R. *v.* Levogiannis, [1993] 4 S.C.R. 475

Dimitrios Levogiannis *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General of Manitoba and
the Attorney General for Alberta *Interveners*

Indexed as: R. *v.* Levogiannis

File No.: 22953.

Hearing and judgment: June 15, 1993.

Reasons delivered: November 18, 1993.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Fundamental justice -- Fair trial -- Right to cross-examine witness -- Right of accused to be within witness's sight -- Accused charged with touching young boy for sexual purposes -- Young complainant testifying behind screen pursuant to s. 486(2.1) of Criminal Code -- Whether s. 486(2.1) infringes s. 7 of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 486(2.1).

Constitutional law -- Charter of Rights -- Fair trial -- Presumption of innocence -- Right to cross-examine witness -- Accused charged with touching young boy for sexual purposes -- Young complainant testifying behind screen pursuant to s. 486(2.1) of Criminal Code -- Whether s. 486(2.1) infringes s. 11(d) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 486(2.1).

The accused was charged with touching a child for a sexual purpose contrary to s. 151 of the *Criminal Code*. At the opening of the trial, the Crown requested that the 12-year-old complainant be allowed to testify behind a screen pursuant to s. 486(2.1) of the *Code*. That section provides that a judge may permit a complainant under the age of 18 years to testify behind a screen if the judge is of the opinion that the use of a screen is "necessary to obtain a full and candid account of the acts complained of from the complainant". The trial judge granted the Crown's motion following the testimony of a clinical psychologist who indicated that the complainant was experiencing a great deal of fear about testifying. The accused challenged the constitutional validity of s. 486(2.1) on the grounds that it violates his right to a fair trial guaranteed by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Both the trial judge and the Court of Appeal held that s. 486(2.1) of the *Code* did not infringe ss. 7 and 11(*d*). The Court

of Appeal added that even if s. 486(2.1) infringed these sections, the infringement would be justified under s. 1 of the *Charter*.

Held: The appeal should be dismissed. Section 486(2.1) of the *Code* is constitutional.

The main objective pursued by s. 486(2.1) is to better get at the truth by facilitating the giving of evidence by young victims of various forms of sexual abuse. The section recognizes that a young complainant may react negatively to a face-to-face confrontation with the accused and may, as a result, require different treatment than adults in the courtroom. The exception, however, is very limited. Under s. 486(2.1), a screen can only be used in cases where the accused is charged with one of the offences enumerated and the complainant is under the age of 18. The screen blocks the complainant's view of the accused but it does not obstruct the accused's view of the complainant. In addition, it can only be used when the trial judge is of the opinion that it is "necessary to obtain a full and candid account of the acts complained of from the complainant". A trial judge has substantial latitude in deciding whether the use of the screen should be permitted. Section 486(2.1) does not require that exceptional and inordinate stress be caused to the young complainant.

Section 486(2.1) of the *Code*, which has been carefully worded to protect the right of an accused to a fair trial, does not violate s. 7 or 11(*d*) of the *Charter*. The absence of face-to-face confrontation between the accused and the young complainant does not infringe any principle of fundamental justice. While normally an accused has the right to be in the sight of the witnesses who testify

against him, it is not an absolute right but is rather a right which is subject to qualification in the interests of justice. When an order is made pursuant to s. 486(2.1), the requisite elements of confrontation remain, albeit in a limited form, since the accused is able to observe the complainant as he testifies. The use of a screen does not preclude the accused from effective cross-examination. The fact that the complainant's giving of evidence may be facilitated by the use of a screening device in no way restricts or impairs an accused's ability to cross-examine the complainant. Finally, s. 486(2.1) does not contravene the accused's right to be presumed innocent. The potential effect on the minds of jurors of the use of a screen to protect a complainant is not relevant in this case since the accused was tried before a judge sitting alone. In any event, a jury properly informed will not be biased by the use of such a device.

Cases Cited

Referred to: *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Maryland v. Craig*, 110 S.Ct. 3157 (1990); *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Smellie* (1919), 14 Cr. App. R. 128; *R. v. D.J.X.* (1989), 91 Cr. App. R. 36; *R. v. Accused (T 4/88)*, [1989] 1 N.Z.L.R. 660; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. M. (P.)* (1990), 1 O.R. (3d) 341; *R. v. Faid* (1981), 61 C.C.C. (2d) 28 (Alta. C.A.), rev'd on other grounds [1983] 1 S.C.R. 265; *R. v. Corbett*, [1988] 1

S.C.R. 670; *R. v. Vetrovec* (1980), 58 C.C.C. (2d) 537 (B.C.C.A.), aff'd [1982] 1 S.C.R. 811.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*).

Criminal Code, R.S.C. 1970, c. C-34, s. 140 [en. 1987, c. 24, s. 1].

Criminal Code, R.S.C., 1985, c. C-46, ss. 151 [en. c. 19 (3rd Supp.), s. 1], 486(2.1) [*idem*, s. 14].

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Child Witness Project. London Family Court Clinic. *Reducing the System-induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-up*. London, Ont.: London Family Court Clinic, January 1991.

McGillivray, Anne. "Abused Children in the Courts: Adjusting the Scales After Bill C-15" (1990), 19 *Man. L.J.* 549.

Schmolka, Vicki. *Is Bill C-15 Working? An Overview of the Research on the Effects of the 1988 Child Sexual Abuse Amendments*. Ottawa: Department of Justice, 1992.

APPEAL from a judgment of the Ontario Court of Appeal (1990), 1 O.R. (3d) 351, 43 O.A.C. 161, 2 C.R. (4th) 355, 62 C.C.C. (3d) 59, dismissing the

accused's appeal from his conviction for touching a child for a sexual purpose contrary to s. 151 of the *Criminal Code*. Appeal dismissed.

Brian H. Greenspan and *Lisa A. Silver*, for the appellant.

David Finley, for the respondent.

Graham Reynolds, *Q.C.*, and *Kimberly Prost*, for the intervener the Attorney General of Canada.

Lucie Rondeau and *Dominique A. Jobin*, for the intervener the Attorney General of Quebec.

Marva J. Smith and *Deborah L. Carlson*, for the intervener the Attorney General of Manitoba.

Written submissions only by *Jack Watson*, for the intervener the Attorney General for Alberta.

The judgment of the Court was delivered by

L'HEUREUX-DUBÉ J. -- This appeal raises many of the same questions as canvassed in *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, an appeal heard at the same time and judgment released concurrently, to which I will refer throughout the course of these reasons. More specifically, at issue in this case, however, is whether the accused's right to a fair trial guaranteed by ss. 7 and 11(*d*) of the

Canadian Charter of Rights and Freedoms was infringed by the provisions of s. 486(2.1) of the *Criminal Code*, R.S.C., 1985, c. C-46, which allow the testimony of a complainant in certain offences (here s. 151 of the *Criminal Code* (formerly s. 140)) to be given behind a screen.

The following two constitutional questions were formulated by the Chief Justice on December 7, 1992:

1. Does s. 486(2.1) of the *Criminal Code* violate s. 7 and/or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question one is in the affirmative, is the infringement justified by s. 1 of the *Charter*?

Section 486(2.1) of the *Criminal Code* reads:

> **486.** . . .
>
> (2.1) Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant. [Emphasis added.]
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> (Added R.S.C., 1985, c. 19 (3rd Supp.), s. 14.)

Following the appellant's oral argument and without hearing the respondent, judgment was rendered from the bench on June 15, 1993, in the following terms:

The appeal is dismissed, with reasons to follow. The constitutional questions are answered as follows:

1. Does s. 486(2.1) of the *Criminal Code* violate s. 7 and/or s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer to question one is in the affirmative, is the infringement justified by s. 1 of the *Charter*?

Answer: The question does not arise.

Facts

The complainant B.L. was a 12-year-old boy at the commencement of the trial who first met the appellant in the fall of 1986, when he was nine years old. The appellant was a 28-year-old male volunteer with the "One to One" organization at the University of Western Ontario, which provides the influence of someone outside the family for a child experiencing difficulties. From the fall of 1986 to the fall of 1987, the appellant and B.L. spent time together approximately once a week, swimming or playing with the appellant's computer. From September 1987 to March 1988, the appellant and B.L. did not see each other on a regular basis. At the end of August or in early September 1988, the appellant offered to take B.L. to the Western Fair in London. B.L. stayed at the appellant's home on September 9, 1988, the night before going to the fair. B.L. indicated that, early in the morning on September 10, he awoke when he felt the appellant's hand feeling his penis. He further recounted that this happened five or six times and that, each time, he took evasive action to stop the act by pretending to be asleep and rolling away. Finally, B.L. reported that the appellant rolled him on top of him and rubbed his penis against him and said "Keep me warm". In response, B.L. pretended to sleep and rolled away.

As a result, the appellant was charged with sexual interference pursuant to s. 151 of the *Criminal Code*:

> SEXUAL INTERFERENCE
>
> **151.** Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with and object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable by summary conviction.

At the trial before a judge alone, the Crown prosecutor requested that the complainant be allowed to testify behind a screen, pursuant to the provisions of s. 486(2.1) of the *Criminal Code*. Following the testimony of a clinical psychologist involved with a child witness project, who indicated that, from her conversations with him, B.L. was experiencing a great deal of fear about testifying at trial, the trial judge granted the motion. He held that an order for a screening device pursuant to s. 486(2.1) did not contravene the *Charter* and should be granted in the circumstances of the case: (1989), 53 C.C.C. (3d) 492. On the evidence, the appellant was convicted. His appeal to the Court of Appeal for Ontario was dismissed: (1990), 1 O.R. (3d) 351, 43 O.A.C. 161, 62 C.C.C. (3d) 59, 2 C.R. (4th) 355. He now appeals his conviction to this Court.

Judgments

District Court of Ontario (Jenkins Dist. Ct. J.)

Regarding the constitutionality of s. 486(2.1) of the *Criminal Code*, the trial judge distinguished the American authorities and observed that the American

Constitution, unlike the *Charter*, enshrines the right of an accused to confront his or her accuser. He concluded that the use of a screen preventing the child witness from seeing the accused, did not preclude the accused from effective cross-examination. With respect to the appellant's argument that the screen would somehow raise an inference of guilt, Jenkins Dist. Ct. J. stated that this factor could be taken into account when exercising his discretion as to whether to allow the complainant to testify behind a screen, in order that the trial be fair both to the accused and to the prosecution. He concluded that s. 486(2.1) did not offend the *Charter*.

Ontario Court of Appeal (1990), 1 O.R. (3d) 351 (Morden A.C.J.O., Krever and Labrosse JJ.A.)

Morden A.C.J.O., for the court, noted that the effect of an order under s. 486(2.1) was to block the complainant's view of the accused but not to obstruct the view of the complainant by either the accused, the defence counsel, the prosecutor or the trial judge. Morden A.C.J.O. considered whether, within the context of s. 7 of the *Charter*, a witness must have an unobstructed view of the accused and, upon review of English, Canadian and American authorities, he concluded that if one has a right to confrontation in Canada it is not an absolute right and it is "subject to qualification in the interests of justice" (p. 367). The Court of Appeal further expressed the view that, even when an order is made pursuant to s. 486(2.1), the requisite "elements of confrontation" remain and, therefore, the accused's rights under s. 7 are not infringed.

With regard to the appellant's right to be presumed innocent or to a fair hearing under s. 11(*d*) of the *Charter*, Morden A.C.J.O. held that s. 486(2.1) did not

infringe this right. In any event, the court held that if s. 486(2.1) infringed the *Charter*, the infringement would be justified under s. 1.

The Issues

The only issue in this case concerns the constitutionality of s. 486(2.1) of the *Criminal Code* in that it provides for the complainant to testify behind a screen. As previously mentioned, the Court has already dismissed the appellant's constitutional challenge to s. 486(2.1). The following are the reasons which underlie that judgment.

The Context

Here, as in the case of *R. v. L. (D.O.), supra*, it is important to examine the context in which the determination of constitutional questions should be made. As Wilson J. wrote in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1355:

> One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context.

(See also *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647.)

The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and courts' duties to ascertain the truth. The

goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. In ascertaining the constitutionality of s. 486(2.1) of the *Criminal Code*, one cannot ignore the fact that, in many instances, the court process is failing children, especially those who have been victims of abuse, who are then subjected to further trauma as participants in the judicial process. In fact, as I commented in *L. (D.O.)*, despite the increase in child sexual assault complaints since the early 1980s, the ratio of charge to conviction rate remains unchanged (A. McGillivray, "Abused Children in the Courts: Adjusting the Scales After Bill C-15" (1990), 19 *Man. L.J.* 549). In addition, young complainants often suffer tremendous stress when required to testify before those whom they accuse. Social science research, as reflected in the brief for *amicus curiae* of the American Psychological Association in *Maryland v. Craig*, 110 S.Ct. 3157 (1990), at p. 3, indicates that:

> ... testifying in confrontation with the alleged abuser may in many cases cause child victim-witnesses to refuse to testify or to testify less completely than they are capable.

In this regard, the London Family Court Clinic (Ontario) has done a three-year study of over 221 child witnesses. In their report entitled *Reducing the System-induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-up* (January 1991), at p. 107, the authors remark:

> The children who did have the benefit of the screen were assisted greatly in giving their evidence in court. All screen recipients were fearful of the accused, and felt unable to tell their story in court because of their anxieties and fears for their personal safety, as well as due to their great uncomfortableness at facing the accused.

> Younger children seemed to experience the screen as providing a physical barrier between themselves and the accused which made them feel safe. Older children described not having to worry about making eye contact and being drawn to look at the accused out of fear.

The plight of children who testify and the role courts must play in ascertaining the truth must not be overlooked in the context of the constitutional analysis in the case at hand. As this Court has said, children may require different treatment than adults in the courtroom setting (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at p. 54; and *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 133). For a more comprehensive analysis, I refer to my reasons in *L. (D.O.)*, *supra*. It is with that context in mind that the constitutionality of s. 486(2.1) must be examined.

Constitutionality of Section 486(2.1) of the *Criminal Code*

In this Court's view, s. 486(2.1) does not violate the appellant's right to a fair trial and to fundamental justice under either s. 7 or s. 11(*d*) of the *Charter*. Sections 7 and 11(*d*) respectively assert:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

At the outset, I must say that I totally agree with the reasons of Morden A.C.J.O. at the Court of Appeal. Whether one approaches the concerns raised by the appellant from s. 7 or 11(*d*) of the *Charter*, the issue focuses primarily on whether the purpose and effect reflected in the provisions of s. 486(2.1) render the trial procedure fundamentally unfair to the accused. In order to determine whether the legislative initiatives put in place by s. 486(2.1) violate the rights of the accused, however, one must first appreciate the real scope of the provision. An order under s. 486(2.1) simply blocks the complainant's view of the accused and not vice versa. The wording of s. 486(2.1) merely provides that the screen "would allow the complainant not to see the accused". The screen does not obstruct the view of the complainant by the accused, his counsel, the Crown or the judge. All are present in court. The evidence is given and the trial is conducted in the usual manner, including cross-examination. As a result, the issue before this Court, is, simply put, whether a witness's obstructed view of an accused, infringes the rights of such accused under s. 7 or 11(*d*) of the *Charter*. I will first deal with the appellant's concerns with regard to the infringement of his rights under s. 7.

Section 7 of the *Charter*

His liberty and security interest being at stake, the appellant argues that s. 486(2.1) offends the principles of fundamental justice protected by s. 7 of the *Charter*, since he is prevented, by the placement of the screen, from "facing his accuser". He further argues that the screening device undermines the integrity of the fact finding process by effectively disallowing full cross-examination.

The principles of fundamental justice provided by s. 7 must reflect a diversity of interests, including the rights of an accused, as well as the interests of society (*R. v. Seaboyer*, *supra*, at p. 603; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519). While the objective of the judicial process is the attainment of truth, as this Court has reiterated in *L. (D.O.)*, *supra*, the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make a full defence (*R. v. Seaboyer, supra*, at p. 608).

In my view, the main objective pursued by the legislative enactment presently challenged is to better "get at the truth", by recognizing that a young child abuse victim's evidence may, in certain circumstances, be facilitated if the child is able to focus his or her attention on giving testimony, rather than experiencing difficulties in facing the accused. Section 486(2.1) of the *Criminal Code* recognizes that a child may react negatively to a face-to-face confrontation and, as a result, special procedures may be required to alleviate these concerns. Professor Nicholas Bala, in "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., *Discrimination in the Law and the Administration of Justice* (1993), 232, writes in this connection (at p. 248):

> Parliament has recognized that victims of child sexual abuse may be traumatized by the process of testifying in court. Children are invariably more than simply nervous about being in court; they often are afraid of facing their assailant again. There have, for example, been cases involving children so frightened of the accused while testifying that they were physically ill on the witness stand and the prosecution

> had to be stopped, or so frightened that they were unable to answer questions.

The use of the words "full and candid account of the acts complained of" in s. 486(2.1) of the *Criminal Code* cannot express more clearly what this section purports to achieve. That this is a valid purpose is beyond doubt. The only question is whether the effect of s. 486(2.1) deprives an accused of his or her right to a full defense and fair trial. In my view, it does not.

One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time. As discussed at length in *L. (D.O.), supra,* the recent trend in courts has been to remove barriers to the truth-seeking process (*R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. W. (R.), supra*; and *R. v. Marquard*, [1993] 4 S.C.R. 223). Recent Supreme Court of Canada decisions (*R. v. B. (K.G.), supra*; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Khan*; and most recently in *L. (D.O.)*), by relaxing certain rules of evidence, such as the hearsay rules, the use of videotaped evidence and out of court statements, have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.

Parliament, on the other hand, is free to enact or amend legislation in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. It is clear that, in enacting s. 486(2.1) of the *Criminal Code*, Parliament was well aware of the plight of young victims of sexual abuse, as well as the need to curtail such abuse. This is perfectly legitimate. The only limit placed on Parliament is the obligation to respect the *Charter* rights of those affected by such legislation.

As mentioned above and as discussed in the companion case, rules of evidence and procedure have evolved through the years in an effort to accommodate the truth-seeking functions of the courts, while at the same time ensuring the fairness of the trial. The idea of removing an accused from the view of a complainant, however, is not new. In *R. v. Smellie* (1919), 14 Cr. App. R. 128 (C.C.A.), a case involving child sexual assault and neglect, the trial judge ordered that the accused sit on the stairs leading out of the prisoner's dock in order that he would be out of the sight of the child complainant. As a result of the relocation the child was also out of the accused's sight. On appeal, the court stated at p. 130 that:

> If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

Neither is such an initiative unique to Canada. It is interesting to note, as did Morden A.C.J.O., that a number of American states have implemented similar legislation in order to better deal with the testimony of young complainants. These enactments have also been criticized on the grounds of potential constitutional invalidity, as a result of infringements upon the rights of accused. As I pointed out in *L. (D.O), supra,* in *Maryland v. Craig, supra*, a case involving the use of one way closed-circuit television O'Connor J., speaking for a majority of the United States Supreme Court, stated at p. 3167:

> We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.

This statement is all the more remarkable since both the United States Constitution and numerous state constitutions guarantee an accused the right to confront those witnesses testifying against him or her at trial, a right on which the Canadian *Charter* is silent. Section 7 of the *Charter*, whose protection the appellant claims, simply refers to the all-encompassing concept of "principles of fundamental justice".

A cursory review of other jurisdictions reveals that similar issues were raised and similar objections were overruled, even in the absence of legislation. In *R. v. D.J.X.* (1989), 91 Cr. App. R. 36 (Eng. C.A.), which the Court of Appeal of Ontario cited in the present case, involving abhorrent sexual abuse of children, a screen was placed in the courtroom to block both the accused from seeing the child complainants and the child complainants from seeing those whom they accused. Lane L.C.J. succinctly dealt with the concerns raised here by the appellant, when he asserted at pp. 39-41:

> The circumstances are these. It had become apparent from experience that children in cases such as this, not surprisingly, were shown to be reluctant to give evidence at all. Again we are told that there had been cases which had collapsed simply because the child was unwilling or unable to speak as to the facts of which he or she was expected to speak. Consequently it seemed to the court, upon representations one imagines by the Crown Prosecution Service, that steps ought to be taken in order if possible to remedy that situation, if that could be done without unfairness to the defendants.
>
> . . .
>
> The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies. He came to the conclusion that in these circumstances the necessity of trying to ensure

> that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.
>
> . . .
>
> We take the view that we do not need authority to confirm us in the view that what the learned judge here did in his discretion was a perfectly proper, and indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses.

In the New Zealand case of *R. v. Accused (T 4/88)*, [1989] 1 N.Z.L.R. 660 (C.A.), involving the use of a screen to protect a 12-year-old female victim of sexual assault when giving evidence in court, Cooke P., giving the principal reasons for the Court of Appeal, eloquently remarked at p. 667:

> But we see no reason why the jurisdiction cannot be used to allow protection of child witnesses by one-way screens in any case where that is shown to be reasonably necessary. A very reason for the existence of the inherent jurisdiction is that justice may require a departure from ordinary rules. Its very strength is its adaptability.

Morden A.C.J.O. also cites McMullin J.'s concurring reasons in the same case, at p. 672, which clearly depict the rationale behind the rule:

> Confrontation in the sense of being in the presence of one's accusers is one thing; but confrontation merely to afford the opportunity to glower at and thereby intimidate witnesses is another. The sight of an accused person from whose actions a child has lived in terror in the past is very likely to intimidate that child in the giving of evidence about that accused, particularly when the evidence involves him in incidents of the most intimate and degrading kind.

I could not agree more with Morden A.C.J.O. when, referring to the "right" to face one's accuser claimed by the appellant, he says (at pp. 366-67):

> My conclusion, based on the foregoing, is that, since it is an accepted tradition of our legal system that judge, jury, witnesses, accused and counsel are all present in sight of each other, it can be said that normally an accused has the right to be in the sight of witnesses who testify against him or her. That this is probably so is confirmed by the need for a judge's order providing otherwise if the accused is not to be in the sight of the witnesses....
>
> Accepting that it is a right, of a kind, I do not think that it can be said to be an absolute right, in itself, which reflects a basic tenet of our legal system. It is a right which is subject to qualification in the interests of justice.
>
> . . .
>
> I do not think that, by reason of the absence of face to face confrontation, any principle of fundamental justice has been infringed in such a trial. It may be that, if the order under s. 486(2.1) is not properly made, a legal right has been infringed, but that is not the present issue.

The intervener the Attorney General of Manitoba suggests that the importance of confrontation in truth seeking is a culturally biased vision of human characteristics and, as a result, should not be viewed as part of our fundamental principles of justice. I tend to agree. It is not, however, necessary to decide this point, since this Court has found, as did Morden A.C.J.O., that even when an order is made pursuant to s. 486(2.1) of the *Criminal Code*, the requisite "elements of confrontation" remain, albeit in a limited form.

For reasons more fully elaborated in *L. (D.O.), supra*, in spite of the provisions of s. 486(2.1) of the *Criminal Code*, the appellant's right to cross-examination remains intact. The slight alteration provided for by Parliament by the impugned section is aimed, simply, at enabling the young complainant to be able to recount the evidence, fully and candidly, in a more appropriate setting, given the circumstances, while facilitating the elicitation of the truth. However, young complainants, shielded by the screen, remain predominantly subject to the

rigours of the courtroom and cross-examination. The fact that the complainant's giving of evidence may be facilitated by the use of a screening device in no way restricts or impairs an accused's ability to cross-examine the complainant. The words of La Forest J. in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, are highly relevant in this regard:

> It seems to me that s. 7 of the *Charter* entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.

In the case at hand, the accused was able to observe the young complainant as he testified. In addition, s. 486(2.1) provides a very limited exception. A screen may only be utilized in cases with regard to offences set out in the section and in which the complainant is under the age of 18. As well, the provision specifically provides for the trial judge's discretion to make such an order if, in her or his opinion "the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant." This, in itself, goes a long way towards guaranteeing an accused a fair trial. In *Baron v. Canada*, [1993] 1 S.C.R. 416, this Court held that residual judicial discretion may be constitutionally required in order to provide a mechanism for balancing the rights of an accused and those of the state.

I wish to make it clear, however, that the circumstances under which a judge may resort to an order under s. 486(2.1) of the *Criminal Code* do not require that exceptional and inordinate stress be caused to the child complainant. I am in agreement with the Ontario Court of Appeal in *R. v. M. (P.)* (1990), 1 O.R. (3d) 341, which held that a trial judge has "substantial latitude" in deciding

whether the use of the screen should be permitted under s. 486(2.1). I also agree with the Ontario Court of Appeal in this case, that the evidence need not take any particular form. In exercising her or his discretion the trial judge may consider the evidence brought forward with regard to, but not limited to, the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case. In *R. v. Faid* (1981), 61 C.C.C. (2d) 28 (Alta. C.A.), rev'd on other grounds [1983] 1 S.C.R. 265, where the accused was assigned to the prisoner's box out of sight of the public, Harradence J.A., correctly in my view, remarked (at p. 40):

> . . . in a criminal trial the seating and location of the accused lies within the sole discretion of the learned trial Judge. That discretion cannot be interfered with unless its exercise manifestly precluded the accused from making full answer and defence to the charge.

The appellant suggests that a number of unique difficulties may arise should an accused be unrepresented and, as such, is unable to face the young witness during cross-examination. In my view, should such rare situations arise, they can easily be remedied. Generally, in criminal proceedings legal representation is made available to all accused, should they so wish. If they do not, the trial judge has discretion to adopt whatever procedure or device is best suited to prevent the infringement of an accused's rights and to ensure a fair trial. It may well be that self-representation of an accused is one of the circumstances which the trial judge, in exercising her or his discretion, may consider together with other factors when determining whether to permit the use of a screening device. In any event, this is not the case here. The trial judge in this case, in my view, properly exercised his discretion and, in so doing, did not infringe the appellant's right to a fair trial. Moreover, for reasons already discussed, s. 486(2.1) of the *Criminal*

Code in no way infringes the principles of fundamental justice and accordingly, is constitutional. The appellant's argument must fail.

Section 11(*d*) of the *Charter*

I now turn to the appellant's submission that s. 486(2.1) of the *Criminal Code* violates his rights under s. 11(*d*) of the *Charter*. The appellant submits that his right to "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" is violated, as the screen undermines the presumption of innocence, operates unfairly against the accused and hampers cross-examination. Given the issue of cross-examination has been fully dealt with under s. 7, I will only deal with the appellant's other concerns.

According to the appellant, the use of a screen lends an air of credence to the witness' testimony and, since the courtroom has been altered for the protection of the young complainant, the accused may appear guilty. In the case at bar, the appellant was tried before a judge sitting alone and, as a result, the issue of appearance to the jury is not relevant. Had a jury been present, however, I suggest that, properly informed, they would not have been swayed by the use of the screen. As Dickson C.J. said in *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692:

> In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. [Emphasis in original.]

In a similar vein, I suggest that one should assume that a jury will follow judicial instruction and will not be biased by the use of such a device. In

fact, in contrast to the perspective raised by the appellant, it has been remarked that Crown prosecutors are reluctant to request the use of screens because they are concerned that the young complainant may not come across as credible or the child's testimony may have less of an impact (V. Schmolka, *Is Bill C-15 Working? An Overview of the Research on the Effects of the 1988 Child Sexual Abuse Amendments* (1992), at pp. 62-63). The use of a screen could very well be held against a child complainant, who might be judged to be an unreliable witness, because she or he is unable to look the accused in the eye, rather than against the accused. If screens were used more regularly as part of the courtroom procedure, as recommended by the Family Court Clinic in London, these perceptions may well be totally eliminated. Finally, while it is true, as the appellant contends, that s. 486(2.1) of the *Criminal Code*, similar in this regard to most sections of the *Code*, does not contain prescribed jury instructions, such instructions are routinely given by judges and such a caution is no more a constitutional prerequisite with respect to this section than with respect to any other section of the *Criminal Code*. Such caution may not be necessary or, if it is, it will be a function of the circumstances of the case (*R. v. Vetrovec* (1980), 58 C.C.C. (2d) 537 (B.C.C.A.), aff'd [1982] 1 S.C.R. 811).

For these reasons I conclude that s. 486(2.1) does not contravene the appellant's right to be presumed innocent or to a fair hearing pursuant to s. 11(*d*) of the *Charter*.

Conclusion

Section 486(2.1) of the *Criminal Code* has been carefully worded to protect the rights of accused, while at the same time facilitating the giving of evidence by young victims of sexual abuse of varying kinds. I find the appellant's attack on the constitutionality of s. 486(2.1) of the *Criminal Code* unfounded. Further, I agree with the respondent that "neither historical review, comparisons of the jurisprudence of other free and democratic societies, nor present day Canadian constitutional and evidence jurisprudence, support the Appellant's contention". Since s. 486(2.1) does not infringe either s. 7 or s. 11(*d*) of the *Charter*, there is no need to resort to s. 1 of the *Charter*.

Parliament has devised s. 486(2.1) in such a way as to properly balance the goal of ascertaining the truth and the protection of children as well as the rights of accused to a fair trial by allowing cross-examination and by tailoring the use of screens to the complainants' age and confining their use to limited and specific types of crimes. Furthermore, s. 486(2.1) of the *Criminal Code* preserves the discretion of the trial judge to permit such use only when the "exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant". Since there was no infringement of the principles of fundamental justice nor of the right to be presumed innocent or to a fair trial, s. 486(2.1) of the *Criminal Code* is constitutional.

In the result, the appeal is dismissed.

Appeal dismissed.

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