R. *v.* François, [1994] 2 S.C.R. 827

Lorne François *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* François

File No.: 23677.

1994: May 5; 1994: July 14.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Criminal law -- Appeals -- Unreasonable verdict -- Accused charged with rape -- Complainant's evidence containing inconsistencies concerning number of times she was raped and conflicting with prior sworn statements indicating that she had never been sexually abused -- Complainant offering explanations for inconsistencies -- Accused not testifying in his defence -- Whether guilty verdict unreasonable -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(a)(i).

Criminal law -- Evidence -- Inferences -- Failure to testify -- Accused charged with rape -- Complainant's evidence containing several inconsistencies --

Complainant offering explanations for inconsistencies -- Accused not testifying in his defence -- Jury during deliberation asking trial judge for clarification on accused's right to testify -- Guilty verdict rendered shortly after trial judge's answer to jury's question -- Whether jury drew improper inference from accused's failure to testify.

The accused was charged with rape. The only evidence at the trial was that of the complainant, who testified that, during the year her family lived next door to the accused in the early 1980s, she was regularly sent to his home to make phone calls since her family did not have a telephone, and that the accused raped her on several occasions. She was 13 years old at the time. The complainant reported the incidents only 10 years later, stating that she was afraid to tell anyone because of what the accused could do to her. Her cross-examination disclosed inconsistencies concerning the number of times she was raped by the accused. In her first statement to the police, she said it had happened three times; at the preliminary inquiry, she put the number at five or six, and at trial at 10 to 20. The complainant explained this by saying that it was "hard to put a number [on] exactly how many times these things happen to you". In cross-examination, she was also confronted with two statements inconsistent with her allegations about the accused, the first one made in 1987 in child support proceedings where she swore that she was a virgin prior to 1985, and the second in 1989 in wardship proceedings, where she swore that she had never been sexually abused. The complainant explained that she believed the statements were true at the time she made them, because she had blocked out the incidents involving the accused until her memory returned in a flashback in 1990. The complainant testified that this flashback occurred during a period when she was being interviewed by police and children's aid workers in connection with further wardship proceedings concerning her son, where she was

told that part of the process to get him back might be admitting things that had happened to her. The complainant denied in cross-examination that the pressure she was experiencing caused the flashbacks. The accused did not testify. The jury after deliberating for two hours asked for clarification as to the accused's right to testify in his defence. The trial judge answered and, 10 minutes later, the jury returned with a verdict of guilty. The majority of the Court of Appeal upheld the conviction. This appeal raises two issues: (1) whether the verdict should be set aside because the jury drew an improper inference from the accused's failure to testify; and (2) whether the verdict was unreasonable and should be set aside under s. 686(1)(*a*)(i) of the *Criminal Code*.

Held (Sopinka, Cory and Major JJ. dissenting): The appeal should be dismissed.

Per La Forest, Gonthier, McLachlin and Iacobucci JJ.: The first ground of appeal cannot succeed. Since the inferences the jury drew in this case cannot be known, in determining whether the jury may have drawn an improper inference from the accused's failure to testify would require speculation as to what the jury did. In any event, while an accused's failure to testify cannot be used to shore up a Crown case which otherwise does not establish guilt beyond a reasonable doubt, a jury is permitted to draw an adverse inference from the failure of an accused to testify.

The function of a court of appeal, under s. 686(1)(*a*)(i) of the *Code*, is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. In

order to apply the test the court of appeal must re-examine and to some extent reweigh and consider the effect of the evidence. This rule also applies to cases where the objection to the conviction is based on credibility. In such cases, the court of appeal should show great deference to findings of credibility made at trial. Review for credibility may involve consideration of the basis for conclusions which the witness has drawn. More problematic is a challenge to credibility based on the witness's alleged lack of truthfulness and sincerity, the problem posed in this appeal. A court of appeal reviewing a jury verdict on the basis of credibility cannot, however, infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable. A jury may deal with inconsistencies and motive to concoct in a variety of ways and its verdict based on such evidence may very well be both reasonable and lawful. Here, the verdict was not unreasonable. The complainant gave a detailed and largely consistent account of what had happened to her and offered an explanation for each of the alleged inconsistencies concerning the number of times she was raped and her sexual history. It was for the jury to weigh the significance, if any, of the inconsistencies and to determine whether they had been neutralized by the complainant's explanations. It was thus open to the jury to accept those explanations and, if they did, the inconsistencies lost their power to raise a reasonable doubt with respect to the accused's guilt. It was also for the jury to determine, on the basis of common sense and experience, whether they believed the complainant's story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth. The jury's acceptance of the complainant's evidence concerning what happened to her cannot, on the basis of the record, be characterized as unreasonable. In sum, the verdict was not illogical or speculative or inconsistent with the main body of the evidence.

Per Sopinka, Cory and Major JJ. (dissenting): There is more than one inference that can be drawn from the accused's failure to testify and there is no reason to assume the jury drew the wrong one, using the lack of testimony by the accused to strengthen the Crown's case to a point where they felt safe in convicting. It is impossible to know what took place either in the jury room or in the minds of the individual jurors and a jury's verdict cannot be interfered with on the basis of speculation.

In enacting s. 686(1)(*a*)(i) of the *Code*, Parliament has given appellate courts the jurisdiction to interfere with a jury verdict on occasion, even where there is no error of law, but purely on the basis of unreasonableness. When considering an appeal under that section, the function of the appellate court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. In order to apply the test, the court must re-examine and to some extent reweigh and consider the effect of the evidence. This test equally applies to cases where the verdict is based on findings of credibility. The deference to be shown to a trier of fact on questions of credibility, while high, is not absolute. Finally, it is not necessary to find an error or omission in the Court of Appeal's reasoning before this Court can interfere with their decision. When considering the reasonableness of a verdict under s. 686(1)(*a*)(i), this Court is entitled, and obligated, to consider the matter anew. In this case, the majority of the Court of Appeal erred in holding that the verdict was not unreasonable. The question asked by the jury, which was irrelevant to the consideration of this issue, appears to have diverted the Court of Appeal's attention from the obligation to re-examine and to some extent reweigh and consider the effect of the evidence. When the complainant's evidence is fully reviewed, and

allowing for the advantage enjoyed by the jury in assessing the complainant's credibility, it is unreasonable that the jury did not have at least a reasonable doubt as to the accused's guilt, given the vital inconsistencies in the complainant's evidence on central matters and the suspicious circumstances of the flashbacks.

Cases Cited

By McLachlin J.

Referred to: *Kolnberger v. The Queen*, [1969] S.C.R. 213; *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *Vézeau v. The Queen*, [1977] 2 S.C.R. 277; *R. v. Johnson* (1993), 12 O.R. (3d) 340; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Warkentin v. The Queen*, [1977] 2 S.C.R. 355; *R. v. Darnell and Newstead* (1978), 40 C.C.C. (2d) 220; *R. v. Chevrier* (1992), 49 Q.A.C. 37, rev'd [1993] 2 S.C.R. 226 (*sub nom. R. v. C. (R.)*).

By Major J. (dissenting)

R. v. W. (R.), [1992] 2 S.C.R. 122; *Kolnberger v. The Queen*, [1969] S.C.R. 213; *Vézeau v. The Queen*, [1977] 2 S.C.R. 277; *R. v. Johnson* (1993), 12 O.R. (3d) 340; *R. v. Yebes*, [1987] 2 S.C.R. 168; *Corbett v. The Queen*, [1975] 2 S.C.R. 275.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, ss. 686(1)(*a*)(i) [am. 1991, c. 43, s. 9 (Sch., item 8)], 691(1)(*a*).

APPEAL from a judgment of the Ontario Court of Appeal (1993), 14 O.R. (3d) 191, 64 O.A.C. 140, 82 C.C.C. (3d) 441, 21 C.R. (4th) 350, dismissing the accused's appeal from his conviction for sexual assault. Appeal dismissed, Sopinka, Cory and Major JJ. dissenting.

Bruce Duncan, for the appellant.

James K. Stewart, for the respondent.

The judgment of La Forest, Gonthier, McLachlin and Iacobucci JJ. was delivered by

MCLACHLIN J. -- Section 686(1)(*a*)(i) of the *Criminal Code*, R.S.C., 1985, c. C-46, provides that on the hearing of an appeal against a conviction, a court of appeal may allow the appeal where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence. The main issue before us is whether this is such a case.

I - The Background

The accused is charged with having repeatedly raped the complainant, a 13-year-old girl. She was the only witness at the trial, held 10 years later. The accused did not testify. Her story may be summarized as follows.

At the time in question, the complainant lived with her family next door to the accused. Her family did not have a telephone. She was often sent to the accused's house to place calls which her family wanted placed. She was the family "gopher"; it was her job to make the calls. On one such occasion, late in the afternoon or early evening -- she recollected that it must have been a weekend because her father was home -- she went next door to use the phone. She knocked at the accused's door and when he answered put her request. He let her in and closed the door behind her. She went to the living room. The telephone was on a stand, by the window just inside the door on the other side of a big armchair. There was also a couch, a television, a bookstand and a coffee table in the room. She sat in the big armchair and made her call.

When she went to get up from the armchair to leave, the accused seized her and pulled her over to the couch, where he laid her down. She recalled lying on the couch, with her feet touching the floor. The accused said nothing to her. He began feeling her over the top of her clothes with his hand, fondling her breasts and her private area between her legs. She was wearing either jeans or jogging pants, with a sweater or t-shirt, over a training bra and underwear. She testified that she lay on the couch in a state of shock as the appellant fondled her. She did not know why he wanted to do this. The accused proceeded to pull down her pants and underwear and forced her to have sexual intercourse with him, which she described to the jury in detail. She said she was frightened: "I felt a lot of terror inside." When he had finished, the accused told the complainant not to tell anyone else, "or else". In pain, she dressed and went home. The rapes were repeated on other occasions when she was sent to use the phone.

The complainant never told anyone about the incidents until 1990 when she told the police. She stated that she was afraid to tell anyone because of what the accused might do to her. She told her parents that she did not want to go over to the accused's house to make other calls, but they kept asking why; afraid to tell them, she went back. She testified that she never wanted to have intercourse with the accused, and that during this time she felt frightened, dirty and cheap. After the family moved, the sexual assaults ceased.

On two occasions between the sexual assaults and the time she told the police, the complainant made statements which appeared to be in conflict with her allegations about the accused. Both were related to proceedings about her children. In 1987 she appeared before a judge in Brockville seeking support for her son from the man she alleged was his father. She testified that she had not had sex with anyone else before this man. During proceedings in 1989 to regain custody of her son, who was in the care of the Children's Aid Society, she swore in an affidavit: "I have never been party to nor have I ever permitted my son to be abused either sexually or physically."

Cross-examined on these statements, the complainant stated that she had not lied since at the time, she believed these statements to be true. She explained she had blocked the sexual assaults by the accused out of her mind. She testified that this memory block had lasted from the early 1980s until January 17, 1990. In 1990 she had been attending at the Children's Aid Society offices for supervised visits with her son. She wanted to get her son back. The people at the Society and the police, who had an office there, were discussing this with her. They wanted information from her. She was told that her cooperation both with

respect to her son and events concerning herself would help her get her son back. They indicated to her that part of the process might be admitting things that had happened to her. One evening, she thought while she was watching television with a cup of coffee, the memory of the events with the accused came back to her. She wrote them down on a piece of paper. The next day she went to the police and told them about Mr. François.

While admitting that she felt under pressure at the time of what defence counsel called the "flashback", due to her circumstances and her desire to get her son back, the complainant denied that the police were hounding her:

> Q. Had you been hounded before you gave the statement about Mr. François?
>
> A. No it was after that statement.

She also denied that the pressure she felt caused the "flashback":

> Q. And given the pressure of the situation and all of those things about your son in your mind eventually you told the police about an incident with respect to Mr. François, correct?
>
> A. It wasn't like due to the pressure and that, it happened.
>
> Q. It happened.
>
> A. It happened and I felt the trust within the police to go to them and to tell them what had happened.

II - <u>The Issues</u>

Two issues were raised on appeal. First, it was suggested that the jury's verdict should be set aside because the jury may have drawn an improper inference from the accused's failure to testify, as evidenced by the return of a verdict shortly after putting a question concerning the accused's right not to testify. The second and principal ground of appeal is that the jury's verdict of guilty was unreasonable and should be set aside under s. 686(1)(*a*)(i) of the *Criminal Code*.

III - Analysis

A. *Improper Inference from the Accused's Failure to Testify*

This ground of appeal cannot succeed because it would require speculation as to what the jury did. We cannot know what inferences the jury drew in this case. We know only that they received proper instructions on the law and on their duties, including explicit directions that the burden lay on the Crown to prove guilt beyond a reasonable doubt and that the burden never shifted to the accused.

In any event, subject to the caveat that failure to testify cannot be used to shore up a Crown case which otherwise does not establish guilt beyond a reasonable doubt, a jury is permitted to draw an adverse inference from the failure of an accused person to testify: *Kolnberger v. The Queen*, [1969] S.C.R. 213; *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, and also *R. v. Johnson* (1993), 12 O.R. (3d) 340 (C.A.).

B. *Unreasonable Verdict*

(1) The Legal Principles

In *Corbett*, Pigeon J., speaking for the majority, described the Court's function on review for unreasonableness as follows (at p. 282):

> . . . the question is whether the verdict is unreasonable, not whether it is unjustified. The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.

This statement was affirmed in *R. v. Yebes*, [1987] 2 S.C.R. 168, which went on to say that in order to apply the test the court of appeal "must re-examine and to some extent reweigh and consider the effect of the evidence" (p. 186). This rule also applies to cases where the objection to the conviction is based on credibility -- where it is suggested that testimony which the jury must have believed to render its verdict is so incredible that a verdict founded upon it must be unreasonable. This was confirmed by this Court in *R. v. W. (R.)*, [1992] 2 S.C.R. 122. However, the Court recognized the special difficulties posed by such a contention. I stated (at pp. 131-32):

> ... in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility ... The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

Review for credibility may involve consideration of the basis for conclusions which the witness has drawn. For example, a witness may say, "That is the man who hit me". If other evidence indicates that the witness was unable to see the person who hit him at the time of the assault, the witness's identification might be considered unreasonable and a verdict dependent solely upon it overturned under s. 686(1)(*a*)(i). This sort of challenge for credibility is not much different in practice than the challenge on other grounds in *Corbett* and *Yebes*. More problematic is a challenge to credibility based on the witness's alleged lack of truthfulness and sincerity, the problem posed in this appeal. The reasoning here is that the witness may not have been telling the truth for a variety of reasons, whether because of inconsistencies in the witness's stories at different times, because certain facts may have been suggested to her, or because she may have had reason to concoct her accusations. In the end, the jury must decide whether, despite such factors, it believes the witness's story, in whole or in part. That determination turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. The latter domain is the "advantage" possessed by the trier of fact, be it judge or jury, which the court of appeal does not possess and which the court of appeal must bear in mind in deciding whether the verdict is unreasonable: *R. v. W. (R.), supra*.

In considering the reasonableness of the jury's verdict, the court of appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury

may reject the witness's evidence in its entirety. Or the jury may accept the witness's explanations for the apparent inconsistencies and the witness's denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness's evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable. A verdict of guilty based on such evidence may very well be both reasonable and lawful.

A final factor which the court of appeal reviewing for unreasonableness must keep in mind, is that the jury may bring to the difficult business of determining where the truth lies special qualities which appellate courts may not share. This most certainly applies to sexual offences. As de Grandpré J. of this Court stated in *Warkentin v. The Queen*, [1977] 2 S.C.R. 355, at p. 381:

> Rape is particularly a crime for which juries are the proper forum. It is the type of offence the examination of which turns on an infinite number of small details related to the credibility of the witnesses, the community in which the actors and the jurors live, the standards of conduct in that area, etc.

See also *R. v. Darnell and Newstead* (1978), 40 C.C.C. (2d) 220 (Ont. C.A.), at pp. 221-22.

At the end of the day, the following words of Rothman J.A. in *R. v. Chevrier* (1992), 49 Q.A.C. 37, at p. 42, approved by this Court in *R. v. C. (R.)*,

[1993] 2 S.C.R. 226, remain a useful guide for an appellate court reviewing a jury verdict on the basis of credibility:

> Credibility is, of course, a question of fact and it cannot be determined by fixed rules. Ultimately, it is a matter that must be left to the common sense of the trier of fact, in this case the trial judge (*R. v. White*, [1947] S.C.R. 268). Unless the record reveals an error of law or in principle or a clear and manifest error in the appreciation of the evidence, a court of appeal should not intervene in that determination.

(2) Application of the Legal Principles

It is not denied that there was sufficient evidence before the jury to found a conviction. The suggestion is rather that the alleged inconsistencies between the complainant's evidence at trial and what she said on other occasions, as well as the "pressures" and motives present which might have led her to concoct a story about Mr. François, should at least have raised a reasonable doubt with respect to the accused's guilt. In short, a reasonable and reasoning jury, considering her testimony, would be bound to have a reasonable doubt about Mr. François' guilt.

The complainant gave a detailed and largely consistent account of what had happened to her and why she had acted as she did. She described not only the events, but offered surrounding details of things like furnishings and clothing. She seemed ready to admit her mistakes and failings. She was not evasive. No other witness came forward to contradict her, and no contradiction on matters like dates and physical evidence arose.

One alleged inconsistency concerns the number of times the complainant was raped by Mr. François. In her first statement to the police, she said it had happened three times. At the preliminary inquiry, she put the number at five or six times. At trial, she said it had happened 10 to 20 times. She provided an explanation for the variances: "I don't know, like it is hard to put a number exactly how many times these things happen to you."

Another alleged inconsistency concerns her sexual history. On two occasions in the intervening years the complainant made statements which are said to be inconsistent with having been raped by Mr. François. Again she provided an explanation: she said that she had suffered a memory block between the early 80s and January 17, 1990. While admitting that she was under pressure at the time and had been talking to the Children's Aid Society and the police, she denied that her recovery of memory in 1990 was caused by the pressure. She had not created it: "it happened".

The important point is this. The complainant offered an explanation for each of the alleged inconsistencies. It was open to the jury to accept those explanations. If they did, the inconsistencies lost their power to raise a reasonable doubt with respect to the accused's guilt. The explanations provided a means of reasonably resolving such doubt as may have been created by the inconsistencies themselves. It was for the jury to weigh both the significance of the alleged contradictions and whether such significance as they might have, had been neutralized by explanations as to why they occurred. The jury might have concluded that the contradictions were significant and had not been neutralized by the proffered explanations. That result would have been reasonable. But it was

equally open to the jury to conclude that the alleged contradictions had been neutralized by the explanations. That alternative too was "reasonable".

This leaves the question of the complainant's memory block in the early 80s and recovery of memory in 1990 -- the "flashback". It is suggested that it was unreasonable for the jury not to have a reasonable doubt about the accused's guilt given the complainant's evidence that her memory of the assaults by Mr. François had been blocked, only to be revived after discussions with the people at the Children's Aid Society and the police about the importance of "admission on [her] part that things had happened to [her]". Without pronouncing on the controversy that may surround the subject of revived memory amongst experts, it is sufficient to say for purposes of this appeal that the jury's acceptance of the complainant's evidence on what happened to her was not, on the basis of the record, unreasonable. The complainant was cross-examined on the possibility of concoction. She denied the suggestion of cross-examining counsel that her recovered "memory" was a product of the pressures she was experiencing. Thus explored, the matter was left to the good judgment of the jury. It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether they believed the complainant's story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth. To do so cannot be characterized as unreasonable.

Considering the alleged inconsistencies in the complainant's versions of events at different times in the light of her explanation of repressed and recovered memory, I can find no basis for concluding that the jury's verdict of

guilty was unreasonable. It cannot be said that the jury's verdict was illogical or speculative or inconsistent with the main body of the evidence. No error in the jury's appreciation of the evidence is demonstrated, much less the "clear and manifest error" required by the law: *R. v. C. (R.)*, *supra*.

I am fortified in this conclusion by noting that the weaknesses in the complainant's evidence were thoroughly canvassed by defence counsel in cross-examination and reviewed by him in his address to the jury. In his charge to the jury, the trial judge once again reviewed the frailties in her evidence and pointed out the need to be fully satisfied of guilt beyond a reasonable doubt. After a thorough recital of the frailties in the complainant's testimony and a favourable reference to defence counsel's detailed submissions about them in his address to the jury, the trial judge said:

> You will consider the complainant's evidence in this respect and determine in your own mind the [e]ffect if any it may have on her credibility.

Immediately following that instruction, he referred to the challenged evidence of the complainant about the number of occasions on which she had been sexually assaulted and her explanation of the telephone calls she continued to make. Of the escalation in the number of attacks he said:

> You will determine in your own mind what [e]ffect if any those inconsistencies o[n] your view of her believability.

At the end, the trial judge stated:

> You will consider the explanation and determine what impact if any it may have on her credibility because as far as you are concerned ... you are the final judges of the facts.

The jury, so instructed, appears to have done exactly what the trial judge told them to do. For a court of appeal to quash that verdict would be to negate the trial judge's ultimate instruction to the jury: "you are the final judges of the facts".

One more matter requires mention. My colleague Major J. suggests that the Court of Appeal allowed itself to be "diverted ... from the obligation imposed by *Yebes* and *W. (R.)*" (p. 858), permitting this Court to reconsider the matter of the unreasonableness of the verdict. With respect, I would not so fault the Court of Appeal (1993), 14 O.R. (3d) 191. Robins J.A., having considered the point arising from the jury's question, went on to state that the "ultimate question" was whether the verdict was reasonable. He thoroughly reviewed the evidence and concluded that the "verdict cannot be considered unreasonable within the meaning of s. 686(1)(*a*)(i) of the *Criminal Code*" (p. 196) and that "the verdict finding the appellant guilty of rape is a verdict that a properly instructed jury acting judicially could reasonably have rendered" (p. 199). Krever J.A. dealt with the improper inference issue summarily and devoted the remainder of his reasons to the question of the unreasonability of the verdict, in the end stating: "... I am unable to conclude that the verdict was unreasonable or cannot be supported by the evidence" (p. 205). Carthy J.A., dissenting on the improper inference issue, added at p. 204 that he "would have deferred to the advantage of the jury in assessing credibility and would not have deemed the verdict unreasonable if not for the question put to the court by the jury". In short, it is clear that all members of the court below fully

considered the arguments on the verdict issue and concluded that it was not unreasonable, subject to the concern of Carthy J.A. on the first issue.

This raises the question of whether, the Court of Appeal having fully considered the reasonableness of the verdict, this Court may conduct its own re-examination of the evidence to determine whether in its view the verdict was unreasonable. Crown counsel submitted that in the absence of clear error or omission in the Court of Appeal, this Court should not engage in its own review *de novo*. Having concluded that the verdict is not unreasonable in any event, I need not decide this point. Whatever the legal answer, I note the practical problem of a second appellate court saying a verdict is "unreasonable", after the court of appeal below has concluded the verdict is "not unreasonable". The very existence of such divergence may suggest that the verdict is not so much clearly unreasonable, as one upon which different reasonable views may be held.

IV - Disposition

I would dismiss the appeal.

The reasons of Sopinka, Cory and Major JJ. were delivered by

MAJOR J. (dissenting) -- This appeal following a dissent on a point of law in the Ontario Court of Appeal is as of right pursuant to s. 691(1)(*a*) of the

Criminal Code, R.S.C., 1985, c. C-46. The issue is whether the jury's verdict is unreasonable.

I - Facts

The appellant was charged that, between January 1, 1979, and January 3, 1983, he sexually assaulted the complainant. The complainant did not report the assaults until 1990. The appellant's trial from March 30 to April 2, 1992 was held before Morin J. of the Ontario Court, General Division, and a jury.

The only evidence at the trial was the complainant's, who testified at trial that at the time of the alleged assaults she lived with her family next door to the appellant. Her family did not have a telephone. They had the appellant's permission to use his. She testified that, in approximately 1981, when she was 13 years old, she was sent to make a telephone call at the appellant's home, and while she was there he raped her. She said that she froze, was frightened, and said nothing to her parents.

During the year that her family lived next door to the appellant, the complainant initially testified that she was regularly sent to the appellant's home to make telephone calls, and that he raped her on 10 to 20 such occasions. The complainant testified during examination in chief that she did not report the assaults until 1990 because she was afraid of what the appellant might do to her.

During the complainant's cross-examination, it was disclosed that in her initial statement to the police in January of 1990, she stated that the appellant had raped her three times. At the preliminary hearing, she stated that he raped her five or six times. At the trial, in 1992 she said he had raped her 10 to 20 times. The complainant explained this by saying that it was "hard to put a number [on] exactly how many times these things happen to you".

The complainant was cross-examined with respect to an affidavit sworn by her in 1989 and filed in wardship proceedings concerning her son, in which she swore that she had never been sexually abused. She was also cross-examined with respect to testimony she gave in 1987, in proceedings claiming support from her son's father, in which she swore that she was a virgin prior to 1985.

Once confronted with these, the affidavit and the sworn statement in cross-examination, the complainant stated that she believed the statements were true at the time she made them, because she had blocked out the incidents involving the appellant until her memory returned in a flashback in 1990. This evidence in cross-examination was in direct contradiction to her testimony in chief that she did not complain until 1990 because of her fear of the appellant.

The complainant testified that this flashback in 1990 occurred during a period when she was being interviewed by police and children's aid workers in connection with further wardship proceedings over her son and following suggestions allegedly by the police that if she thought about what the police told her she might have a flashback and in her mind remember. This suggestion occurred at a time when the complainant was seeking custody of her son and felt

she needed the co-operation of the police who she had admitted saying were hounding her.

The appellant did not testify in his defence. The jury after deliberating for two hours returned to ask for clarification as to the appellant's right to take the stand in his own defence. The trial judge answered, saying that the appellant was entitled to give evidence or call evidence on his behalf, but that there was no onus on him to prove his innocence. The jury returned 10 minutes later with a verdict of guilty.

The appellant appealed his conviction to the Court of Appeal for Ontario, the principal ground of appeal being that the verdict was unreasonable. The appellant claimed that the jury, which returned with a verdict immediately after being instructed on the appellant's right to take the stand in his defence, drew an improper inference from the failure of the appellant to give evidence. On June 24, 1993, the Court of Appeal dismissed the appellant's appeal, Carthy J.A. dissented: (1993), 14 O.R. (3d) 191, 64 O.A.C. 140, 82 C.C.C. (3d) 441, 21 C.R. (4th) 350.

II - Relevant Statutory Provisions

The appellant relies on s. 686(1)(*a*)(i) of the *Criminal Code*:

> **686**. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence...

III - Judgments Below

Ontario Court of Appeal (1993), 14 O.R. (3d) 191

(1) Majority

Each of the three judges in the Ontario Court of Appeal wrote separate reasons for judgment. Robins J.A. concluded that the appellant's conviction "followed a fair trial, is amply supported by the evidence, and is not unreasonable" (p. 193). He stated that there was no basis in law for the court's intervention in the case. The jury was entitled to find the complainant to be a credible witness. The fact that there were some elements of her testimony which could have raised a reasonable doubt does not make the verdict unreasonable.

In response to the argument that the jury drew an improper inference from the appellant's failure to testify, as was clear from the timing of their question, Robins J.A. concluded that "neither the question nor its timing renders the verdict unreasonable" (p. 196). There was no reason to presume that the jury ignored the trial judge's explicit instructions and drew an improper inference from the appellant's failure to testify.

Krever J.A. concurred with Robins J.A. in the result. He said that he attached no significance to the question asked by the jury, nor to its timing with respect to the verdict ultimately returned. The trial judge's instructions were unimpeachable, and he did not think it appropriate to speculate as to the connection

between the question and the verdict ultimately returned. Since no significance can be attached to the question, and since there was evidence to support the verdict, Krever J.A. said at p. 204 that while "confess[ing] to some disquietude about the complainant's evidence...", he was unable to conclude that the verdict was unreasonable.

(2) Dissent

Carthy J.A. held that the question put by the jury to the trial judge and its timing "raise very real concern that the jury drew an improper inference despite the very proper instruction" (p. 203). He stated that he was left in serious doubt as to the guilt of the appellant after reviewing the evidence, and that he would have deferred to the advantage enjoyed by the jury but for the question asked by the jury. He felt that the question and its timing indicated that the jury themselves had some doubt as to the appellant's guilt solely on the basis of the complainant's evidence. Therefore, it was likely that the jury drew an improper inference from the appellant's failure to testify, and the verdict should therefore not be allowed to stand.

IV - Issues

There are two issues on this appeal:

1. Did the jury draw an improper inference from the appellant's failure to testify in his own defence?

2. Is the jury's verdict unreasonable within the meaning of s. 686(1)(*a*)(i) of the *Criminal Code*?

V - Analysis

1. *Did the Jury Draw an Improper Inference from the Appellant's Failure to Testify in his Own Defence?*

The inferences which can properly be drawn from an accused's failure to testify have previously been discussed by this Court in *Kolnberger v. The Queen*, [1969] S.C.R. 213, and *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, and more recently by the Ontario Court of Appeal in *R. v. Johnson* (1993), 12 O.R. (3d) 340. These cases make it clear that, where the accused does not testify, it is open to the jury to draw the inference that he or she could not have raised a reasonable doubt in the face of convincing Crown evidence. However, it is not permissible for a jury which is not otherwise convinced that the Crown has proven guilt beyond a reasonable doubt to infer from the fact that the accused has not testified that he must be guilty. In other words, where the Crown has proven its case beyond a reasonable doubt, the absence of the accused's testimony may indicate that he or she is unable to raise a reasonable doubt as a basis for acquittal, but this lack of testimony cannot otherwise be used to strengthen the Crown's case where the Crown has fallen short of proving guilt.

Therefore, the appellant claims that the jury was not otherwise convinced beyond a reasonable doubt solely on the basis of the complainant's testimony, and that they used the lack of accused's testimony to strengthen the Crown's case to a point where they felt safe in convicting.

If this was in fact what happened, then it would be an error. However, it is impossible to know what took place either in the jury room or in the minds of

the individual jurors. What the appellant is asking us to do is to speculate that the jury reached their verdict improperly. A jury's verdict cannot be interfered with on the basis of speculation.

As there is more than one inference to be drawn from the accused's failure to testify there is no reason to assume the jury drew the wrong one. The verdict should not be open to such speculation. As a result this ground of appeal fails.

2. *Is the Jury's Verdict Unreasonable Within the Meaning of Section 686(1)(a)(i) of the Criminal Code?*

The remaining ground of appeal is whether the verdict of guilty, in light of the complainant's evidence and cross-examination, ignoring the question from the jury, is unreasonable or cannot be supported by the evidence within the meaning of s. 686(1)(*a*)(i) of the *Criminal Code*.

It is important to remember that the complainant was the only witness at the trial. The only evidence that the jury had to consider was her testimony in chief, and the extent it was weakened by cross-examination. Clearly, the principal issue facing the jury was the complainant's credibility.

The case of *R. v. Yebes*, [1987] 2 S.C.R. 168, established the standard of review when considering an appeal under s. 686(1)(*a*)(i). At page 184, McIntyre J., for the Court, quoted from the earlier decision of *Corbett v. The Queen*, [1975] 2 S.C.R. 275:

> I do not read the above as meaning that the duty of the Court of Appeal is to reach its opinion on the basis of what its members think they would have decided if sitting as the jury so that, if they are not convinced that they would have rendered the same verdict, they are to find it unreasonable.... [T]he question is whether the verdict is unreasonable, not whether it is unjustified. The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. [Emphasis added in *Yebes*.]

McIntyre J. went on to say at p. 186:

> The function of the Court of Appeal, under [s. 686(1)(*a*)(i)] of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. [Emphasis added.]

This general approach under s. 686(1)(*a*)(i) has been recently confirmed and expanded upon in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, where the issue raised was whether the test as established in *Yebes* applied equally to cases where the verdict was based on findings of credibility.

McLachlin J., writing for this Court, restated the *Yebes* test and confirmed that it applied to verdicts based on credibility in the following language (at pp. 131-32):

> In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility. . . . The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of

> credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable. [Emphasis added.]

Therefore, the Court of Appeal as the first step had to re-examine, and to some extent at least, reweigh and consider the effect of the evidence in order to determine whether a properly instructed jury acting judicially could reasonably render that verdict. A somewhat detailed review of the evidence is necessary.

In her examination in chief, the complainant testified:

> Q. Now after that first time, did anything like this ever happen again?
>
> A. Yes it did.
>
> Q. How many times?
>
> A. Every time I went over to use the phone up until we moved to Johnstown.
>
> Q. And how many times would that have been?
>
> A. Several.
>
> Q. Do you have any idea how many?
> A. 10 to 20 maybe. Maybe a few more. [Emphasis added.]

However, in cross-examination, she swore:

> Q. And as your statement has indicated, you speak about the first time and then you say it happened again two other times?
>
> A. I do believe it happened like more that I think about it, it happened quite often.
>
> Q. But you said during your initial flashback and then having read the statement, it happened again two other times?

A. That's correct.

Q. And then at the preliminary inquiry you were asked as well about how many times it occurred?

A. That's correct.

Q. For Your Honour and my friend it is at page 125 the transcript of the preliminary inquiry before His Honour Judge Anderson at line four, three I suppose. And you were being asked these questions by Mr. McGarry. Question: "After that first time, how many times did it happen after that?" Answer: "Approximately five or six, like I would say several times." Do you remember that question and giving that answer?

A. Yes I do.

Q. So that particular time at the preliminary inquiry, you indicated that it happened five or six times?

A. That's true.

Q. Yesterday as I recall you were asked the same question and you told us that it happened 10 to 20 times?

A. That's true. [Emphasis added.]

In addition, as indicated above, the complainant testified during examination in chief that she was raped every time she went over to use the phone, and in cross-examination she stated:

Q. All right, you made these phone calls about once a week on average?

A. Approximately, sometimes more, dependent on what phone calls needed to be made and when type thing.

Q. Okay. So can we agree that maybe at least once a week maybe more, is that fair?

A. That's fair.

Q. All right. And you lived at this address for about a year?

A. That's correct.

Q. And this occurred each and every time you went to make a phone call?

A. Not each and every time but most of them. [Emphasis added.]

This cross-examination confirmed the complainant's evidence in chief, that she was sexually assaulted almost every week over the course of a year or approximately 40 such assaults.

The complainant was confronted with two sworn statements she had made in separate proceedings. The first was an affidavit sworn by the complainant on November 3, 1989 in proceedings over the wardship of her son, Tommy. Paragraph 12(a) of this affidavit stated that "I have never been party to nor have I ever permitted my son to be abused either sexually or physically."

Her evidence on cross-examination stated:

Q. ... Is that in fact the affidavit that you recall swearing?

A. Yes it is.

Q. Now if I could just direct you [A.] to a portion of it, paragraph 12(a). Could you read that over to yourself?

A. This one.

Q. Yes. It indicates and correct me if I am wrong, "I have read the affidavits of Maureen McDougall [*sic*] and Pam Gumbridy [*sic*] to November 3rd, 1989 and state a) I have never been party to nor have I ever permitted my son to be abused either sexually or physically." Was that true?

A. No but I um, I was like blocking out my own sexual abuse therefore I was blocking out that Tommy may have or may not have been sexually abused.

Q. So that portion, that paragraph 12(a), that wasn't a true statement was it?

A. No.

This affidavit was sworn only two months before the alleged recall by her through the "flashbacks" in January of 1990.

The second of these statements came in an application for monetary support of her son from the man she alleged to be her son's father. During the course of her testimony in this application on June 30, 1987, she testified that she had been a virgin before having sex with her son's father in 1985.

The complainant explained away these previous and serious inconsistent statements by saying that at the time, she thought they were true. She said that she had "blocked out" memory of the abuse until it returned to her in a "flashback" in January of 1990. However, this boldly contradicted her evidence during examination in chief, where she explained the delay between the alleged abuse and her initial complaint to the police by testifying that she was scared of the appellant.

There was no mention of her memory being "blocked out", or the "flashback" in her testimony until she was confronted with the previous inconsistent sworn statements in cross-examination.

A very disturbing aspect of the complainant's testimony were the circumstances in which she admitted that these "flashbacks" came to her. During the period immediately preceding her initial statement to the police, the complainant was involved in proceedings with the Children's Aid Society in an

attempt to regain custody of her son, Tommy. He had been taken into custody by the Children's Aid Society on October 20, 1989, and from that time onward the complainant had supervised visits with him at the Children's Aid Society. During these visits, she met with representatives of the Children's Aid Society, and also met with the police during a number of these visits.

The following is a portion of the complainant's cross-examination:

Q. Would you agree that in the past [A.] that you have characterized what the police did in terms of the talks that [they] had with you as hounding you?

A. That's correct.

Q. So you have indicated that in the past?

A. That's correct.

Q. And that is the way you felt about it sometime prior to today?

A. That's correct.

Q. And would you agree that they would tell you of an incident and tell you to think about it and if you thought about it long enough you might have a flashback and in your mind remember it, correct?

A. That's correct.

Q. Now how would these flashbacks occur, would they be when you were sleeping?

A. I could be wide awake or they could happen whenever I am sleeping.

Q. And you would be concentrating on what the police had told you and eventually this flashback would happen?

A. That's correct.

Q. All right. And would you not also agree with me [A.] that on occasion you were told that your cooperation would assist you with respect to the access or care of Tommy?

A. That's correct.

Q. And that as a mother certainly was high in your list of priorities?

A. That's correct.

. . .

Q. So you were memory blocking at that time?

A. That's correct.

Q. And then memory of incarceration blocking later on when you swore the affidavit of November of 1989?

A. That's correct. Like none of the molestation came back until approximately 1990, until after I got thinking about it and what not.

Q. And not until 1990 after your son was taken into care on October 20th of 1989?

A. That's correct.

Q. And the police and the Children's Aid Society whoever started talking to you?

A. That's correct.

Q. And asking for cooperation?

A. That's correct.

Q. Cooperation that which would perhaps result in your return of Tommy to you?

A. Pardon.

Q. Cooperation which would perhaps return Tommy to your care?

A. That's correct.

Q. So you weren't lying when you said this in order to get support for your son monetarily to give him the best, were you?

A. No.

Q. You were memory blocking again?

A. That's correct.

Q. Now in addition [A.] to the police suggesting things which would result in what we call flashbacks the police would at times indicate to you that you perhaps could go to jail yourself if you weren't cooperative?

A. That's correct.

Q. And that certainly caused you a great deal of concern?

A. Yes it did.

Q. Because not only would your son be in care, would not be returned to you but you would be in a position where your son couldn't be returned to your care?

A. That's true.

Q. And the prospect [of] incarceration in jail was certainly in and of itself cause for fear in you?

A. That's correct.

Q. Now with respect to the Children's Aid Society workers and or the police, they wished you to cooperate not only with respect to events regarding Tommy but with respect to events regarding yourself?

A. That's correct.

Q. Part of the process was indicated to you to assist you in perhaps having Tommy returned would be an admission on your part that things had happened to you?

A. That's correct.

Q. And given the pressure of the situation and all of those things about your son in your mind eventually you told the police about an incident with respect to Mr. François, correct?

A. It wasn't like due to the pressure and that, it happened.

Q. It happened.

A. It happened and I felt the trust within the police to go to them and to tell them what had happened.

Q. The police that had been hounding you?

A. That's correct.

Q. You began to trust them?

A. That's correct.

. . .

[regarding her initial statement to police]

Q. And when you gave that statement you were attempting to assist the police?

A. That's correct.

Q. You racked your brain and you had this flashback and you decided you were going to tell them about it?

A. That's correct.

Q. However the sequence of giving that statement is that you would come for one of your supervised visits with Tommy, correct?

A. That's correct.

Q. At the Children's Aid Society office and on your way leaving the visit, the police approached you, correct?

A. That's correct, I do believe.

Q. It wasn't your approaching them with this flashback rather it was on your way out, them approaching you?

A. Well they approached me and then I came forward and told them about having the flashback and what not.

Q. And what did they approach you and ask you to come into their office?

A. Just that they would like to talk to me, I am not sure if they approached me or just left a message at the C.A.S. office for me to stop in.

Q. Okay. And when did you have that flashback?

A. Pardon?

Q. When did you have the flashback in your memory that caused you to remember about what you said to us about Mr. François?

A. I do believe it was the night or evening before.

Q. And at that point you hadn't had the message, received any messages to see the police?

A. No so like I was going to approach them, only that they had left the message for me, so it worked out kind of.

Q. Do you remember the circumstances under which you had this flashback?

A. No I don't.

Q. And by coincidence it was the night before you were going to have a visit with your son Tommy?

A. That's correct.

Q. And in addition it's a coincidence that the police wanted to talk to you because of course it would be your intention to come forward and tell them about what you had the flashback on?

A. Yes it is.

Q. Did you phone anybody that particular evening and say listen I would like to talk to somebody while it is really fresh in my memory?

A. No I didn't, actually I do believe I wrote important points down on a piece of paper as I remembered them. [Emphasis added.]

These passages portray a picture of a mother who was experiencing a great deal of stress because of wardship proceedings over her son, and who felt that she had to cooperate with the police and the Children's Aid Society in order to obtain custody of her son, and also to avoid going to jail herself.

The police and the Children's Aid Society led her to believe, whether intentionally or not, that disclosure of some disturbing event from her past would be helpful in this regard. It was the police, according to the complainant, who suggested that if she thought long enough about her past, that she might remember

something in a "flashback". In fact, she testified that these flashbacks occurred while she was concentrating on what the police had told her.

Given the inconsistencies of the evidence, the suspicious circumstances of the flashbacks, the powerful motive to lie or unconsciously fabricate these memories in order to please the authorities and obtain custody of her son and avoid jail, the question is whether the sum of these irregularities are sufficient to make the jury's verdict of "guilty" unreasonable within the meaning of s. 686(1)(*a*)(i).

The Ontario Court of Appeal carefully assessed the possible effect of the jury's question and the unusually early verdict thereafter. With respect I think that question appears to have preoccupied the appeal judges and diverted their attention from the obligation imposed by *Yebes* and *W. (R.)*.

As a result of the omission it is necessary for this Court, in determining whether a properly instructed jury, acting judicially, could have reached that verdict, to re-examine and to some extent reweigh and consider the effect of the evidence.

This is not to say that it is necessary to find any error or omission in the reasoning of the Court of Appeal before this Court can interfere with their decision. When considering the reasonableness of a verdict, this Court is entitled, and obligated, to consider the matter anew. If we should come to a different conclusion from the Court of Appeal after fully reviewing the evidence at trial, then we are bound to allow the appeal. This point was made clear by McIntyre J. in *Yebes*, where he said at p. 186:

> This Court, in considering an appeal where the sole issue raised is the application of [s. 686(1)(*a*)(i)] of the *Code*, must put itself in the place of the Court of Appeal and, pursuant to the powers given in [s. 695(1)] of the *Code*, consider the matter anew, and if error be found make such order as the Court of Appeal should have made. [Emphasis added.]

The question of the reasonableness of the verdict is, itself, a question of law, and if this Court disagrees with the Court of Appeal's conclusion in this regard, then we are bound to allow the appeal even if no other error is demonstrated.

Clearly, by enacting s. 686(1)(*a*)(i), Parliament has given appellate courts the jurisdiction to on occasion interfere with a jury verdict, even where there is no error of law, but purely on the basis of unreasonableness. In fact, if there is an error, such as in the charge, this error itself is sufficient to set aside the verdict and there is no need in that circumstance to have to rely on s. 686(1)(*a*)(i).

It follows that s. 686(1)(*a*)(i) contemplates a situation where the trial judge and counsel's actions have been proper, where there is evidence upon which the jury could base its decision, but in spite of those ingredients of a fair trial the decision is unreasonable.

The fact that this case turns on a finding of credibility by the jury is not determinative. *R. v. W. (R.)*, *supra*, clearly holds that in appropriate cases verdicts can be found to be unreasonable, even where the verdict hinges on a finding of credibility.

It has long been established that appellate courts are to show great deference to the trier of fact, whether a judge sitting alone or more particularly a jury given the advantage they enjoy in seeing and hearing the witness. It requires unusual circumstances to depart from that principle. However, juries are not blessed with infallibility. Given the unusual environment of a trial and the adversarial nature of our law, unreasonable results on occasion do occur. Paying deference to the findings of fact by a jury does not permit appellate courts to wash their hands in every case where the verdict turns on a finding of credibility.

The deference to be shown to a trier of fact on questions of credibility, while high, is not absolute. McLachlin J. makes this clear in *W. (R.)* when she says that it remains open to an appellate court to overturn a verdict based on findings of credibility when, after giving appropriate deference to the advantage enjoyed by the trier of fact, the appellate court still considers the verdict to be unreasonable.

The remaining question is whether, after giving full consideration to the advantage enjoyed by the jury in assessing the complainant's credibility, the verdict in this case is unreasonable. It is my opinion that it is. If the contradictions in the complainant's evidence are weighed with the suspicious circumstances in which the allegations arose, it is unfathomable that a properly instructed jury would not have at least a reasonable doubt of appellant's guilt following the complainant's testimony.

In a criminal case, and its accompanying burdens of proof, the test under s. 686(1)(*a*)(i) is whether it is unreasonable that the jury did not have a

reasonable doubt. After reading the complainant's testimony in its entirety and in particular the contradictory passages already referred to, and allowing for the advantage enjoyed by the jury in assessing the complainant's credibility, nonetheless it is unreasonable that the jury did not have a reasonable doubt.

In coming to this conclusion, I am aware of McLachlin J.'s reasons in *W. (R.)*. That case, like this one, revolved around the question of whether or not the verdict could be said to be unreasonable, given the fact that there were inconsistencies in the evidence of the complainants. McLachlin J. held that the Court of Appeal erred by holding that the extent of the inconsistencies was sufficient to meet the test in s. 686(1)(*a*)(i), and that the trial judge properly weighed and considered all of the evidence, in particular the age of the children and the significance of the inconsistencies, in finding the accused guilty.

There are a number of distinctions between *W. (R.)* and the case on appeal that warrant a different outcome.

To begin, the inconsistent evidence in *W. (R.)* came from the two youngest complainants. The first of these two was between two and four years old at the time of the offences and nine years old at the time of trial. The second was between nine and ten at the time of the offences, and 12 at the time of trial. McLachlin J. reviewed the law as it relates to children's evidence, and said that such inconsistencies should be considered in the context of the age of the witness at the time of the events to which he or she is testifying. Having regard for the children's ages at the time of the offences and at the time of the trial, it is not

surprising that there would be some inconsistencies in their evidence that were not fatal to that case.

In the present appeal, however, the complainant was 13 years old at the time of the alleged offences, and 23 at the time of trial. She was considerably older both at the time of the events to which she was testifying, and also at the time of trial than the children in *W. (R.)*.

As well, the matters on which there were contradictions in the present case were much more significant than in *W. (R.)*. There were vital inconsistencies in the present case on central matters. These have been noted in detail and include the number of assaults alleged to have occurred, the complainant's explanation for the delay between the assaults and her initial complaint to the police and the suspicious circumstances in which the complaint arose.

By contrast, in *W. (R.)*, the inconsistencies related to matters which could be described as peripheral to the assaults. As McLachlin J. described them at p. 135:

> Some of the inconsistencies are minor, for example an error on the distance from a van to a ball game many years ago. Others are more significant, relating to the sleeping arrangements of the three children, the location of the bedrooms in the house and possibly the respondent's nighttime attire.

Finally, the Court of Appeal in *W. (R.)* used the fact that there was no corroborating evidence as one of the reasons for finding that the verdict was unreasonable. In the present case, the lack of corroboration in my opinion is

meaningless. The unreasonableness of the verdict is amply demonstrated solely on the inconsistencies and other difficulties with the complainant's evidence.

The extent of the inconsistencies and fragile nature of the complainant's evidence in this appeal is such that it meets the test in s. 686(1)(*a*)(i) as enunciated in *W. (R.)*.

VI - Conclusion and Disposition

The majority of the Court of Appeal erred by holding that the verdict of the jury in this case was not unreasonable within the meaning of s. 686(1)(*a*)(i). While the question asked by the jury is irrelevant to the consideration of this issue, the inconsistencies and suspicions raised during cross- examination were such that a reasonable jury should have at least had a reasonable doubt as to the appellant's guilt. I would therefore allow the appeal, and set aside the conviction.

Appeal dismissed, SOPINKA, CORY *and* MAJOR *JJ. dissenting.*

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