions of the House enunciated by Lord Hail-sham of St. Marylebone and Lord Cross of Chelsea was that when the admissibility of similar fact evidence is being considered, there

is no logical distinction to be drawn between a defence of innocent association and one of complete denial.

In his judgment the trial Judge places proper weight on Director of Public Prosecutions v. Kilbourne, [1973] 1 All E.R. 440, and the whole question of corroborative evidence in a case of this nature was extensively dealt with. I cannot but be struck by one passage in the opinion of Lord Hailsham [at p. 448]:

A considerable part of the time taken up in argument was devoted to a consideration whether such evidence of similar incidents could be used against the respondent to establish his guilt at all, and we examine the authorities in some depth from Makin v. A-G for New South Wales, [1894] A.C. 57, through Lord Sumner's observations in Thompson v. R, [1918] A.C. 221 to Harris v. Director of Public Prosecutions, [1952] 1 All E.R. 1044, [1952] A.C. 694. I do not myself feel that the point arises in the present case. Counsel for the respondent was in the end constrained to agree that all the evidence in this case was both admissible and relevant ... In my view, this was wholly correct.

The conclusion which I have reached is that the evidence of F.L. was properly found to be a similar fact evidence which was admissible by way of rebuttal and it was properly made part of the prosecution case in anticipation of the defence. This evidence was clearly capable of being corroborative and in instructing himself on this question the Judge arrived at the conclusion that it was in fact corroborative of the unsworn evidence.

In his judgment Chief Judge Steele has taken great pains to examine the authorities very fully and he has quoted many of them in support of his conclusions. I am satisfied that the conclusions at which he arrived were the proper conclusions in law and should be sustained. I think this appeal fails to succeed and is dismissed.

Morgan, J.A., concurs with Gushue, J.A.

GUSHUE, J.A.:--This appeal is taken by John George Pottle against his conviction by Chief Judge Steele of the District Court of a breach of s. 156 [am. 1972, c. 13, s. 70] of the Criminal Code [39 C.C.C. (2d) 484, 16 Nfld. & P.E.I.R. 388]. The specific offence was that of indecent assault against one G. C., a male person eight years of age. The appellant was sentenced by the learned Judge to 16 months' imprisonment following his conviction.

The grounds of appeal are as follows:

(1) That the learned Judge erred in holding that words spoken by the appellant were similar fact evidence;

(2) that the learned Judge erred in holding that the evidence held by him to be similar fact evidence was admissible;

(3) that the learned Judge erred in convicting the appellant on the uncorroborated evidence of unsworn witnesses, and (4) that the learned Judge erred in holding that the unlawful issue of a summons by a Justice of the Peace to compel the attendance of the appellant did not result in a loss of jurisdiction over the information.

Before outlining the facts of the matter, I intend to deal first with the fourth ground of appeal which is obviously of a technical nature. The basis of this ground is that the Justice of the Peace who received the information on August 5, 1976, did not follow the mandatory provisions of s. 455.3(1) [enacted R.S.C. 1970, c. 2 (2nd Supp.), s. 35(2)] of the Criminal Code relating to the issue of a summons or a warrant which would compel the attendance of the accused to answer the charge. That section states:

455.3(1) A justice who receives an information, other than an information laid before him under section 455.1 shall

(a) hear and consider, ex parte,
(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him to answer to a charge of an offence.

The Justice gave evidence at trial confirming that she had not heard and considered the allegations of the informant as required by para. (a)(i) and (ii) of the section, but, once having read the information, simply took the informant's oath and signed the jurat. Counsel for the appellant argued before Chief Judge Steele, and before this Court, that because the requirements of this section are mandatory, and were not complied with, the subsequent appearance of Pottle before the Magistrate was illegal and that there was in consequence a loss of jurisdiction over both the person of the accused and over the offence itself. The learned Judge, after exhaustively reviewing the relevant authorities and the law generally, concluded that the irregularity was one of procedure only, that jurisdiction over the offence had not been lost, and that he was also in doubt that jurisdiction over the person of the accused had been lost by the Justice. However, even if jurisdiction over the person had been lost, it was his view that such was subsequently regained on the appellant's appearing before the Magistrate.

I am in complete agreement with him on this point. As pointed out by the learned Judge, there is a definite distinction between the laying of the information and the issuing of a summons or war-

rant. The former is a ministerial act and the Justice, by virtue of the provisions of s. 455 [rep. & sub. idem] of the Criminal Code which states that "the justice shall receive the information", is obliged to receive it. The issuing of a summons or warrant, on the other hand, is a judicial act

within the discretion of the Justice. the two acts are separate and distinct. This distinguishes this matter from the case of Doyle v. The Queen (1976), 29 C.C.C. (2d) 177, [1977] 1 S.C.R. 597, 10 Nfld. & P.E.I.R. 45, 9 N.R. 285, where the eight-day time-limitation during which a remand of an accused must be made had expired. Mr. Justice Ritchie (for the Court) stated that this amounted to loss of jurisdiction over the offence the word "offence" meaning in this context the information itself. In such a case, the information is treated as if never laid and if the Crown desires to pursue the matter, it must lay a new information and start the process afresh. In the case at bar, the validity of the information is obviously unaffected by an irregularity in the issuing of the summons and if the accused was not properly before the Magistrate, the most which could be said was that jurisdiction over the person of the accused was lost. The Doyle decision makes it clear that in such an instance the information does not lapse and jurisdiction can be regained in certain circumstances -- e.g., a subsequent appearance before the Justice or Magistrate by the accused.

The authorities cited, and quoted from, by the learned Chief Judge (and it would be redundant for me to further quote them), make it clear, as he puts it, that [at p. 494] "the provisions of s. 455.3(1)(a) of the Code ... although mandatory, are essentially procedural in nature and do not affect the jurisdiction of the Magistrate". The various Canadian cases on point follow the lead of the English case of R. v. Hughes (1879), 4 Q.B.D. 614, which reached the above conclusion and further concluded that once an accused is brought before the Magistrate by whatever method, any jurisdiction over the accused's person which was lost is thereby regained. To briefly quote from the judgment of Lopes, J., in that case (at p. 622):

I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, is immaterial ...

In my view, this is a correct expression of the law. Inasmuch as the appellant did subsequently appear before the Magistrate and made his election as to trial, the proceedings were made regular,

if in fact there was a temporary loss of jurisdiction over his person, which may well have been the case. I would dismiss this ground of appeal.

We come therefore to the substantive aspect of this appeal, namely, whether certain words spoken by the appellant were similar fact evidence and, if so, were admissible in evidence, and, further, whether such evidence, if admissible, constituted corroboration of the evidence of unsworn witnesses. The facts of the matter are fully set out in the judgment, but briefly they are that G. C. who, as stated was eight years old, and his 11-year-old sister, S. C., gave unsworn evidence of the appellant's getting into G. C.'s bed, lying on top of him and performing certain indecent acts, one of which was that of fellatio. This, although unsworn, was direct evidence. B. C., another brother of G. C., age 14 years, gave sworn evidence to the effect that a short time after the above incident took place while the appellant was lying on a sofa downstairs in the house, Pottle offered him money to perform an act of fellatio on him, which request was refused. The learned Judge ruled that the latter evidence was similar fact evidence and that it was

admissible because of the proximity in time between the two events, the degree of similarity establishing a nexus or connection, and because of its relevancy and cogency. He then further found, for basically the same reasons, that this evidence was sufficient to corroborate the unsworn evidence of G. C. and S. C. He thus convicted Pottle.

I shall take the three grounds of appeal in order:

(1) That the learned Judge erred in holding that words spoken by the appellant were similar fact evidence

I see no merit in this ground of appeal. In my view, for evidence to be "similar fact evidence", it has only to be that, and nothing more. It is not necessary that the evidence be of similar crimes committed by the accused, but what is relevant is the similarity it bears to the evidence relating to the charge itself. Thus, in the present case, there is sworn evidence of an invitation by the appellant to B. C. to perform the same indecent act that he, the appellant, was charged with having performed on G. C. I cannot accept the argument of counsel for the appellant that the two incidents were (as he put it) substantially different and set apart. I think that they are significantly similar in that, amongst other things, the latter incident is indicative of the appellant's state of mind or intent. The last moves us really to the second ground of appeal which is one of the two important questions to be resolved,

but I have no doubt that the learned Judge was correct in classifying the evidence of B. C. as similar fact evidence. This ground of appeal is dismissed.

(2) The learned Judge erred in holding that the evidence held by him to be similar fact evidence was admissible

The important question is thus whether the evidence should have been admitted. There is of course a general exclusionary rule that an accused has only to answer the charge raised by the indictment preferred against him, but that there are exceptions to the rule, including that dealing with evidence of similar facts or acts, has been formulated, modified and approved by a series of English cases. As put by Lord Hailsham in the case of Boardman v. Director of Public Prosecutions (1974), 60 Cr. App. R. 165 at p. 184 (H.L.):

The rule is as stated by Lord Herschell in MAKIN ... by Lord du Parcq in NOOR MOHAMED, in the passage quoted by Lord Simon in HARRIS (1952), 36 Cr. App. R. as p. 57; [1952] A.C. at p. 707, and is subject to the judge's discretion as defined by Lord Simon at the same place.

In the case of Makin et. al. v. A.-G. N.S.W. [1894] A.C. 57 at p. 65, Lord Herschell states that:

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it

bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

The latter proposition, which will be seen to be independent of the first, may be invoked by a trial Judge in the exercise of his discretion if, as stated by Lord Morrison in the Boardman case, supra, it is a case [at p. 172]:

... where a judge, having both limbs of Lord Herschell's famous proposition in mind, considers that the interests of justice (of which the interests of fairness form so fundamental a component) make it proper that he should permit a jury when considering the evidence on a charge concerning one fact or set of facts to consider the evidence concerning another fact or set of facts if between the two there is such a close or striking similarity or such an underlying unity that probative force could fairly be yielded.

The case of R. v. Sims (1946), 31 Cr. App. R. 158, came under criticism for certain aspects of its application of the rule, but in the Boardman case again, Lord Wilberforce stated that the rule as laid down in Makin, supra, and applied in Sims was now as follows [at p. 174]:

The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen froma cause common to the witnesses or from pure coincidence.

In the same case, Lord Morris said [at p. 171]:

... evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt: so evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided.

The learned Chief Judge in the present case did not directly consider the Boardman case, but he did consider the various prior English cases, as well as certain Canadian cases. He points out that the proposition put forward in Makin, supra, has been followed in Canada and he specifically refers to and quotes from the Supreme Court of Canada cases of Boulet v. The Queen (1976), 34 C.C.C. (2d) 397, 75 D.L.R. (3d) 223, 15 N.R. 541, and Leblanc v. The Queen (1975), 29 C.C.C. (2d) 97, 68 D.L.R. (3d) 243, 8 N.R. 541. I do not find it necessary to further quote what he has already done, except from the judgment of Beetz, J., in Boulet where he states, at p. 411 C.C.C., p. 558 N.R.:

Evidence of similar acts is not designed to show that, because he has committed other crimes, the accused probably committed the act with which he is charged, and in principle it should not be admitted if that is its only effect. However, although it may have this effect, it is still admissible if it is relevant to a question which is important to the outcome of the trial, which is the case, for example, when it establishes the accused's state of mind, intent ... systematic course of action, premeditation, and so on.

I think that the last sentence is important. Counsel for the appellant has contended that the evidence of B. C. should not have been accepted because it is prejudicial and comes within the exclusionary rule. But it is apparent that almost all such evidence, if relevant, will have a prejudicial effect on an accused's defence, once it is admitted. If it did not, there would be little point in its being introduced by the prosecution. However, the Judge must decide whether it is sufficiently relevant or important to the case to outweigh the above consideration. If he decides that it is, then he admits it and the jury (if there is one), or he, if he is sitting alone, would then weight that evidence.

The learned Judge goes into great detail to show the nexus in both time and the type of acts referred to in the evidence of B.C. and unsworn evidence of B.C. and S.C., as well as the questions of relevancy and cogency. I agree with him that the type of evidence supports his admission of it, and would merely further state that,

in my view, the law as set out in the Boardman case, supra, the judgments which thoroughly analyze the law, and the other English cases cited quoted from above and by Steele, C.J.D.C., justify the admissibility of the evidence of B. C. in this case. Without doubt as well, that evidence indicates or establishes "the accused's state of mind, intent ... systematic course of action, premeditation ..." as propounded by Beetz, J., in Boulet, supra. This ground of appeal is dismissed.

The final ground of appeal is:

(3) That the learned Judge erred in convicting the appellant on the uncorroborated evidence of unsworn witnesses

Section 16 of the Canada Evidence Act, R.S.C. 1970, c. E-10, states as follows:

16(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinionof the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

Further, s. 586 of the Criminal Code says basically the same thing as s-s. (2) above:

586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

Thus, the evidence of G. C. and S. C., being unsworn and that of children, must be corroborated by material evidence implicating Pottle in the commission of the offence for which he was

charged. The Crown relied upon the sworn evidence of B. C. to do so. The learned trial Judge raised the question first of whether corroboration could be afforded by similar fact evidence, but I think (with him) that this is irrelevant. He decided, and I have agreed, that the similar fact evidence should be admitted. Once this has been done, it becomes simply evidence and the only question which arises therefore is whether that particular piece of evidence is capable of supplying the necessary corroboration.

Once again, the learned Judge has exhaustively and, in my view, correctly analyzed the various authorities pertaining to corroboration. I see no point in repeating all that he said and, as to the law, I adopt his reasoning in its entirety. The law as to corroboration is still that as set out by Lord Reading in the well-known

case of R. v. Baskerville (1916), 12 Cr. App. R. 81 at p. 91, where he states that the corroborating evidence:

... must be evidence which implicates him [the accused] that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

(My brackets.) He further says:

The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed, by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

(Emphasis added.)

The last is obviously important in the case at bar because the evidence of B. C. is circumstantial. The statement of Lord Simons in Director of Public Prosecutions v. Kilbourne, [1973] A.C. 729 at p. 758., that:

Corroboration is ... nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence ... It is, in short, evidence which renders other evidence more probable.

is also highly relevant. Thus, circumstantial evidence may produce corroboration. The last question to be answered therefore is whether the circumstantial evidence of B. C. was sufficient to do so, as found by the learned Judge.

There can be no question but that the evidence of B. C. is material. If it were not, it would not have been properly admitted in the first place. The other rules which pertain to corroborating

evidence, as set out in Baskerville, supra, in addition to that of materiality, are that the evidence must be independent of the evidence to be corroborated, it must emanate from a source other than the witness or witnesses whose testimony is sought to be corroborated, it must tend to confirm that a grime has been committed and, further, it must confirm that the accused committed that crime. There is obviously no difficulty with the first two requirements, and while on the face of it the last two requirements would appear to be more difficult for the prosecution to overcome in the present case, it must be noted from the italicized quotations from Baskerville above, and from Kilbourne on this page, that the seeming rigidity of these two requirements may be relaxed considerably depending on the facts and the circumstances of a particu-

lar case. It is, I think, important to note here the strength of the evidence of G. C., S. C. and B. C. and the manner in which it is interwoven. I have read this evidence carefully and in my view the learned Judge was correct in accepting it as such strong evidence which was certainly not fabricated nor the result of any conspiracy between these witnesses. The evidence of B.C., while circumstantial, confirms the indecent intent of the appellant in his behaviour towards G. C. In fact, the actions of the appellant towards B. C. are so closely related in time to the assault upon G. C. as perhaps to form part of the actus reus. In my view, in light of these circumstances, and as well for the reasons set forth by the learned Chief Judge, he acted correctly in finding the evidence of B. C. as being sufficiently corroborative of the evidence of G. C. and S. C. relating to the assault, and that it was sufficient, again under these circumstances, to confirm the crime and Pottle's commission of it. As stated by Lord Salmon in the Boardman case, supra [at p. 188]: "After all, corroboration is only evidence tending to implicate an accused in the commission of the offence with which he is charged." The evidence here certainly does at least that. This ground of appeal, and the appeal itself, is therefore dismissed.

Appeal dismissed.