Regina v. V.K.;

68 C.C.C. (3d) 18

British Columbia Court of Appeal
Hutcheon, Wood and Gibbs JJ.A.

APRIL 2, 1991

Received October 25, 1991.

Sexual offences — Identity of complainant — Order made at trial that identity of complainant and information that could disclose her identity not to be published — Such order continues in effect until varied by court having jurisdiction to do so — Order continuing for purposes of appeal — Cr. Code, s. 486(3).

Trial — Reasons for judgment — Sexual assault of child — Eleven-year-old child giving sworn evidence as to alleged sexual assault — Child neighbour of accused — No rule of law or practice requiring trial judge to caution himself as to danger of acting on uncorroborated evidence of child — Caution required only where some evidentiary basis upon which reasonable to infer that witness's evidence may be unreliable — Cr. Code, s. 274.

Trial -- Reasons for judgment -- Sexual assault of child

Trial — Reasons for judgment — Sexual assault of child — Accused allegedly sexually assaulting 11-year-old child — Accused testifying and giving innocent explanation for child's presence in his home and some of conduct testified to by child — Trial judge finding that explanations given by accused not reasonably true and not having "inherent probability of innocence" — Constitutes misdirection — Effect of statements to shift burden of proof to accused — Appeal by accused from conviction allowed and new trial ordered.

The accused was charged with sexual assault. The Crown's case depended on the sworn testimony of the 11-year-old complainant. She was a neighbour of the accused and testified that when she entered the accused's home to see if his young son would come out and play, the accused picked her up and sat her on his knee. She testified that the accused then touched her breasts, buttocks and vagina. The accused testified that while he was not sure how the complainant came to sit on his lap, he denied any fondling of the complainant. He did, however, admit to some tickling and "horseplay". There was no independent confirmatory evidence of the testimony of the complainant. The accused argued that the trial judge erred in ***[page19]*** failing to caution himself with respect to accepting the unsupported evidence of the complainant. The

accused also argued that the effect of the trial judge's reasons was to impose a duty on the accused to offer an explanation that had "the inherent probability of innocence". In his reasons, the trialjudge said that the explanation given by the accused was not one "that is reasonably true" and that "his explanation does not have the inherent probability of innocence that he offers in his explanation. It lacks a ring of truth."

On appeal by the accused from his conviction, held, the appeal should be allowed and a new trial ordered.

There is no statutory requirement that the trial judge consider the unsupported evidence of a child witness with caution, nor is there any rule of practice requiring the trial judge to caution himself as to the danger of acting on the unconfirmed evidence of a child witness or a witness charged with a sexual offence. To the contrary, s. 274 of the Criminal Code provides that where an accused is charged with a sexual assault, no corroboration is required for a conviction and the judge "shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration". There may, however, be cases where the failure or refusal of the trial judge to exercise a discretion to give such a caution will raise the spectre of an injustice and may result in reversible error. Such cases cannot be neatly categorized or described. In this case, the trial judge's failure to exercise a discretion in favour of giving himself such a caution did not result in any miscarriage of justice. The trial judge reviewed the evidence of the complainant with great care and, in particular, was aware of her age and the various factors which could affect the credibility of her testimony. The trial judge found her evidence credible. No circumstances such as an indication that the story was told out of self-interest or self-exculpation or vindictiveness existed which would require exercise of the discretion. No automatic assumptions of unreliability arise because of the age or the nature of the complaint. There must be an evidentiary basis upon which it could be reasonable to infer that the witness's evidence is or may be unreliable. Absent such evidentiary foundation, it could not possibly be argued that failure to exercise the discretion resulted in the miscarriage of justice. Were it otherwise the purpose of Parliament in enacting s. 274 of the Criminal Code would be circumvented.

There is no requirement in a case other than a charge of possession of stolen goods that the trial judge in considering the explanation of the accused consider whether it might reasonably be true. Thus, in this case, the trial judge was not required to use that formula in assessing the credibility of the accused. On the other hand, it was an error when considering the evidence of the accused to consider whether or not his explanation "is reasonably true". This is not a correct statement of the law and amounted to misdirection. The question was not whether the trial judge believed the testimony of the accused, nor was it whether in his view the accused's testimony was reasonably true, but whether that evidence, or the evidence as a whole, left him with a reasonable doubt as to the guilt of the accused. This was a trial in which credibility was the major issue and in such cases there is always a danger that the trier of fact will be lured into seeing the issue as one of whether to believe the complainant or the accused. The trial judge's statement that the accused's explanation did not have the inherent probability of innocence when considered with these other statements, had the effect of shifting the burden of proof to the accused. While there are no assumptions that complainants in sexual cases are less credible, equally it would be wrong to adopt a set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes. In this case, ***[page20]*** the trial

judge may have unwittingly allowed himself to shift the burden of proof to the accused and, accordingly, the verdict cannot stand.

R. v. Beasley (1985), 14 W.C.B. 209 distd;

Kendall v. The Queen (1962), 132 C.C.C. 216, [1962] S.C.R. 469, 37 C.R. 179; R. v. Boss (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123, 42 C.R.R. 166, 30 O.A.C. 184, 7 W.C.B. (2d) 88; R. v. Camp (1977), 36 C.C.C. (2d) 511, 79 D.L.R. (3d) 462, 39 C.R.N.S. 164, 17 O.R. (2d) 99, 1 W.C.B. 396; Director of Public Prosecutions v. Hester, [1973] A.C. 296; Richler v. The King (1939), 72 C.C.C. 399, [1939] 4 D.L.R. 281, [1939] S.C.R. 101 consd;

Cases referred to:

R. v. Campbell (1956), 40 Cr. App. R. 95; R. v. Kilbourne, [1973] A.C. 729; Horsburgh v. The Queen, [1968] 2 C.C.C. 288, 63 D.L.R. (2d) 699, [1967] S.C.R. 746; R. v. Tennant and Naccarato (1975), 23 C.C.C. (2d) 80, 7 O.R. (2d) 687, 31 C.R.N.S. 1; R. v. Morrell, B.C., No. CA770572, March 13, 1979 (unreported); R. v. Norum (1980), 6 W.C.B. 19; Thomas v. The Queen (1952), 103 C.C.C. 193, [1952] 4 D.L.R. 306, [1952] 2 S.C.R. 344, 15 C.R. 1; R. v. Firkins (1977), 37 C.C.C. (2d) 227, 80 D.L.R. (3d) 63, 39 C.R.N.S. 178 [leave to appeal to S.C.C. refused C.C.C. and D.L.R. loc. cit., 17 N.R. 179n]; R. v. Daigle (1977), 37 C.C.C. (2d) 386, 18 N.B.R. (2d) 658; R. v. Chenier (1981), 63 C.C.C. (2d) 36 [leave to appeal to S.C.C. refused C.C.C. loc. cit., 40 N.R. 173n]; R. v. B. (W.D.) (1987), 38 C.C.C. (3d) 12, 45 D.L.R. (4th) 429, 59 Sask. R. 200; R. v. Saulnier (1989), 48 C.C.C. (3d) 301, 89 N.S.R. (2d) 208, 7 W.C.B. (2d) 178; Mattouk v. Massad, [1943] A.C. 588; R. v. Vetrovec (1982), 67 C.C.C. (2d) 1, 136 D.L.R. (3d) 89, [1982] 1 S.C.R. 811, 27 C.R. (3d) 304, [1983] 1 W.W.R. 193, 41 N.R. 606; Ungaro v. The King (1950), 96 C.C.C. 245, [1950] 2 D.L.R. 593, [1950] S.C.R. 430, 9 C.R. 328; R. v. Haynes, B.C. No. CA011830, November 26, 1990 (unreported); R. v. Palmer, [1970] 3 C.C.C. 402, 9 C.R.N.S. 342, 71 W.W.R. 344 [leave to appeal to S.C.C. refused [1969] S.C.R. x]; R. v. Sugiyama (1976), 38 C.R.N.S. 92, [1977] 3 W.W.R. 478, 2 B.C.L.R. 164, [1976] W.W.D. 116; R. v. Bernard, B.C., No. CA790180, December 10, 1979 (unreported); R. v. Bolianatz (1987), 20 B.C.L.R. (2d) 304, 3 W.C.B. (2d) 179; R. v. Guenther (1991), 12 W.C.B. (2d) 439; R. v. Challice (1979), 45 C.C.C. (2d) 546

Statutes referred to:

Criminal Code, R.S.C. 1970, c. C-34, s. 246.4 [enacted 1980-81-82-83, c. 125, s. 19] Criminal Code, R.S.C. 1985, c. 274 [rep. & sub. R.S.C. 1985, c. 19 (3rd Supp.), s. 11] 486(3) [rep. & sub. R.S.C. 1985, c. 23 (4th Supp.), s. 1]

Appeal by the accused from his conviction for sexual assault.

D.B. Adair, for accused, appellant.

H.M. McSheffrey, for the Crown, respondent.

The judgment of the court was delivered by

Wood J.A.:

Vaclav Kubelka appeals his conviction by a Provincial Court judge on a charge that: "... on or about the 15th day of April, A.D. 1989, at or near the City of Trail, Province of British

Columbia, [he] did commit a sexual assault of another person, to wit: [K.D.L.]."

At an early stage of the proceedings before the Provincial Court the trial judge made an order, pursuant to s. 486(3) of the Criminal Code, directing that the identity of the complainant and any information that could disclose her identity not be published in any document or broadcast in any way. It is my view that once such an order is made it continues in effect until varied by a court having jurisdiction to do so.

Three grounds of error are raised on this appeal. First it is alleged that the trial judge erred in not cautioning himself with respect to accepting the unsupported evidence of an 11-year-old child. Secondly, it is submitted that the verdict was unreasonable and cannot be supported by the evidence. Finally, it is argued that the trial judge imposed a duty on the appellant to offer an explanation that had "the inherent probability of innocence".

II

Because I have decided that there must be a new trial, I propose to say as little about the facts as is necessary to an understanding of the grounds of appeal which are discussed below.

The allegation of sexual assault amounted to a fondling of the breasts, buttocks and vagina of the 11-year-old complainant. It was alleged to have occurred in the living-room of the appellant's home while his three-and-a-half- year-old son slept on a mattress, which was on the floor in that room, and various other neighbourhood children played outside. The complainant, who testified under oath, stated that she twice went into the appellant's house, which was next door to her own residence, to see if his son could come outside to play. On the first occasion she immediately went back outside as soon as she found that the son was asleep. It was on the second occasion that the assault allegedly occurred.

She testified that on entering the house a second time the appellant followed her into the living-room. After putting his leg around her three or four times, he picked her up and sat in the only chair with her on his knee. Over the next short while, as they both watched T.V., he touched her breasts, her buttocks and her vagina through her clothing. She said that she was scared. At some point the accused asked her to get down on the mattress next to his sleeping child. She refused. Shortly after that they woke up the appellant's son and all three went outside, where they joined in the games being played by other children. About half an hour later she ***[page22]*** went home with her babysitter and told her mother what had happened.

The appellant testified that after the complainant came into the house the first time, he turned the T.V. on to help his son wake up. When the complainant came in the second time his son had not

yet awakened. He was not sure how it was that she came to sit on his lap, but he denied any form of sexual touching in general and in particular the fondling alleged by the complainant. He did acknowledge that there was some tickling and what he described as "horseplay". He testified that she was laughing and did not appear scared. He denied that he asked her to get down on the mattress beside his son, but acknowledged that at one point they both were down near the mattress attempting to wake the boy up.

It is common ground that there was no independent confirmatory evidence of the testimony of either the complainant or the appellant relating specifically to the allegations of sexual assault.

III

(a) Did the trial judge err in failing to caution himself with respect to accepting the unsupported evidence of an 11-year-old child?

After setting out a detailed summary of the evidence of both the complainant and the appellant, the trial judge stated that the principal issue in the case was one of credibility.

He then rejected the argument of defence counsel that he should acquit in the absence of any evidence corroborating the complainant. His reasons in that respect are to be found at p. 3 of the reasons for judgment:

> The defence argued that the court should look for the evidence of the child to be corroborated. In my view corroboration is not necessary in order to convict an accused, either because of the age of the child witness or the type of offence. In this regard I refer to s. 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5, as now amended and to s. 274 of the Criminal Code.

The trial judge then reviewed and rejected a number of what counsel alleged were weaknesses in the complainant's evidence. After referring to the theory of the defence, which was that the complainant had either lied or misinterpreted the conduct of the appellant, he stated, at pp. 4-5 of the reasons for judgment:

> The more important question for me to decide though is did she in fact lie or fabricate such an incident? She could have. But did she? Considering her evidence and the evidence on the voir dire, considering the cross-examination of her by the defence, I find that no question arises as to her credibility as a witness, nor am I led to the conclusion that she lied or fabricated the incident in question.

[page23] The trial judge then turned his attention to the evidence given by the appellant. He noted first that the appellant had put his character in issue. There was no evidence of bad character and accordingly he concluded that character was not a negative factor in assessing the appellant's credibility. In language which will be the subject of further scrutiny later in these reasons, he then went on to set out, at some length, why he found the credibility of the appellant wanting.

Nothing said by the trial judge in his reasons for judgment would support the inference that he cautioned himself against the risks associated with relying solely on the unsupported evidence of a child witness in arriving at his verdict. On the contrary, the content and the flow of the reasons I have just summarized would lead to the inference that he did not do so. Thus, if such a caution was required in this case, I must conclude that none was given.

The appellant argues that such a caution was required and cites as authority the decision of this court, sitting as the Yukon Territories Court of Appeal, in R. v. Beasley, unreported, May 2, 1985, Registry No. Y10-85 [summarized 14 W.C.B. 209]. Beasley had been convicted of sexually assaulting a 14-year-old female complainant. There was evidence to suggest that the complainant, who was the sister of his wife, was emotionally disturbed. Just prior to her complaint to the police she had been discharged from her baby-sitting duties by Beasley and his wife, who did not approve of her associates and suspected her of stealing. There was no evidence supporting her allegations, which were met by a complete denial from the appellant. In giving oral reasons for allowing the appeal, Carrothers J.A. said this:

I have read the entire evidence and I am of the considered opinion that this conclusion is unreasonable and unsupported by the evidence and must be set aside. The trial judge said nothing about the demeanour of the witnesses which was inconsistent or which would belie the spoken word. The evidence fits a disturbed young girl's uncorroborated allegations in unlikely circumstances, coupled with a motive to discredit the appellant who had recently discontinued using her baby-sitting services and disapproved of her companions, against the straightforward denial by the appellant, supported by his wife.

The trial judge did not appear to caution himself of the dangers of accepting the unsupported evidence of the complainant.

I begin my considerationof this point by noting that there is no statutory requirement that a judge caution himself in the manner suggested by counsel because of the age of the complainant. Thus, if a caution was required in this case, it could only have been so ***[page24]*** because of the existence of a common law rule of practice to that effect.

Such a rule of practice did exist in England: see R. v. Campbell (1956), 40 Cr. App. R. 95 at p. 102, per Lord Goddard L.C.J., and R. v. Kilbourne, [1973] A.C. 729 (H.L.), per Lord Hailsham at p. 740. It would seem that the same rule of practice also existed in this country. The basis of that rule was described by Judson J. in Kendall v. The Queen (1962), 132 C.C.C. 216 at p. 220, [1962] S.C.R. 469, 37 C.R. 179:

The basis for the rule of practice which requires the Judge 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: His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility. (Wigmore on Evidence, 3rd ed., para. 506.)

The last point, a sense of moral responsibility, disappears when the children are of mature years and understand the duty to speak the truth.

See also: Horsburgh v. The Queen, [1968] 2 C.C.C. 288 at p. 320, 63 D.L.R. (2d) 699, [1967] S.C.R. 746, per Spence J., and R. v. Tennant and Naccarato (1975), 23 C.C.C. (2d) 80, 7 O.R. (2d) 687, 31 C.R.N.S. 1 (C.A.).

The latter was a murder case in which the evidence of three child witnesses, all of whom testified under oath, was in direct conflict with that of the accused and, in some instances, in conflict the one with the other. The failure to caution the jury according to the rule of practice was held to be non-direction amounting to misdirection. At p. 88 of the report the following appears as part of the judgment of the court:

Failure to caution the jury with respect to the matters referred to by both Judson, J., and Spence, J., was to leave them to deal with the evidence of these children as one would the evidence of adults and, in the circumstances, that was error.

In recent years this court has referred to the caution as a matter for the discretion of the trial judge rather than as a rule of practice: see R. v. Morrell, unreported, March 13, 1979, CA770572, and R. v. Norum, unreported, October 10, 1980, CA791003 [summarized 6 W.C.B. 19]. Both were oral judgments of the court, in cases of sexual offences, in which the words of Judson J. in the Kendall case were considered. In light of these decisions I conclude that, in this province at least, there is no rule of practice that would have required the trial judge to have cautioned himself in the fashion suggested by counsel, simply because of the age of the complainant.

[page25] I turn then to consider whether any rule of practice required such a caution to be given because of the nature of the alleged offence. That suggestion hardly seems credible in the face of s. 274 of the Criminal Code which provides:

274 [previously 246.4]. Where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

However, counsel relied on the decision of the Ontario Court of Appeal in R. v. Boss (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123, 42 C.R.R. 166, where Cory J.A., for the court, made the following comment on s. 274 at p. 531 of the report:

It is apparent that the section removes any legal requirement for corroboration with respect to the offences which it enumerates. Further, a trial judge is prohibited from instructing a jury that it is unsafe to convict an accused in the absence of corroboration. However, there is nothing in the section which would prohibit a judge from exercising his or her discretion when reviewing the factual issues with the jury. In sexual assault cases this might include an instruction as to the weight (or the lack thereof) that a jury might see fit to give to the unsupported testimony of a complainant.

What is described in that passage is a discretion, not a rule of practice. In order to appreciate the significance of that distinction and the manner in which the discretion came to be recognized, it is necessary to refer briefly to the historical development of this area of the law.

Prior to April 1, 1955, in the case of certain sexual offences, the common law required a trial judge to caution the jury on the dangers of convicting on the uncorroborated evidence of the complainant. This requirementwas described as a rule of practice: see Thomas v. The Queen (1952), 103 C.C.C. 193 at p. 199, [1952] 4 D.L.R. 306, [1952] 2 S.C.R. 344, per Cartwright J. When s. 134 (later to become s. 142) of the new Criminal Code came into effect, the requirement for such a caution became a rule of law in the case of certain sexual offences including rape and indecent assault on a female.

Section 142 was repealed effective April 26, 1976. In R. v. Firkins (1977), 37 C.C.C. (2d) 227, 80 D.L.R. (3d) 63, 39 C.R.N.S. 178, this court held that by repealing the section Parliament did not intend to revive the common law rule of practice which had prevailed prior to 1955 in respect of those offences which the section had listed. A similar conclusion was reached in R. v. Camp (1977), 36 C.C.C. (2d) 511, 79 D.L.R. (3d) ***[page26]*** 462, 39 C.R.N.S. 164 (Ont. C.A.), where Dubin J.A. considered the issue at some length. At pp. 520-1 of that report he said:

> Apart, however, from the application of s. 35(a) of the Interpretation Act, I am satisfied that Parliament, by repealing s. 142, did intend to change the law governing the trial of those persons accused of having committed the offences enumerated in that section. I think the manifest purpose of the repeal was to remove the mandatory nature of the charge required to be given to the jury by the Judge, which arbitrarily cast doubt on the credibility of all complainants who were the alleged victims in the enumerated offences, as well as to remove the requirement of the complex instruction which the former section required.
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> The repeal is also consistent with the development of the law in England and, of more recent date, in Canada as well. It is no longer the law that a jury must be instructed with respect to those offences enumerated in the former s. 142 in the language therein prescribed, and a trial Judge ought not to do so.
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> On the other hand, in my opinion, the repeal of s. 142 does not limit the trial Judge's well-established right to comment on the evidence and to assist the jury as to the weight that they should give to it. There will be many cases in which the evidence, as it unfolds, will dictate to the trial Judge the wisdom of instructing the jury for the reasons so fully expressed in R. v. Hester, [1973] A.C. 296, and Director Of Public Prosecutions v. Kilbourne, [1973] A.C. 729, as to the caution that they should exercise if they are founding a conviction upon the evidence of the complainant alone.
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> In such cases it would be appropriate for the trial Judge to outline to the jury the reasons which gave rise to the rule of practice hereinbefore discussed. He should do so, however, not by putting the matter as a question of law to the jury, but as a matter which goes to the weight to be given to the evidence of the complainant. Even in such cases, however, it is no longer necessary nor appropriate for the trial Judge to become engaged in the complex matter of corroboration, and the technical rules as to what evidence is in law capable of being corroborative.

In short, therefore, I am of the opinion that it is no longer a rule of law that it is dangerous to convict on the uncorroborated evidence of the complainant with respect to those offences which had been enumerated in the former s. 142 [of the Criminal Code] and an instruction to the jury in the language therein prescribed is no longer appropriate. On the other hand the effect of the repeal does not limit the discretion of a trial Judge, nor relieve him of the duty in appropriate cases, while commenting on the weight to be given tothe evidence of a complainant, to caution the jury in simple language as to the risk of relying solely on the evidence of a single witness, and to explain to them the reasons for the necessity of such caution. In doing so, the trial Judge ought not to resort to the term "corroboration", but is free to point out to the jury any evidence which, in his opinion, supports the trustworthiness of the testimony of a complainant, even if such evidence does not meet the test set forth in R. v. Baskerville, [1916] 2 K.B. 658.

These conclusions have subsequently been adopted by a number of other Canadian appellate courts: see R. v. Daigle (1977), 37 C.C.C. (2d) 386, 18 N.B.R. (2d) 658 (C.A.); R. v. Chenier (1981), 63 C.C.C. (2d) 36 (Que. C.A.); R. v. B. (W.D.) (1987), 38 C.C.C. ***[page27]*** (3d) 12, 45 D.L.R. (4th) 429, 59 Sask. R. 200 (C.A.), and R. v. Saulnier (1989), 48 C.C.C. (3d) 301, 89 N.S.R. (2d) 208, 7 W.C.B. (2d) 178 (C.A.).

In 1983 s. 246.4, the forerunner to the present s. 274, was enacted. At that time it was specifically limited in its scope to cases involving charges of incest, gross indecency, and the new sexual assault provisions which were concurrently enacted. The section was subsequently amended to include reference to all but four of the offences in the Criminal Code which had previously required either corroboration as a basis for conviction or a caution such as is here under discussion.

When one reviews this history a discernible trend becomes obvious. The common law rule of practice, which prevailed in a wide range of sexual offences prior to 1955, was predicated on assumptions which as described by Dubin J.A. in Camp, arbitrarily cast doubt on the credibility of all complainants who were alleged victims in cases of certain sexual offences. A good example was that described by Lord Atkin in Mattouk v. Massad, [1943] A.C. 588 (P.C.) at p. 591:

It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age [15] in charging men with sexual intercourse. No doubt, there is no law against believing them, but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law.

That assumption is no longer valid and the statutory amendments prior to 1982 reflect its rejection by a society moving to rid itself of such gender-related stereotypical thinking.

The statutory changes after 1982 reflect the obvious response of Parliament to the decision of the Supreme Court of Canada in R. v. Vetrovec (1982), 67 C.C.C. (2d) 1, 136 D.L.R. (3d) 89, [1982] 1 S.C.R. 811. There the common law rule requiring juries to be cautioned on the danger of convicting on the uncorroborated evidence of an accomplice was examined and rejected as no longer either relevant or desirable. While the criticisms voiced by Dickson J. (as he then was), who gave the reasons for the court, were restricted to the rule of practice relating to the evidence

of accomplices, I am of the view that they apply equally to the similar rules relating to other categories of witnesses. At pp. 17-8 of the report, Dickson J. described the proper practice that should prevail in place of the rule:

I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a ***[page28]*** central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. There are great advantages to be gained by simplifying the instruction to juries on the question as to when a prudent juror will seek some confirmation of the story of such a witness, before concluding that the story is true and adopting it in the process of finding guilt in the accused as charged. It does not, however, always follow that the presiding justice may always simply turn the jury loose upon the evidence without any assisting analysis as to whether or not a prudent finder of fact can find confirmation somewhere in the mass of evidence of the evidence of a witness. Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness's testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on the question of sifting the evidence where guilt or innocence might, and probably will, turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses. All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as, for example, a witness with a record of perjury. All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense in the realm of the process of determining guilt or innocenceof an accused on the basis of a record which includes evidence from potentially unreliable sources such as an accomplice.

While he nowhere uses the word, I am satisfied that the practice described by Dickson J. is consistent with the discretion described by both Dubin J.A. in the Camp case and Cory J.A. in the Boss case.

I am aware that in the former case Dubin J.A. does suggest that in some "appropriate" cases there will be a duty to caution the jury in simple language as to the risk of relying solely on the evidence of a single witness. The notion of a duty is quite inconsistent with that of a discretion, and would, by itself, be quite inconsistent with the intent which underlies s. 274 of the Criminal Code. To the extent that the Camp case may be seen as authority for a rule that there are some cases in which the caution must be given, such a rule could not have survived the passage of s.

274. But I do not think that was what was meant by Dubin J.A. I think he intended to say no more than that there will be some cases where the failure ***[page29]*** or refusal of the trial judge to exercise the discretion to give such a caution will raise the spectre of an injustice and may thereforeresult in reversible error.

The question that then arises is whether or not such cases can be neatly categorized or described. The answer, of course, is that they cannot. As was pointed out by Dickson J. in Vetrovec, there is an infinite range of circumstances that can arise in the criminal trial process, and it would not only be impossible, it would be self-defeating, to attempt any precise guidelines for the exercise of the discretion in favour of giving the caution.

There is some help to be found in the authorities, however, particularly in those cases such as Kilbourne and Kendall where the underlying rationale for the old common law rules of practice is discussed. In respect of the specific argument raised in this case, some guidance can be found in the speech of Lord Morris of Borth-y-Gest in Director of Public Prosecutions v. Hester, [1973] A.C. 296 (H.L.) at p. 309 of the report:

The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. Thereare some suggestions which can readily be made but which are only with more difficulty rebutted. There may in some cases be motives of self- interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood.

After this long discourse, it is time now to focus on the submissions of the appellant. To the extent that argument postulates a rule of practice that would have required the trial judge in this case to caution himself on the risk of accepting the unsupported evidence of an 11-year-old child, it is clear from what I have said to date that no such rule any longer exists, either because of the age of the complainant or because of the nature of the complaint.

If, on the other hand, what is advanced is that a miscarriage of justice resulted from the failure of the trial judge to exercise a discretion in favour of giving himself such a caution, I would reject that argument for two reasons. The first is that the trial judge reviewed the evidence of the complainant with great care. In particular he was aware of her age and he considered those specific factors mentioned by Judson J. in the Kendall case, which could be adversely affected by her tender years. He found her evidence ***[page30]*** credible, and I cannot say that his conclusion in that respect resulted in an injustice in this case.

The second reason is that no circumstances such as those described by Lord Morris, in the passage from Hester quoted above, or anything like them, existed in this case so as to call into question the reliability of the complainant's evidence.

The focus of the new discretion, which has replaced the old common law rules of practice, is the potential for the witness's evidence to be unreliable. No automatic assumptions of unreliability arise because of age, or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness's evidence is or may be unreliable. Absent such evidentiary foundation, it could not possibly be argued that failure to exercise the discretion resulted in a miscarriage of justice. Were it otherwise the purpose of Parliament in enacting s. 274 would be circumvented.

That brings me to the Beasley case. I do not read that case as having adopted a rule of practice requiring a caution in all cases where the evidence of a child witness, given under oath, is unsupported by other evidence. It is clear that in that case the complainant's evidence was troubled by a number of the specific hallmarks of unreliability described by Lord Morris in the Hester case. I am of the view the case must properly be construed as one in which this court found that, as a consequence of the evidence tending to show that the complainant was an unreliable witness, the failure of the trial judge to exercise the discretion in favour of cautioning himself in that case resulted in a miscarriage of justice.

Nothing I have said is intended to minimize in any way either the importance of supportive evidence when it exists, or the significance that may be attached to its absence in those cases where one would expect it to be there. In any case a modest resort to common sense will lead the trier of fact to look for supportive evidence, and to draw what inferences should properly be drawn from its presence or absence. The views I have expressed are made in the context of an allegation of error based on a failure by the trial judge to give himself a special caution in those cases where such evidence does not exist. For the reasons I have given I would not give effect to this ground of appeal.

(b) Was the verdict "unreasonable"?

In light of the conclusion which I have reached on the third ground of appeal argued, and the fact that there must accordingly be a new trial, I decline to consider or to offer any opinion on this ground of appeal.

[page31] (c) Did the trial judge impose a duty on the appellant to offer an explanation that had "the inherent probability

of innocence"?

After noting that there was no evidence of bad character and that character was accordingly not a negative factor in assessing the appellant's credibility, the trial judge went on to describe at some length why it was he found the credibility of the appellant wanting:

The area, I believe, where the credibility of the accused falls into difficulty is the explanation that he has offered. The explanation given by the accused as to what happened in the home is not one, in my view, that is reasonably true. The test with regard to such an explanation is not whether I believe the accused or not, but whether the explanation is reasonably true. The accused explains that he touched the child in order to direct her into the living-room where Rochan

[phonetic] was sleeping. The touching that is of concern here is what the child said occurred while she was on his lap while they were watching television. She complained of him massaging her breasts, placing his hands on her bottom and putting his hands with her fingers moving in her vaginal area. I am not convinced that the touching that he describes in his evidence was misinterpreted by the child or confused by the child with the conduct she complained of in her evidence. And I am not convinced that she misinterpreted what he called tickling and horsebites with what she described as happening while on his lap. His explanation that her brother while playing outside asked her about her bra does not, in my view, answer what she testified he said to her while he was in the room. The suggestion of his evidence was the child was confused on these two incidents. I do not find that she was so confused.

The child asked to see Rochan [phonetic] who was sleeping on the mattress. There is no dispute about that from either witness. At that point he was not about to waken the child. Was it then necessary to lead the child into the living-room? Was an explanation not sufficient that the child was sleeping? The accused asks the court to accept an explanation that his presence in the living-room with the child on his lap and watching television, with his child sleeping on a mattress, was an innocent association. The child testified that she had been in the home on one occasion and that she did not know the name of the accused at the time of this incident. There is no evidence to suggest that the relationship between he and the child was such that it would have been proper for her to be sitting on his lap, in the home, under those circumstances. His explanation does not have the inherent probability of innocence that he offers in his explanation. It lacks a ring of truth.

I think it is more correct to say that on cross-examination he maintained this above-mentioned explanation rather than he was shaken on cross-examination. An explanation offered, not shaken on cross-examination, is entitled to some weight, but that explanation must be one that is reasonably true. I have found that the explanation and denials offered by the accused are not, in my view, reasonably true and are therefore rejected. In coming to that conclusion I have taken into account the accused's obvious difficulty with the English language in expressing his position. Considering then all the evidence, including the evidence heard on the voir dire and being satisfied that the child's evidence is credible, is of sufficient weight for me to conclude ***[page32]*** that the Crown has proven this charge against the accused beyond a reasonable doubt.

(My emphasis.)

The appellant takes two objections to this portion of the judgment. The first is that the judge below erred when he described the test to be applied to the evidence of the appellant as "... not whether I believe [him] or not, but whether the explanation is reasonably true". It is argued that the proper test which ought to have been applied was whether the appellant's evidence "might reason ably be true". Authority for that submission was said to be found in the decision of the Supreme Court of Canada in Ungaro v. The King (1950), 96 C.C.C. 245, [1950] 2 D.L.R. 593, [1950] S.C.R. 430, and in the recent decision of our court in R. v. Haynes, unreported, November 26, 1990, CA011830.

In Ungaro the accused was charged with receiving stolen property knowing it to have been stolen. For proof of knowledge the Crown relied on the doctrine that, in the absence of any reasonable explanation, guilty knowledge may be presumed upon proof of possession of recently stolen property. At p. 249 of the report, Estey J. discussed the test which the trial judge ought to have applied when considering Ungaro's evidence as to how he came to be in possession of the stolen property. He quoted from the reasons of Duff C.J.C. in Richler v. The King (1939), 72 C.C.C. 399 at p. 400, [1939] 4 D.L.R. 281, [1939] S.C.R. 101:

"The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reason ably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial Judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

This court has repeatedly rejected the notion that what I shall refer to as the "might reasonably be true" test, established in Ungaro, is an obligatory test of general application in all cases when assessing the weight to be given to the evidence of an accused. As an obligatory test it has been restricted to those cases of possession of stolen property where the Crown has the benefit of relying on the presumption of guilty knowledge flowing from the unexplained possession of recently stolen property.

The point was first made in R. v. Palmer, [1970] 3 C.C.C. 402, 9 C.R.N.S. 342, 71 W.W.R. 344 (B.C.C.A.). There the charge was one of possessing stolen bonds and debentures knowing same to have been obtained by the commission in Canada of an indictable offence; however, the Crown did not rely on the doctrine of recent ***[page33]*** possession. The accused testified as to the circumstances under which he had come into possession of the securities in question. The trial judge refused to instruct the jury that they should acquit if they were of the view that his evidence might reasonably be true. On appeal this was raised as an error of law. In giving reasons for the court, Bull J.A. said at p. 409 of the report:

I can see no principle to support the view that the particular test in question, in the words outlined, is an essential direction in a situation where the doctrine of recent possession is not applicable; as in such case no presumption of fact is raised against the accused which is rebutted should the accused give an explanation which might reasonably be true and hence raise a reasonable doubt of his guilt. Where the doctrine of recent possession is not applicable, the accused has no burden cast upon him to meet any presumption by making an explanation and has no obligation to raise a reasonable doubt. The burden of proving guilt lies at all times throughout the whole case on the Crown and it is always its obligation to prove guilt beyond a reasonable doubt.

See also: R. v. Sugiyama (1976), 38 C.R.N.S. 92, [1977] 3 W.W.R. 478, 2 B.C.L.R. 164 (C.A.); R. v. Bernard, unreported, December 10, 1979, CA790180, R. v. Bolianatz (1987), 20 B.C.L.R. (2d) 304, 3 W.C.B. (2d) 179 (C.A.), and R. v. Guenther, unreported, February 25, 1991, CA012543 [summarized 12 W.C.B. (2d) 439 (B.C.C.A.)].

In Haynes the accused was charged with indecent assault on a female and committing an act of gross indecency. In charging the jury on the proper approach to be taken when assessing the weight to be given to the evidence of the accused, the trial judge said this:

The accused gave evidence in this case. You had an opportunity to hear him. You should approach his evidence in the same way you approach the evidence of any other witness, bearing in mind what I have told you about the credibility of witnesses. Please remember that you do not have to accept or reject all of the testimony of any witness, including Haynes. It is up to you whether you accept all of his testimony, part of his testimony or none of his testimony. It is not a question of whether you believe his testimony. If his evidence or the evidence as a whole in its totality raises a reasonable doubt in your minds about his guilt then you must return a verdict of not guilty.

It is not clear from the reasons of this court exactly what objection was taken to this portion of the trial judge's charge, but in dismissing it the court said this at p. 5 of the reasons:

The question facing the jury was whether the complainant's evidence might possibly be untrue. Such a conclusion would follow logically, of course, from a finding that the accused's denial might possibly be true. On that aspect of his charge, as on all other aspects, the trial judge put the questions correctly to the jury.

On behalf of the appellant it was argued that the foregoing amounted to this court adopting, for general purposes, the "might reasonably be true" test in Ungaro. I do not agree with that submission. One must not lose sight of the actual jury instruction ***[page34]*** which was in issue in that case. This court did not suggest that the trial judge ought to have instructed the jury in terms consistent with the language of Estey J. in Ungaro. On the contrary, the court endorsed with full approval the instruction given by the trial judge.

With respect to the passage quoted above, it is my view that the court in Haynes was simply pointing out one approach which the jury could have taken to the question of reasonable doubt in that case. The distinction is between a test which must be applied and one which, depending on the circumstances of the case, may be useful or even important in determining whether or not the evidence as a whole raises a reasonable doubt. The point was made by Bull J.A. in the Palmer case, at p. 410 of the report:

I am, therefore, of the view that in cases where the doctrine of possession of recently stolen property is not involved, the Judge is not obligated to instruct himself, or a jury, that his or their mind must be directed to any question as to whether or not any explanation of possession might reasonably be true. I add that the question of whether or not an explanation "may reasonably be true" may well be in a particular case of vital importance in consideration of the guilt or innocence of an accused, and whether there be any reasonable doubt about his guilt. My conclusion is only directed to the submitted obligatory nature of the question as being the governing test to which a Judge or jury must direct their respective minds.

(Emphasis mine.)

Thus, while it was clearly open to the trial judge in this case to invoke the "might reasonably be true" test as part of his approach to the question of reasonable doubt, I do not accept the submission that his failure to do so amounted to an error of law.

That, however, does not dispose of the issues raised by this portion of the trial judge's reasons. On two occasions, once near the beginning and again near the end of the passages quoted above, he described the proper test, when considering the evidence of the appellant, to be whether or not his explanation "is reason ably true". This was not a correct statement of the law, and it amounted to misdirection. The question was not whether he believed the testimony of the appellant, nor was it whether in his view the appellant's testimony was reasonably true, but rather whether that evidence, or the evidence as a whole, left him with a reasonable doubt as to the guilt of the appellant. If it did he was bound to acquit. If it did not he was bound to convict.

This was a trial in which credibility was the major issue. In such cases there is always a danger that the trier of fact will be lured into seeing the issue as one of whether to believe the complainant or the accused. When I read the reasons for judgment as a whole, I am left with the impression that such may have occurred in this ***[page35]*** case. I am particularly troubled by those passages in which the test vis-a-vis the appellant's evidence is said to be whether or not it "is reasonably true", which follow directly on the heels of an extensive consideration of the credibility of the complainant.

I have not overlooked the fact that the reasons for judgment were delivered orally. The trial judge gave long and obviously carefully considered reasons, but he did so extemporaneously and without the luxury of being able to reflect at length on his choice of words. In such circumstances care must be taken to consider the reasons as a whole in order to make sure that a slip of the tongue has not been responsible for an apparent error which is more one of form than substance.

Any doubt on such a question must, of course, be resolved in favour of the appellant. Unfortunately, a careful review of the reasons for judgment as a whole does not dispel the doubt raised by the passages already touched upon, for such review brings one to the second passage to which objection was taken, where the trial judge, again referring to the evidence of the appellant, said: "His explanation does not have the inherent probability of innocence that he offers in his explanation. It lacks a ring of truth."

I agree with counsel's submission that these statements, when taken together with those already discussed, had the effect of shifting the burden of proof to the appellant.

I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgment I noted the gender-related stereotypical thinking that led to assumptions about the credibility of complainants in sexual cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

The proper course to follow in such cases is that described by Morden J.A. in R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.) at pp. 556-7 of the report:

Undoubtedly, it is wrong to instruct a jury in a criminal case that they are obliged, in order to render a verdict, to decide whether they believe the Crown evidence or the defence evidence. The jury is obliged to consider all of the evidence before arriving at their verdict and the putting of the stark alternatives of believing the Crown evidence or the defence evidence excludes the legitimate possibility of being unable to resolve the conflicting evidence and, accordingly, being left in a state of reasonable doubt on whether the Crown has proven its case: R. v. Nimchuk, supra, at p. 210. If the jury is ***[page36]*** instructed in such terms that they may understand the case to turn on the result of a credibility contest then this will, depending on other relevant directions in the charge, in effect, shift the burden of proof to the accused or lower the standard of proof resting on the Crown.

Understandably, a jury have to give careful consideration to issues of credibility when deliberating upon their verdict, and with respect to various pieces of evidence they may have differing views: total acceptance, total rejection, or something in between. An effective and desirable way of recognizing this necessary part of the process, and putting it to the jury in a way that accurately comports with their duty respecting the burden and standard of proof, is to instruct the jury that it is not necessary for them to believe the defence evidence on a vital issue -- but that it is sufficient if it, viewed in the context of all the evidence, leaves them in a state of reasonable doubt as to the accused's guilt: see R. v. Lobell, [1957] 1 Q.B. 547 at p. 551, per Lord Goddard, C.J. The failure to use such language is not fatal if the charge, read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply.

Unfortunately, my reading of the whole of the reasons for judgment does not dispel my fear that the trial judge may have unwittingly allowed himself to shift the burden of proof in this case to the appellant.

IV

It follows that the verdict cannot stand. I would quash the conviction and order a new trial. Appeal allowed; new trial ordered.