R. *v.* B. (G.), [1990] 2 S.C.R. 30

G.B., A.B. and C.S. *Appellants*

v.

Her Majesty The Queen *Respondent*

indexed as: r. *v.* b. (g.)

File Nos.: 20905, 20919 and 20931.

1989: November 29; 1990: June 7.

Present: Wilson, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for saskatchewan

Criminal law -- Sexual offences -- Time of offence -- Trial judge finding that date of offence had not been established -- Whether time an essential element of offence -- Whether trial judge erred in refusing to amend information -- Criminal Code, R.S.C. 1970, c. C-34, s. 529(4.1).

Criminal law -- Sexual offences -- Information -- Amendment -- Trial judge finding that date of offence had not been established -- Whether time an essential element of offence -- Whether trial judge erred in refusing to amend information -- Criminal Code, R.S.C. 1970, c. C-34, s. 529(4.1).

Each of the appellants, who are young offenders, was charged with sexually assaulting the complainant, a fellow elementary school student who was seven years old at the time of the

alleged offence. The complainant was sworn in by the trial judge and testified that the assault took place sometime during the wintertime when she was in grade one. The complainant's mother testified that her daughter experienced bed-wetting and nightmares during the late months of 1985 and the early months of 1986. The trial judge concluded that if the event did take place, its date had not been established. He noted that if the offence had taken place while the complainant was in grade one, it would have had to occur a year earlier than alleged. He found that the date is an essential element of the offence and refused to amend the information as requested by the Crown. He concluded that since one of the main ingredients of the offence had not been established beyond a reasonable doubt, the appellants must be acquitted. The Court of Appeal found that the trial judge erred in failing to find that the date had been established with sufficient particularity and in failing to amend the information in light of the evidence presented at trial. It set aside the acquittals and ordered a new trial.

Held: The appeal should be dismissed.

An information or indictment must provide an accused with enough information to enable him or her to defend the charge. While time must be specified, the exact time need not be identified or proved. In this case the information provided was adequate, having regard to the nature of the offence charged and the age of the victim. Under s. 529(4.1) of the *Criminal Code*, a variance between the indictment and the evidence is not material with respect to the time of commission of the offence. The common law had developed a similar rule: if the time specified in the information conflicts with the evidence and time is not an essential element of the offence or crucial to the defence, the variance is not material and the information need not be quashed. Further, the Crown need not prove the alleged date unless time is an essential element of the offence, as when an accused defends the charge by providing evidence of an alibi for the date or time period alleged. The first question that must be asked is thus whether time is either an

essential element of the offence or crucial to the defence. If it is not, a conviction may result even though the time of the offence is not proven. In the present case the trial judge failed to address this question. Had he done so, he would have been forced to conclude that time was not an essential element of the offence or crucial to the defence. The Court of Appeal was therefore correct in holding that the time of the offence did not need to be proven beyond a reasonable doubt in the circumstances of this case.

Cases Cited

Referred to: *Kendall v. The Queen*, [1962] S.C.R. 469; *R. v. Hamilton-Middleton* (1986), 53 Sask. R. 80; *Brodie v. The King*, [1936] S.C.R. 188; *R. v. Côté*, [1978] 1 S.C.R. 8; *R. v. Wis Development Corp.*, [1984] 1 S.C.R. 485; *R. v. Colgan* (1986), 30 C.C.C. (3d) 183; *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399; *R. v. Ryan* (1985), 23 C.C.C. (3d) 1, leave to appeal refused, [1986] 1 S.C.R. xiii; *R. v. Fox* (1986), 24 C.C.C. (3d) 366, leave to appeal refused, [1986] 1 S.C.R. ix; *Veronneau v. The King* (1916), 26 C.C.C. 278 (aff'd (1916), 54 S.C.R. 7); *R. v. Dossi* (1918), 13 Cr. App. R. 158; *R. v. James* (1923), 17 Cr. App. R. 116; *R. v. England* (1920), 35 C.C.C. 141; *R. v. Ball* (1953), 17 C.R. 244; *R. v. Hindle* (1955), 113 C.C.C. 388; *R. v. Greene* (1962), 133 C.C.C. 294; *R. v. Nadin* (1971), 3 C.C.C. (2d) 221; *R. v. Pawliw* (1973), 13 C.C.C. (2d) 356; *R. v. Clark* (1974), 19 C.C.C. (2d) 445; *W. Eric Whebby Ltd v. Gunn Prov. Magistrate* (1974), 26 C.R.N.S. 379; *R. v. Labine* (1975), 23 C.C.C. (2d) 567; *R. v. McCrae and Ramsay* (1981), 25 Man. R. (2d) 32; *R. v. Sarson* (1982), 15 Man. R. (2d) 192; *R. v. Parkin (1), (2)* (1922), 37 C.C.C. 35; *Wright v. Nicholson*, [1970] 1 All E.R. 12.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, s. 529(1), (4.1) [ad. 1985, c. 19, s. 123(3)].

Authors Cited

Archbold, John Frederick. *Archbold's Pleading, Evidence, & Practice in Criminal Cases*, 23rd ed. By Sir John Jervis. Twenty-third edition by William Feilden Craies and Guy Stephenson. London: Sweet and Maxwell, 1905.

Ewaschuk, Eugene G. *Criminal Pleadings and Practice in Canada*, 2nd ed. Aurora, Ontario: Canada Law Book, 1987.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1988), 65 Sask. R. 134, allowing the Crown's appeal from appellants' acquittals on charges of sexual assault. Appeal dismissed.

Donna Taylor, *Mervin Ozirny* and *Wayne Rusnak*, for the appellants.

Kenneth W. MacKay, Q.C., for the respondent.

//*Wilson J.*//

The judgment of the Court was delivered by

Wilson J. -- The appellants are young offenders who were acquitted of sexual assault at trial. The Crown's appeal to the Saskatchewan Court of Appeal was allowed and the appellants now appeal to this Court as of right. This judgment is the second in a trilogy concerning the alleged sexual assaults that occurred at Sheho Elementary School in Saskatchewan between September 1985 and May 1986. This appeal was heard together with *R. v. B. (G.)*, [1990] 2 S.C.R. 000, and *R. v. B. (G.)*, [1990] 2 S.C.R. 000, which are dealt with in two related judgments. In this case the

appellants raise three grounds of appeal, the main ground being the degree of precision required by law for the date on which the offence is alleged to have been committed.

1. The Facts

Each of the appellants was separately charged in informations alleging that:

> On or between the 2nd day of December A.D. 1985 and the 20th day of December A.D. 1985 at Sheho in the Province of Saskatchewan being a young person within the meaning of the Young Offenders Act did commit a sexual assault on E.G. contrary to Section 246.1(1)(a) of the Criminal Code.

The complainant, E.G., a student at Sheho Elementary School, was seven years old at the time of the alleged offence and eight years old at the time of the trial. She was sworn in by the trial judge. Her evidence was to the effect that sometime during the noon break during the wintertime when she was in grade one she had been dragged into the boys' washroom by the three appellants and pushed into a cubicle. She was told to pull down her pants and was touched in the area of her "bum" and her "pee-pee" by the appellants. On cross-examination she affirmed that the incident occurred when she was in grade one and she implicated other youths as parties to the alleged offence in addition to the appellants.

At trial the appellants pointed out that the complainant was in grade one in the fall of 1984 and that the information alleged that the offence took place in December of 1985. The Crown submitted, however, that there was other relevant evidence as to the date of the offence and that the complainant's testimony that the incident occurred in grade one must be viewed in light of all the evidence. The evidence included:

1. The floorplan of the school showed that grades 1 and 2 were in the same room.

2. The complainant identified the washroom close to her classroom when she was in grade 2 as the room in which the assault took place.

3. The complainant also testified that she did not know the year in which the assault took place but that her mother was working at the bakery in Foam Lake at the time.

4. The complainant's mother testified that her daughter experienced various problems such as bed-wetting and nightmares during the late months of 1985 and the early months of 1986. She further testified that this stopped abruptly once the complainant spoke with the investigating officer. The mother had been working at Foam Lake at the end of November, 1985, but as a cook, not in a bakery. She testified she had worked at a bakery at Foam Lake when E.G. was in kindergarten.

Dr. Richard Wollert, a clinical psychologist specializing in the treatment of young victims and perpetrators of sexual offences, testified for the Crown. He said that there were several behavioural characteristics which are experienced by young victims of sexual offences. These include bed-wetting, nightmares, and anxiety. He also testified that these problems may be caused by other occurrences in the child's life. He stated that he had not interviewed the complainant but had spoken only briefly to her while waiting to testify.

All three appellants testified and denied any involvement in the alleged offence.

2. Issues

The appellants raise the following issues on appeal:

1. The learned Court of Appeal for Saskatchewan erred in law in holding that the trial judge erred in failing to find the date of the offence with respect to the complainant, E.G., had been established with sufficient particularity and in failing to amend the Information as requested by the Crown. The Court of Appeal further erred in holding that the Crown did not have to

establish the particular time that the offences occurred, with respect to the complainant E.G.

2. The learned Court of Appeal erred in holding that the trial judge erred in applying an adult standard in assessing the credibility of the child witnesses.

3. The learned Court of Appeal erred in law in finding that the trial judge gave little credence to expert testimony because he based the purpose of expert testimony on an erroneous assumption.

The *Criminal Code* provision relevant to the first issue is s. 529(4.1), S.C. 1985, c. 19, s. 123(3) (now R.S.C., 1985, c. C-46, s. 601(4.1)). It reads:

> **529.** . . .
>
> (4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to
>
> (*a*) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or
>
> (*b*) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.

3. The Courts Below

Saskatchewan Provincial Court (Chorneyko Prov. Ct. J., unreported)

The trial judge first acknowledged that he was governed by the admonition of this Court in *Kendall v. The Queen*, [1962] S.C.R. 469, in which Judson J. stated at p. 473:

> The basis for the rule of practice which requires the judges to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation.

2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility.

Chorneyko Prov. Ct. J. was clearly not impressed with the evidence of the alleged event having taken place at all and stated that after hearing the evidence he was forced to conclude that if the event did take place, its date had not been established. He noted that the complainant had stated that the incident occurred sometime in the winter when she was in grade one. That evidence, if true, indicated that the offence would have had to have happened a year earlier than alleged.

The Crown sought at trial to amend the information so as to read between November 1, 1985 and December 20, 1985. However, relying on *R. v. Hamilton-Middleton* (1986), 53 Sask. R. 80, as authority for the proposition that the date of the offence is an essential element of the offence and must be proven beyond a reasonable doubt, the trial judge said that it would be difficult to fashion an appropriate amendment when it was not known when the alleged offence had occurred.

In the opinion of the trial judge the Crown by asking for the amendment was suggesting that the date of the offence could be established through the evidence of the mother and Dr. Wollert. The expert witness had testified as to the way in which someone might be expected to react after suffering an emotional trauma but the trial judge doubted that such evidence could be used to establish that a child displaying those symptoms must have been assaulted and therefore was telling the truth. Even if it could, however, he was of the view that since the doctor had testified that bed-wetting and nightmares could be caused by events other than sexual abuse, the doctor's statement, in conjunction with the mother's testimony as to when the bed-wetting occurred, could have little weight in determining the date of the offence. Neither, he found, could it constitute

corroboration. The trial judge was also of the view that this evidence could not be used to establish the date of the offence because between December 2 and 20 of 1985, when the alleged assault took place, the complainant was in the hospital for a period of thirteen days for an unrelated event. This meant that there was a significant period during which the offence could not possibly have occurred.

The trial judge held, therefore, that the evidence of the mother and doctor could not accurately establish the date of the offence and that using that type of analysis for this purpose was fraught with danger and should be discouraged. He concluded that since one of the main ingredients of the offence had not been established beyond a reasonable doubt, the appellants must be acquitted. In light of his conclusion, the trial judge did not find it necessary to weigh the other evidence in order to determine whether he would have been left with a reasonable doubt as to the guilt or innocence of the accused.

Saskatchewan Court of Appeal ((1988), 65 Sask. R. 134)

The Court of Appeal (Vancise, Wakeling and Gerwing JJ.A.) noted that the only matter dealt with by the trial judge was whether the offence occurred on the date or dates charged It noted also that he had interpreted *Hamilton-Middleton, supra*, as holding that the Crown was required to prove beyond a reasonable doubt the date of the offence as an essential ingredient of the offence. Vancise J.A., writing for the court, said that, although it was not entirely clear from the reported case, *Hamilton-Middleton* did not stand for that proposition and that the trial judge accordingly committed an error of law in so finding.

According to Vancise J.A., in *Hamilton-Middleton* (Wakeling J.A. delivered the judgment with Vancise J.A. concurring) the guilt of the accused turned directly on the date of the offence. It

was therefore a critical element in that case. That was not so here. Turning to the evidence in this case, Vancise J.A. stated at p. 143:

> The information alleged that the offence had occurred between the 2nd of December and the 20th of December 1985. During the course of the trial, it appeared that the assault occurred in November of 1985, when the child was in Grade II. She testified that the assault occurred "in winter", at the beginning of November, while her mother was working at a camp and before her mother worked at a bakery in Foam Lake. Her mother testified that she worked at a bakery in Foam Lake in December 1985, after she finished working as a cook in a construction camp. That evidence and the evidence of the child's teacher would place the timing between the 1st of November and the 20th of December 1985. Section 529(4.1) of the **Code** now makes it clear that the date is not, in the circumstances described here, a critical or essential element.

Vancise J.A. concluded that the trial judge had erred in failing to find that the date had been established with sufficient particularity. He had also erred in failing to amend the information as requested by the Crown and in failing to consider the evidence as a whole in order to determine whether the Crown had proved its case beyond a reasonable doubt. Because the trial judge did not make any findings of fact on any other issues Vancise J.A. concluded that it had no alternative but to direct a new trial.

Wakeling J.A. (Gerwing J.A. concurring) said he was in full agreement with the judgment of Vancise J.A., but wanted to add a few comments on the possibility of expert testimony providing a basis for corroboration. He thought it was important to register his disagreement with the way in which the trial judge dealt with the expert testimony. Wakeling J.A. thought it apparent that the evidence of Dr. Wollert, the expert on child sexual abuse, had been given little credence by the trial judge. In his view, the trial judge's approach ran counter to the current view that the courts need and should be encouraged to seek assistance in the performance of their responsibilities when dealing with the evidence of children in sexual abuse cases. He stated at p. 148:

> I do not need to resort to statistics to establish that there are many more cases now coming to trial involving sexual abuse of children and requiring a very difficult evaluation of youthful testimony. Under these circumstances, it is understandable that the courts should seek as much assistance as possible from those who can be qualified as experts. They can shed some additional light on evidence that would otherwise be of negligible value, so as to assist the judge in reaching a determination of what facts have been adequately corroborated or otherwise established.

Dealing more specifically with the facts at hand he added at p. 149:

> I think it can now be taken that evidence of an expert, in the nature of that given by Dr. Wollert as to the psychological and physical conditions which frequently arise as a result of sexual abuse of a child, is admissible. It provides assistance to the trial judge in concluding whether an assault has occurred. This kind of testimony is helpful, because it provides a benchmark which can hardly be doubted, as it is entirely unlikely that such things as bedwetting and nightmares are subject to be concocted or contrived by a youthful witness to support or buttress the reliability of any testimony that witness may later be called upon to give in court. It is always open to the trial judge to accept or reject expert testimony, but I am concerned that the trial judge's basis for giving little credence to Dr. Wollert's testimony was based on an erroneous assumption of its purpose.

Wakeling J.A. was careful to point out, however, that the expert evidence should not be used to bolster the credibility of witnesses or indicate that they should be believed since credibility is a matter exclusively reserved for the trier of fact.

Wakeling J.A. also added some general comments regarding the testimony of youthful witnesses. He was of the opinion that the trial judge erred in utilizing and applying a strictly adult standard when assessing the credibility of the young people who appeared before him. He stated at p. 150:

> Although the cross-examination was conducted quite reasonably in these trials (but sometimes by as many as three counsel), I find it unremarkable that the youthful witness would eventually find shelter in silence or simple agreement with counsel's suggestions. Nor do I find it difficult to understand that the trauma resulting from the incidents of assault would prevent a witness from having an accurate and detailed recall of the event, even if it were being recalled on the day it occurred. In the same way that adult standards would not be suitable to gauge the

> conduct of youths in physical, mental, social, or other aspects of human activity, it is equally unacceptable that such a standard be applied without modification when measuring the credibility of their testimony.

4. Analysis

(a) *Time of the offence*

The appellants take issue with the Court of Appeal's conclusion that the trial judge erred in finding that the time of the offence was an essential element of the offence and in refusing to amend the information in light of the evidence presented at trial. In support of this ground the appellants advance three main propositions:

1. An information must specify the time, place and matter of an offence in order to afford an accused a full defence and fair trial;

2. If the time specified on the information conflicts with that of the evidence the information must be quashed; and

3. Time is an essential element of any offence, but particularly so when the accused leads alibi evidence. Therefore, the time of the offence must be proven beyond a reasonable doubt in order for a conviction to result and if the evidence is conflicting with respect to time and the date of the offence cannot be determined the information must be quashed.

While these three propositions are not entirely separable and each bears on the balance that must be maintained between eschewing unnecessary technicalities and the right of an accused to make full answer and defence, it is, in my view, most convenient to deal with each proposition individually.

Turning then to the appellants' first proposition, I note at the outset that there was no formal attack on the information in this case and no motion to quash for insufficiency. Under s. 529(1)

of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 601(1)), a motion to quash based on a defect on the face of the count must be brought before plea and thereafter only by leave of the court. Thus, it would not be open for the appellants to claim now that the trial judge should have quashed the information prior to trial. However, the case law on the issue of particularity is instructive in demonstrating the degree of particularity required in relation to the date of the offence.

The general proposition is that an information or indictment must provide an accused with enough information to enable him or her to defend the charge. This Court's decision in Brodie v. The King, [1936] S.C.R. 188, continues to be relied on by accused persons arguing that the charge laid against them does not satisfy the requirements of the *Criminal Code* and therefore should be struck. *Brodie* has thus become the standard against which sufficiency is measured; the indictment must describe the offence so as to "lift it from the general to the particular" (p. 198). The appellants in *Brodie* were convicted of being parties to a seditious conspiracy but this Court held that the indictment should be quashed and acquittals entered because essential averments had been omitted. Rinfret J., writing for the Court, discussed the requirements of s. 852 at p. 193 as follows:

> If section 852 be analysed, it will be noticed the imperative requirement ("shall contain") is that there must be a statement that the accused has committed an indictable offence; and such offence must be "specified." It will be sufficient if the substance of the offence is stated; but every count must contain such statement" in substance." In our view, this does not mean merely classifying or characterizing the offence; <u>it calls for the necessity of specifying time, place and matter</u> . . . of stating the facts alleged to constitute the indictable offence. [Emphasis added.]

Rinfret J. went on to outline one of the main reasons why this degree of particularity is necessary (p. 194):

> [T]he statement must contain the allegations of matter "essential to be proved," and must be in "words sufficient to give the accused notice of the offence with which he is charged." Those are the very words of the section; and they were put there to embody the spirit of the legislation, one of its main objects being that the accused may have a fair trial and consequently that the indictment shall, in itself, identify with reasonable precision the act or acts with which he is charged, in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly. [Emphasis added.]

The appellants rely on the statement in *Brodie* that the time, place, and matter of the offence must be specified in support of their argument that the time of the offence is an essential ingredient and must be clearly identified and proven. However, since *Brodie*, there has been an increased tendency for the courts, including this Court, to reject insufficiency arguments on the basis that they are overly technical and an unnecessary holdover from earlier times. Thus the earlier authorities called for a greater degree of specificity than seems to be required today but there are also more extensive corrective measures available to the Crown in the present *Criminal Code*.

For example, in *R. v. Côté*, [1978] 1 S.C.R. 8, the accused was charged with failing to comply with a demand for a breath sample. The information omitted the words "without reasonable excuse". The Court of Appeal quashed the conviction, having concluded that an essential averment of the offence was omitted. This Court restored the conviction and de Grandpré J., for the majority, commented that the Court should not revert to the old very technical approach. He stated at p. 13:

> [T]he golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the *Code*, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.

One cannot, however, overlook the concerns that gave rise to the strict approach and the importance of providing an accused with sufficient information. And the courts will not hesitate in appropriate circumstances to quash an information that is insufficient and cannot be cured by the provision of particulars. In *R. v. Wis Development Corp.*, [1984] 1 S.C.R. 485, this Court was asked to rule on the sufficiency of an information containing some thirty-two counts alleging breaches of the *Aeronautics Act*, R.S.C. 1970, c. A-3. Lamer J., writing for the Court, held that the counts failed to provide adequate information of the circumstances of the alleged offences, especially the time, place and manner of their commission. He emphasized again that an accused must be treated fairly and be able to identify clearly what is alleged against him so that he can prepare an adequate defence.

What the above cases do not address, however, is with what degree of particularity the time of the offence must be spelled out in order to constitute adequate information. The usual practice in alleging the time of the offence is to state the day on which, or a particular time period during which, the offence was committed. The Crown contends, however, that while time must be specified, the exact time need not be identified or proved. The precedential authority from various provincial appellate courts supports the Crown's position.

In *R. v. Colgan* (1986), 30 C.C.C. (3d) 183, the accused was charged with unlawfully stealing money "[b]etween the first day of January, A.D., 1979 and the 31st day of March, A.D., 1985". Prior to plea, counsel for the accused objected to the insufficiency of the information and the trial judge quashed the information on the basis that it did not give the accused enough detail to enable her to identify the transactions alleged to have occurred between the dates specified. Monnin C.J.M., for the majority of the Manitoba Court of Appeal, noted that the main difficulty confronting the trial judge was that the time period was more than six years. He reviewed this Court's decisions in *Brodie*, *Côté*, and *Wis Development*, and concluded that the wording of the

count did lift the offence from the general to the particular and that no essential element of the offence was missing. In doing so he noted that the accused had been told the time period, the place, the victim and the offence in terms that were sufficient to describe the nature of the offence although not the specific details of it. In addressing the lengthy time period Monnin C.J.M. said at p. 189:

> There are and have been many similar charges in this jurisdiction. The only difference in this one is that the period of the alleged theft extends over 63 months and as a result it may be difficult for the defence to prepare its case. That is not sufficient ground to invalidate an otherwise proper and complete count. Fairness or difficulty to prepare a defence are matters to be presented to the trier of facts when the evidence is tendered.

Chief Justice Monnin's decision was upheld in this Court: see [1987] 2 S.C.R. 686.

In *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399, the majority of the Ontario Court of Appeal upheld the validity of an information charging the accused with sexually assaulting a nine-year-old child over a period of six months. The trial judge of his own motion had quashed the information on the ground that it failed to specify the acts constituting the alleged offence of sexual assault and also because of the period of time over which the offence was alleged to have been committed. The Court of Appeal, Krever J.A., with Brooke J.A. concurring, pointed out that due to the nature of the charge and the age of the victim, complete particularity with respect to time would likely be impossible. Krever J.A. stated at p. 403 that "to require it would make prevention of a serious social problem exceedingly difficult". He concluded that the sufficiency requirements in the *Criminal Code* were met. See also *R. v. Ryan* (1985), 23 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to this Court refused, [1986] 1 S.C.R. xiii; and *R. v. Fox* (1986), 24 C.C.C. (3d) 366 (B.C.C.A.), leave to appeal to this Court refused, [1986] 1 S.C.R. ix, which both dealt with the offences of impaired driving and held that the exact time need not be specified in the information.

It is apparent from these cases that what constitutes reasonable or adequate information with respect to the act or omission to be proven against the accused will of necessity vary from case to case. The factual matters which underlie some offences permit greater descriptive precision than in the case of other offences. Accordingly, a significant factor in any assessment of the reasonableness of the information furnished is the nature and legal character of the offence charged. It is also apparent, however, that in general an information or indictment will not be quashed just because the exact time of the offence is not specified. Rather, the matter will continue on to trial on the merits. While it is obviously important to provide an accused with sufficient information to enable him or her to identify the transaction and prepare a defence, particularity as to the exact time of the alleged offence is not in the usual course necessary for this purpose. It goes without saying, of course, that there may be cases where it is.

In this case the only particular at issue is time, the place, victim and offence alleged to have been committed all being clearly identified in the information. The appellants submit, however, that time is an essential element of any offence and must be specified and proven. Given the tenor of the decisions referred to, the appellants cannot succeed on this ground. Having regard to the nature of the offence charged and the age of the victim, the information provided was, in my view, adequate.

I turn now to the appellants' second submission, namely, that if the time specified in the information conflicts with the evidence the information must be quashed. I believe that s. 529(4.1) of the *Criminal Code* is a complete answer to this submission. It provides that a variance between the indictment and the evidence is not material with respect to the time of commission of the offence. This provision was enacted in 1985 and replaced the former s. 732(4) which was in identical language but applied only to summary conviction proceedings. Prior to the enactment of s. 529(4.1), however, the common law had developed a similar rule and there is an

abundance of case law on the subject which has been fairly consistent throughout this century. I refer to a few of the earlier cases because they have a bearing on the appellant's third submission as well as on this one. They support the view that the date of the offence need not be proven unless it is an essential element of the offence.

In *Veronneau v. The King* (1916), 26 C.C.C. 278 (Que. K.B.) (affirmed by this Court (1916), 54 S.C.R. 7), one of the issues before the court was whether the trial judge should have allowed an amendment to the indictment after it became apparent that there was a variance between the charge as laid and the evidence regarding the date of the alleged offence. Cross J., for the court, noted that as a general rule the date assigned to the commission of an offence need not be the one actually proved, citing at p. 286 the following passage from *Archbold's Pleading, Evidence, & Practice in Criminal Cases* (23rd ed. 1905) at p. 297:

> The day and year on which the facts are stated in the indictment or other pleading to have occurred are not in general material; and the facts may be proved to have occurred upon other day previous to the preferring of the indictment.

The court held that it was only necessary to amend the indictment if the case fell within the common law exception to the general rule because time was "of the essence" of the offence.

Similarly, in *R. v. Dossi* (1918), 13 Cr. App. R. 158, the indictment charged the accused with indecently assaulting an eleven-year-old girl on March 19, 1918. The child gave sworn testimony at trial and the trial judge invoked the rule of practice that it would be dangerous to convict absent corroboration. The accused provided alibi evidence for March 19, 1918 but could not do so for any other day in March. The child gave no evidence of a specific date but referred to constant acts of indecency over a considerable period of time ending at some date in March, 1918. The jury found the accused not guilty of the offence on the date alleged. The Crown then

amended the indictment to read "on some day in March" whereupon the jury found the accused guilty. The conviction was upheld on appeal, Atkin J. stating at p. 159 that "[f]rom time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence". He continued at p. 160:

> Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. [Emphasis added.]

It is noteworthy that in this case not only did the date on the indictment differ from the date arising from the evidence, but the exact date of the offence was not proven. The important thing was that the jury accepted that the accused had committed the offence against the child although not the precise date on which he had committed it. To the same effect see *R. v. James* (1923), 17 Cr. App. R. 116 for further English authority and *R. v. England* (1920), 35 C.C.C. 141, where the New Brunswick Supreme Court, Appeal Division, adopted *Dossi* as a correct statement of the law. For contrary authority see *R. v. Ball* (1953), 17 C.R. 244 (Ont. C.A.), a case cited by the appellants in support of their argument, as well as *R. v. Hindle* (1955), 113 C.C.C. 388, a decision of the same court.

In *R. v. Ball* the accused was convicted on a charge that "on or about November 19, 1952" he retained cattle in his possession knowing them to have been stolen. The evidence suggested, however, that the accused did not discover that the cattle were stolen until February of 1953. The accused was convicted at trial but the Ontario Court of Appeal quashed the conviction. Pickup C.J.O., for the court, stated at p. 246:

> There was no amendment to the indictment made at the trial; none was asked for. Whatever leeway the words "on or about" may give, we are of the opinion that they do not give sufficient leeway to enable the Crown to maintain a conviction on proof of knowledge inferred from events that occurred as late as February when the charge in the indictment was that the offence was committed on or about the 19th November.

Subsequently, however, in *R. v. Greene* (1962), 133 C.C.C. 294, the Ontario Court of Appeal overruled both *Ball* and *Hindle*. In *Greene*, the accused was appealing his conviction for assault. The indictment charged him with assault on December 16, 1961, but the evidence disclosed that the assault took place on December 17, 1961. The Magistrate was of the view that it was unnecessary to amend the information to conform with the evidence and registered a conviction. On appeal the accused argued that the conviction should be quashed on the ground that there was no evidence that the assault took place on the 16th as alleged in the information. McKay J.A., for the court, reviewed the case law, noting that *Ball* and *Hindle* were both oral judgments and that the decisions in the English Court of Criminal Appeal and in New Brunswick and Manitoba courts were not brought to the attention of the court. McKay J.A. held that to the extent that *Ball* and *Hindle* were at variance with what Atkin J. had stated in *Dossi*, they should not be followed. He concluded at pp. 300-301:

> In the present case the appellant does not allege that he was misled or prejudiced in his defence by the wrong date in the information, and while I think it might well have been the better course to amend the information when the evidence disclosed the error in the date, the failure to amend does not invalidate the conviction.

This rule continued to be applied in later cases. For example, in *R. v. Nadin* (1971), 3 C.C.C. (2d) 221, the British Columbia Court of Appeal cited *Dossi* and *Greene* with approval, stating that if the date is not an essential part of the alleged offence, it is not a material matter. For additional authorities to the same effect see *R. v. Pawliw* (1973), 13 C.C.C. (2d) 356 (Sask. C.A.); *R. v. Clark* (1974), 19 C.C.C. (2d) 445 (Alta. S.C., App. Div.); *W. Eric Whebby Ltd. v. Gunn Prov. Magistrate*

(1974), 26 C.R.N.S. 379 (N.S.C.A.); *R. v. Labine* (1975), 23 C.C.C. (2d) 567 (Ont. C.A.); *R. v. McCrae and Ramsay* (1981), 25 Man. R. (2d) 32 (Co. Ct.); and *R. v. Sarson* (1982), 15 Man. R. (2d) 192 (Co. Ct.)

This longstanding rule of the common law is summarized by Ewaschuk J. in his text *Criminal Pleadings and Practice in Canada* (2nd ed. 1987) at para. 9:10050 as follows:

> From time immemorial, a date specified in an indictment has never been held to be a material matter. Thus the Crown need not prove the alleged date unless time is an essential element of the offence or unless there is a specified prescription period. [Emphasis added.]

From the foregoing, it is clear that it is of no consequence if the date specified in the information differs from that arising from the evidence unless the time of the offence is critical and the accused may be misled by the variance and therefore prejudiced in his or her defence. It is also clear from *Dossi* and other authorities that the date of the offence need not be proven in order for a conviction to result unless time is an essential element of the offence. Accordingly, while it is trite to say that the Crown must prove every element of the offence in order to obtain a conviction, it is, I believe, more accurate to say that the Crown must prove all the essential elements. The Crown need not prove elements which are, at most, incidental to the offence. What the Crown must prove will, however, of necessity vary with the nature of the offence charged and the surrounding circumstances. Time may be an essential element of the offence in some circumstances and it may be instructive therefore to look at a few cases where this was held to be so in order to respond to the appellant's third submission.

In *Hamilton-Middleton, supra,* the accused was charged with theft and there was no dispute that she had taken the food and clothing in question. She defended on the basis that she had received

permission. The evidence was to the effect that at one time the accused did have such permission but that it had been subsequently withdrawn. There was nothing in the evidence to establish whether the goods were taken before the permission was withdrawn or after the permission was withdrawn. It was held that time was an essential element of the defence and must be strictly proved.

In *R. v. McCrae and Ramsay, supra,* the accused were acquitted at trial of operating a plane without the proper authorization contrary to the *Aeronautics Act*. The trial judge was not sure that the offence had occurred between the dates contained in the information. The Crown appealed the acquittals alleging that the trial judge erred in concluding that the dates within which the offence was alleged to have occurred constituted an essential averment. Kennedy Co. Ct. J. dismissed the Crown's appeal on the basis that the time of the offence was an essential element of the offence since the case turned upon the holding of a valid certificate during a particular period of time. He acknowledged that time was generally not an essential element requiring strict proof but held that it could become so depending on the circumstances. He stated at p. 33:

> If charged with an offence of indecent assault or forging and uttering (as were the factual situations referred to in the cases of *R. v. England*, 35 C.C.C. 141, and in the case of *R. v. Parkin*, 27 C.C.C. 35 respectively), it was held, it was only necessary to find that an offence had occurred. An offence under the *Aeronautics Act* which involves flying an aircraft, is not in itself an offence if it is done in a period of time in which the pilot or owner had the necessary authorization, just as driving a car is not unlawful unless done during a period where the driver was not licenced.

Another circumstance which has been held on the authorities to make the time of the alleged offence critical is when an accused defends the charge by providing evidence of an alibi for the date or time period alleged. To hold otherwise would be to deny an accused the right to make full answer and defence. For example, in the early case of *R. v. Parkin (1), (2)* (1922), 37 C.C.C. 35 (Man. C.A.), the accused was charged with indecent assault and carnal knowledge. The

offences were alleged to have occurred "on or about August 8, 1920". The accused relied upon an alibi in his defence and provided evidence that he was out of the province between August 7 and 22. The trial judge instructed the jury that it was not confined to the 8th of August as the key date and that, if it found that the offence was committed during the school holidays, the accused could be convicted. He further instructed the jury that the issue before it was whether a crime had been committed around that time and the mere fact that the accused was not in the province on some of the August dates did not matter if the jury was satisfied that the offence had been committed on or about these dates. The accused was found guilty of indecent assault and appealed his conviction. A majority of the Manitoba Court of Appeal cited *Dossi* with approval but went on to conclude that on the facts of this case the trial judge had erred in instructing the jury that the August 8 date was immaterial and that they could convict if they were satisfied that the offence had been committed during the holidays. Dennistoun J.A. noted that the accused relied upon the date specified in the indictment in putting forward his defence of alibi. He expressed the view that the significance of the August 8 date in the context of the alibi defence was not highlighted to the jury as it should have been. On the contrary, they were told to ignore it. The accused therefore succeeded on this ground of appeal and a new trial was ordered. For more recent Canadian authority see *W. Eric Whebby Ltd. v. Gunn Prov. Magistrate*, *supra*.

More modern English authority is found in *Wright v. Nicholson*, [1970] 1 All E.R. 12 (Q.B.), in which the accused was charged with having incited a child on August 17, 1967 to commit a gross indecency. The complainant was unable to recall the date of the offence at trial and testified only that it had occurred "in August". The information was not amended and the accused provided evidence which, if believed, would have afforded him a complete alibi for August 17. The accused was convicted at trial the court finding that the offence had occurred some time in August even if it could not be proven that it had occurred on August 17. On appeal, Lord Parker C.J. for the court allowed the accused's appeal and quashed the conviction. He held

that the date of the offence was important because the evidence suggested that the accused could have established alibi evidence for the whole month of August by reference to work records if the information had been amended. Because of this, *Dossi* was distinguishable.

In my view, the following conclusions can be drawn from the authorities:

1. While time must be specified in an information in order to provide an accused with reasonable information about the charges brought against him and ensure the possibility of a full defence and a fair trial, exact time need not be specified. The individual circumstances of the particular case may, however, be such that greater precision as to time is required, for instance, if there is a paucity of other factual information available with which to identify the transaction.

2. If the time specified in the information is inconsistent with the evidence and time is not an essential element of the offence or crucial to the defence, the variance is not material and the information need not be quashed.

3. If there is conflicting evidence regarding the time of the offence, or the date of the offence cannot be established with precision, the information need not be quashed and a conviction may result, provided that time is not an essential element of the offence or crucial to the defence.

4. If the time of the offence cannot be determined and time is an essential element of the offence or crucial to the defence, a conviction cannot be sustained.

Accordingly, when a court is faced with circumstances in which the time of the offence cannot be determined with precision or the information conflicts with the evidence, the first question that must be asked is whether time is either an essential element of the offence or crucial to the defence. It will only be in cases where this first question is answered affirmatively that the trier of fact must then determine whether the time of the offence has been proven beyond a reasonable doubt. If the answer to the first question is in the negative, a conviction may result even although the time of the offence is not proven, provided that the rest of the Crown's case is proven beyond a reasonable doubt.

In the present case, however, the trial judge failed to address the first question. He found on the evidence before him that the date of the offence had not been established beyond a reasonable doubt and acquitted the accused. In doing so he erred. (I add in fairness to the learned trial judge that he was understandably misled by the sparse report of *Hamilton-Middleton* upon which he relied in reaching his decision.) Had the trial judge directed himself to the first question, he would have been forced to conclude that time was not an essential element of the offence or crucial to the defence. Indeed, the date of the offence is not generally an essential element of the offence of sexual assault. It is a crime no matter when it is committed. From the record in this case it is also clear that the date of the offence was not crucial to the defence. The appellants' claim on appeal that the date was crucial because alibi evidence was led cannot, in my view, be seriously maintained. At trial each appellant testified and put forward only general denials. They did not lead alibi evidence at that time. Moreover, since the alleged assault took place in the school washroom during recess, the only possible alibi would seem to be that one or more of the appellants was not in attendance at school during the relevant period specified in the information or suggested by the evidence. There is nothing in the record to support this.

I conclude therefore that the Court of Appeal was correct in holding that the time of the offence was not an essential element in the circumstances of this case and need not be proven beyond a reasonable doubt. I also agree with the Court of Appeal that if the assault took place as alleged the evidence supports the conclusion that it occurred some time between November 1, 1985 and December 20, 1985 and that amending the information to this effect would not cause irreparable harm to the appellants. Since the trial judge made no findings of fact apart from the time element the Court of Appeal was correct in concluding that a new trial was necessary.

(b) *Standard of Credibility*

The remaining two grounds of appeal are directed at the concurring reasons of Wakeling J.A. in which he discusses the use of expert testimony in cases of sexual assault involving children and the approach that should be taken when assessing the credibility of child witnesses. Given that his comments in this regard are *obiter dicta*, Wakeling J.A. having firmly stated they were not to be viewed as affecting the main judgment with which he concurred, it is not strictly necessary for this Court to deal with them. However, in light of the importance of the testimony of the complainant in this case as well as the testimony of the children in the related appeals, I think this Court should address them, albeit briefly.

Dealing first with Wakeling J.A.'s comments regarding the credibility of child witnesses it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

(c) *Credence given to Expert Testimony*

Wakeling J.A. felt that the trial judge may not have given adequate credence to the evidence of the expert witness because of his concern that expert testimony not supplant his role as the trier of fact. However, all Wakeling J.A. did, it seems to me, was review the settled law regarding the admissibility of expert evidence. I need only say in dealing with this ground of appeal that I agree with Wakeling J.A.'s conclusion that the expert evidence in this case was well within the bounds of acceptable and admissible testimony and that in cases of sexual assault against children the opinion of an expert often proves invaluable.

5. Disposition

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant G.B.: Rusnak, Balacko, Kachur & Rusnak, Yorkton, Saskatchewan.

Solicitors for the appellant A.B.: Kyba, Yaholnitsky & Taylor, Yorkton, Saskatchewan.

Solicitors for the appellant C.S.: Ozirny, Fisher & Bell, Melville, Saskatchewan.

Solicitor for the respondent: The Attorney General for Saskatchewan, Regina.