Regina v. Ay

93 C.C.C. (3d) 456

British Columbia Court of Appeal
Court File No. CA014095 Vancouver Registry
Lambert, Wood and Goldie JJ.A.

SEPTEMBER 13, 1994

Evidence — Witnesses — Previous statements — Prior consistent statement — Sexual assault — Narrative exception to rule prohibiting admission of previous consistent statements — Complainant testifying to series of sexual assaults commencing 30 years earlier — Evidence adduced that complainant told various people of sexual assaults and eventually gave two lengthy detailed statements to police — Open to Crown to lead evidence from complainant that disclosed accused's assaults to various people and that failure to inform authorities resulting from fear accused would carry out threats made to her — Specific contents of such statements not admissible — Other evidence sole purpose of which was to invite jury to conclude that prior statements were truthful and consistent with sworn testimony of complainant also not admissible — Where such evidence admitted trial judge required to carefully instruct jury as to limited use of evidence.

Trial — Charge to jury — Credibility — Application of burden of proof beyond reasonable doubt to credibility — Accused charged with sexual assault as result of allegations of conduct occurring many years earlier over a period of several years — Accused denying allegations and adducing defence evidence suggesting lack of opportunity to commit offences on certain occasions-- Trial judge adequately directing jury as to burden of proof during main part of charge to jury — Jury asking several questions relating to reasonable doubt as applied to credibility — Answer by trial judge suggesting that if decided to accept or reject a witness' evidence no question of reasonable doubt because jury has reached certainty — Constitutes error — Jury to be instructed as to application of burden of proof beyond reasonable doubt to credibility including that even if rejecting evidence of accused still required to be convinced beyond reasonable doubt based on whole of evidence — Appeal by accused allowed and new trial ordered.

The accused was charged with a number of sexual offences alleged to have occurred over a lengthy period of time when the complainant was between the ages of five and 17 years. The trial of these offences took place some 15 years later. According to the complainant she was sexually assaulted by the accused ***[page457]*** virtually on any occasion that presented itself over the period of time that her family was friendlywith the accused's family. According to the complainant the accused threatened her on many occasions so that she was afraid to speak out. Approximately five years after the last incident, the complainant told a family counsellor and at the counsellor's

urging also told her mother. Some years later while seeing a therapist she decided to make a formal complaint. It was at this time that she was interviewed by the police. It would appear that the complainant gave at least two very lengthy statements to the police. The first witness for the Crown was the police officer who testified as to the procedure he followed in taking the first statement from the complainant. Without objection, he was permitted to testify as to the complainant's emotional condition at various times during the statement. In the course of his testimony, he testified that he had "no problem with the victim's credibility". The next Crown witness was the complainant's mother who testified that while the complainant did not give her details of the sexual activity, the complainant did tell her about the times that the accused threatened her and beat her. The complainant testified during an examination-in-chief that she had told the counsellor and therapist everything that had happened. The accused testified and denied the allegations by the complainant. The accused also relied upon evidence of his wife to show that he did not have the opportunity to commit the offences on several of the occasions alleged by the complainant. The accused also adduced character evidence. During cross-examination of the accused's wife and the character witnesses they were asked by Crown counsel if they had read all of the lengthy statements given by the complainant. Crown counsel also referred to these statements during cross-examination of the accused. The trial judge in his charge to the jury made specific reference to some of the evidence relating to the out-of-court statements but did not give the jury any limiting instructions as to the use to be made of such evidence. On appeal, the accused argued that evidence relating to the prior consistent statements was inadmissible and that the trial judge had not properly directed the jury as to the use of such evidence. In addition, it was argued that the trial judge had not adequately directed the jury as to the application of the burden of proof beyond a reasonable doubt to issues of credibility. With respect to this latter complaint, reference was made to the answers given by the trial judge in response to questions from the jury relating to the burden of proof and credibility.

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

Per Wood J.A., Goldie J.A. concurring: An amendment to the Criminal Code in 1983 abrogated the rules relating to evidence of recent complaint. One of the rules with respect to recent complaint which was abrogated was the requirement that the trial judge direct the jury that an adverse inference could be drawn against a complainant where there was no evidence of a complaint made at the first possible opportunity. This rule was abrogated out of recognition that there are many reasons why victims of sexual assault do not complain at the first available opportunity, or even for many years later which have nothing whatever to do with the credibility either of the complaint or the subsequent testimony. If the full purpose underlying Parliament's abrogation of this particular rule is to be achieved, then evidence of when a complaint was first made, why it was not made at the first available opportunity if that was the case, and what it was that precipitated the complaint eventually made, must be receivable as part of the narrative, in order to ensure that the jury had all of the evidence of the complainant's conduct necessary to enable them to draw the right inference with ***[page458]*** respect to her credibility. The prior complaint is admissible under the narrative exception to the rule against prior consistent statements but is not admissible to gauge the consistency and thus, the credibility of the complainant's evidence at trial. Accordingly, unless it is necessary to provide the context for some other circumstance relevant to the jury's consideration, the actual content of the prior

complaint has no relevance and is inadmissible. The Crown is entitled to relate the fact of the complaint to the allegations before the court. However, evidence of such prior complaint must be described in general terms only, without details of what was actually said, to prevent the jury from drawing an inference of truthfulness in respect of the complainant's evidence at trial by reason of its apparent consistency with what was previously said. Thus, in this case, itwas open to the Crown to lead evidence from the complainant that she eventually disclosed the accused's assaults upon her, first to a family counsellor, then to her mother, then to her therapist and finally to the police, and that her failure to go to the authorities earlier resulted from her fear that the accused would carry out the threats he had made to her at various times throughout the alleged assaults. It was also open to the Crown to lead evidence from those to whom she spoke, confirming the simple fact that such "complaints" were in fact made. What should not have been admitted was any evidence of the specific content of such statements, and any other evidence the sole purpose of which was to invite the jury to conclude that these prior statements were both truthful and consistent with the complainant's sworn evidence before them. Thus, the Crown should not have been entitled to lead evidence as to the manner in which these statements were taken from the complainant including evidence of the length of time it took to complete the statements and her emotional condition at the time, the evidence led by the Crown from the complainant's mother as to the accused's threats and beatings, and evidence led by the Crown from the complainant suggesting that her mother believed her after she gave information to her mother to corroborate her disclosure. Also, it was not proper for Crown counsel to have cross-examined the accused and his witnesses to suggest to the jury that the complainant had given long and detailed prior statements which were consistent with her sworn evidence in court.

Even in cases where the evidence is strictly confined to the fact that a prior complaint was made, without any reference to its content, it is essential that the trial judge instruct the jury that such evidence is admitted only to assist their understanding of what happened and that it cannot be used by them as proof of the truth of its implicit content, or as a prior consistent statement corroborative of the complainant's testimony at trial. Where, as in this case, the evidence goes beyond what is properly admissible, the need for a proper limiting instruction is that much greater. Failure to give the required instruction in this case was a serious error.

The trial judge's directions to the jury with respect to the application of the burden of proof beyond a reasonable doubtto issues of credibility were, as well, not adequate. The directions given in the main part of the charge to the jury were sufficient. However, on two occasions the jury asked the trial judge to clarify the meaning of reasonable doubt. In particular, the jury asked the trial judge: "When you have a situation when one person says something happened and the other person denies it. Does this statement alone constitute reasonable doubt." After this question, there was a lengthy delay while counsel and the trial judge attempted to formulate an answer. In the course of the delay the jury indicated that they no longer required an answer but desired only that a certain portion of the evidence be reread. When the jury was recalled, however, the trial judge ***[page459]*** asked them if they did want an answer to the question and the jury indicated that they did. In response, the trial judge instructed the jury in part: "Obviously, if you accept or reject all or part of a witness's evidence, there is no question of reasonable doubt because you have reached certainty." The trial judge's responses to the jury's questions were inadequate and the last response was incorrect. It was apparent that throughout their deliberations the jury were troubled by the issue of credibility and how it related to the rule of

reasonable doubt. The further instructions, however, did not relate the rule to the principal issue in this case which was credibility. What was necessary was a full instruction which made clear how reasonable doubt applied to credibility and, in particular, that even if the jury disbelieved the accused and rejected his evidence as untrue, they still had to be convinced beyond a reasonable doubt of the guilt of the accused on the whole of the evidence, before they could convict. The direction given by the trial judge suggested that if the jury had rejected the accused's evidence then they had achieved certainty and could return a verdict of guilty without considering the evidence as a whole.

Per Lambert J.A.: It was unnecessary to consider the admissibility of prior consistent statements since the misdirection concerning the application of the burden of proof beyond a reasonable doubt to issues of credibility required a new trial. The answers to the jury's question suggested that simple acceptance or rejection of all or even a part of the witnesses' testimony created certainty and removed all questions of reasonable doubt. This was clearly wrong. The fact that the jury withdrew their last question does not mean that they were not influenced by the erroneous answer.

R. v. H. (C.W.) (1991), 68 C.C.C. (3d) 146, 7 W.A.C. 205, 14 W.C.B. (2d) 89 apld;

R. v. Sit (1989), 47 C.C.C. (3d) 45, 31 O.A.C. 21, 7 W.C.B. (2d) 71 [revd on other grounds 66 C.C.C. (3d) 449, [1991] 3 S.C.R. 124, 9 C.R. (4th) 126, 8 C.R.R. (2d) 317, 50 O.A.C. 81, 130 N.R. 241, 14 W.C.B. (2d) 65] distd;

R. v. George (1985), 23 C.C.C. (3d) 42; R. v. Jones (1988), 44 C.C.C. (3d) 248, 66 C.R. (3d) 54, 5 W.C.B. (2d) 292; R. v. F. (J.E.) (1993), 85 C.C.C. (3d) 457, 26 C.R. (4th) 220, 16 O.R. (3d) 1, 67 O.A.C. 251, 21 W.C.B. (2d) 382; R. v. W. (D.) (1991), 63 C.C.C. (3d) 397, [1991] 1 S.C.R. 742, 3 C.R. (4th) 302, 46 O.A.C. 352, 122 N.R. 277, 12 W.C.B. (2d) 551 consd;

Cases referred to:

R. v. Short (1989), 7 W.C.B. (2d) 280; R. v. Lillyman, [1896] 2 Q.B. 167; R. v. Osborne, [1905] 1 K.B. 551; Colpitts v. The Queen, [1966] 1 C.C.C. 146, 52 D.L.R. (2d) 416, [1965] S.C.R. 739, 47 C.R. 175; R. v. Broyles (1991), 68 C.C.C. (3d) 308, [1991] 3 S.C.R. 595, 9 C.R. (4th) 1, 8 C.R.R. (2d) 274, 8 W.A.C. 189, [1992] 1 W.W.R. 289, 84 Alta. L.R. (2d) 1, 120 A.R. 189, 131 N.R. 118, 14 W.C.B. (2d) 394

Statutes referred to:

Criminal Code, R.S.C. 1970, c. C-34 [as amended by 1980-81-82-83, c. 125, s. 19] Criminal Code, s. 686(1)(b)(iii) [am. R.S.C. 1985, c. 27 (1st Supp.), s. 145; 1991, c. 43, s. 9, Sch., item 8]

Appeal by the accused from his conviction on charges of indecent assault, gross indecency, buggery and unlawful intercourse.

J.F. Galati, for accused, appellant.

W.L. Rubin, for the Crown, respondent.

Lambert J.A.: I have had the advantage of reading the reasons of Mr. Justice Wood in draft form. Like him, I would allow this appeal and order a new trial on all counts.

Four issues were argued on this appeal. They are stated in the appellant's factum in this way: A. Did the learned Trial Judge err by not charging or recharging the jury adequately on the issue of reasonable doubt?

B. Did the learned Trial Judge err by giving insufficient direction to the jury on the purpose and relevance of character evidence?

C. Did the learned Trial Judge err by admitting into evidence the testimony of the Crown witnesses in relation to prior complaints made by the complainant and allowing cross-examination of the defence witnesses based on the same testimony?

D. Did the apparent failure of the learned Trial Judge to read certain of the questions posed by the jury in open court violate Section 650 of the Criminal Code ? I would allow the appeal on the first issue. I do not find it necessary to deal with the other three issues and do not propose to do so.

Mr. Justice Wood has described the course of events with respect to the charge to the jury on reasonable doubt in relation to credibility, and he has referred to the passages in the transcript which show that the jury may well have been having a difficult struggle to understand the concepts involved.

I agree with Mr. Justice Wood that the final recharge, in response to a question that was asked by the jury and then withdrawn by the jury, was in error in these two passages: Obviously, if you accept or reject all or part of a witness's evidence, there is no question of reasonable doubt because you have reached certainty...

Do you accept one version, or reject it, or are you not sure? It is when, with reason on the evidence you cannot be sure, that there is a reasonable doubt. Both passages suggest that the simple acceptance or rejection of all or even a part of a witness' testimony creates certainty and removes all questions of reasonable doubt. That is clearly wrong. I think that the jury could have been confused by those two passages and I am not satisfied that those two passages must necessarily be considered to have had no effect on the outcome of the jury's deliberations. The fact that the jury withdrew the question which was being answered does not mean that they were not influenced by the answer.

It is, of course, important that the jury should understand that the test with respect to reasonable doubt should be applied to questions relating to credibility. A body of jurisprudence seems to

be developing about instructions to the jury on the result with respect to guilt or innocence of answers to general questions about credibility of witnesses. I do not think that body of jurisprudence was intended to require that general instructions be given to the jury about the general credibility of particular witnesses in terms which would require particular results with respect to guilt or innocence to follow from the answers to the general questions about general credibility. What was intended, I believe, was that conflicting testimony should be examined in precise relationship to each specific matter of key significance and also in relationship to general conclusions, if any, about the general credibility of the relevant witnesses, and then a question should be answered about whether the specific matter was proven beyond a reasonable doubt, applying the principle of reasonable doubt to issues of credibility as well as to issues of fact. In short, general questions about general credibility do not seem to me to lead, without more, to precise answers about whether particular matters essential to a finding of guilt in a particular case have been proven beyond a reasonable doubt. Indeed, I consider that those general questions may, through confusion, shift the focus of the inquiry from the right question, proof of the essential facts beyond a reasonable doubt, to the wrong question, guilt or innocence determined by who is believed generally and who is disbelieved generally.

In my opinion, the jury was misdirected in this case. I would allow the appeal and order a new trial on all counts.

Wood J.A.:

This is an appeal from conviction by a jury on charges of indecent assault on a female, gross indecency, buggery, sexual intercourse with a female under the age of 14 years and sexual intercourse with a female between the ages of 14 and 16 years. All of the alleged offences involved the same complainant, M. (L.M.), and occurred between 1964, when she was five and 1976, by which time she was 17 years of age.

Two principal grounds of appeal are advanced. The first is that inadmissible evidence of the complainant's prior out-of-court consistent statements concerning the allegations of sexual assault, which were made to her mother, the investigating officers and others, was allowed to go before the jury and that the trial judge failed to instruct the jury as to the use which could properly be made of so much of such evidence as was admissible. The second is that the trial judge misdirected the jury on the application of the reasonable doubt standard to the issue of credibility. II

Because I have decided that there must be a new trial, I shall make as little reference to the evidence as is necessary to an informative discussion of the issues.

In 1964, the appellant's wife was hired by the complainant's mother to babysit her children while she worked. Although the job itself lasted only a few months, the two families became friendly and spent much time visiting back and forth with one another over the next ensuing 10 years.

The complainant testified that commencing soon after Mrs. Ay began her duties as a babysitter, the appellant who accompanied his wife from time to time, took her into a bedroom, pulled down her pants and examined her, and then took her hand in his and caused her to masturbate him to

the point where he ejaculated. Over the next nine years sexual abuse by the appellant continued almost uninterruptedly except for a period of 18 months, from the summer of 1965 until January, 1967, when the complainant's mother moved with her children to Ontario. The abuse progressed through acts of touching, forced masturbation, cunnilingus, anal intercourse and finally vaginal intercourse.

The complainant gave details of 27 specific assaults over a period of nine years, but testified that there were an estimated 4,000 to 5,000 additional such incidents altogether up until the time she ran away from home in the fall of 1973.

According to the complainant, whenever the families visited back and forth the appellant would find an opportunity to get her alone in a room or some other secluded spot and then assault her. From her evidence, the extent of the assault on each occasion would be limited only by the opportunity which the circumstances dictated. In addition, she was frequently asked to accompany the appellant's family on camping trips or other outings, during which similar abuse would occur whenever the opportunity arose. On her evidence, only she and the appellant participated in many of these camping trips, and the entire duration of each such trip was devoted to little more than gratifying the appellant's sexual desires.

The complainant was 14 years old when she left home and went to Ontario to live with her grandmother. She did not see the appellant again until 1976 when she returned to British Columbia and went to visit his children with whom she was friendly. On that occasion, she testified there was a final assault during which the appellant attempted to reassert his former control over her and she eventually prevailed in her resistance.

[page463] The complainant told no one of these events at the time they occurred. She testified that the appellant threatened her on many occasions with the result she was afraid to speak out. When she was in her early 20s she began to see a family counsellor to whom she disclosed details of the abuse. She was advised to tell her mother, which she did, but she was still too afraid to go to the police. Some years later, while seeing another therapist, she decided to make a formal complaint. It was then, in May, 1989, when she was 30 years old, that she was interviewed by a police officer for the first time.

The appellant, his wife, and three family friends who came as character witnesses, testified on his behalf. The appellant denied all allegations of abuse. According to him, he was never alone with the complainant in any of the circumstances she described. He testified that for at least two of the years in which the complainant alleged constant sexual abuse by him, he was living out of town while working on construction projects and never came home, except on the odd weekend. His wife supported his evidence in that respect. Both the appellant and his wife denied that there were any camping trips in which just he and the complainant took part. They both testified that the complainant spent a lot of time at their house as a young girl, because she was unhappy at home and she enjoyed the companionship of their children, but that she gradually developed into an undisciplined adolescent whose life style they did not condone.

Between the evidence of the complainant and that led on behalf of the appellant, there was almost complete contradiction, not just on the specifics of the alleged sexual assault, but also on

the opportunity for such assaults to have occurred. As between the evidence of the complainant and her mother there were also some inconsistencies, particularly with respect to the timing of events and the nature of their relationship while the complainant lived at home. As a consequence, the credibility of all was the major issue for the jury to resolve.

III

Evidence of prior consistent statements and the failure of the trial judge to direct the jury on the use which could properly be made of such evidence

The Crown's first witness was Constable Logan who testified that on May 11, 1989, the complainant came to his office accompanied by her therapist. As far as he knew, he was the first police officer to interview her. He was asked to describe the procedure followed in "receiving information" from the complainant, and he ***[page464]*** did so. In response to a direct question, he testified that the interview took approximately five and a quarter hours, during which the complainant did most of the talking.

Constable Logan, again in response to a direct question, described the emotional condition of the complainant as varying between anger and distress:

> ... it changed from time to time. There were times when she had to compose herself, she couldn't continue on at times after breaking down in tears. There were times where she displayed anger towards what had happened. At the beginning, she was very very nervous about having to talk about these kinds of things specifically with another person present, a male, I suppose, was difficult for her as well, but as time went on she seemed to be more comfortable with it.

[page465] No objection was taken to the admissibility of this evidence. On cross-examination, Constable Logan was unable to recall whether the complainant had come to the interview with notes prepared ahead of time. He acknowledged that he "facilitated" the discussion in order to get as much detail as possible from the complainant, since "... providing the most information is the most credible way of doing things...".

It was then pointed out to Constable Logan that the police report prepared following his interview with the complainant noted that a second interview should be held in order "to gauge the victim's credibility". When asked if he was the author of that note, he replied: "No, I certainly would have no problem with the victim's credibility, and I am not sure actually who wrote that."

No objection was taken to that answer although in a later discussion with counsel, in the absence of the jury, the trial judge indicated he was disturbed by it.

The next Crown witness was the complainant's mother. During her examination-in- chief, the following exchange took place:

> Q Now, the proceedings before the Court relate to allegations made by your daughter [M.(L.M.)] concerning sexual activity between herself and Mr. Ay from the time she was quite young.

A Yes.

Q Have you actually received any details concerning that from your daughter?

A Did she talk to me about it?

Q Yes.

A She told me about it when she was 24 years old. That is the first I ever knew about it at all. And as far as discussing details, not really, because she did not want to talk to me about it or give me any details or want me to know the details. The only ones I know about are the times that he threatened her and beat her and that was it.

No objection was taken to the admissibility of this evidence. Later, during cross-examination, the witness added that the complainant had told her of one occasion when the appellant allegedly threatened and beat her because he thought she was pregnant. The complainant, in her subsequent evidence, described just such an incident.

In response to questions from Crown counsel, the complainant testified that after she told the family counsellor "everything that had happened" she was advised that she would never be able to heal unless she told her mother. As a result, she disclosed what had happened to her mother "without getting into details". At first, she said, her mother did not believe her, but then, after giving "instances and things", her mother "became very upset". Some years later she saw a therapist to whom she again told everything. She resisted making any formal complaint until she watched a T.V. show in which three women "disclosed", at which point she decided to go to the police, both for her own sanity and in the hope that her example might help at least one other woman to overcome the effects of such abuse. Her recollection was that it took her seven hours to give her statement to Constable Logan.

During cross-examination of Mrs. Ay, the first witness called for the defence, Crown counsel made a point of asking whether she had read "the entire" 160 pages of the "first" statement made by the complainant to Constable Logan, and "the entirety" of the 79 pages of the complainant's "second" statement to the police. Neither of these statements were, or could then have been, before the jury as exhibits. Mrs. Ay was also asked if one specific incident, testified to by the complainant, was one which she had seen in the statement. No objection was taken to these questions.

Throughout the cross-examination of the accused, Crown counsel referred on at least three occasions to the complainant's prior statements, again making specific reference to their length. At one point she asked him to explain why the complainant would make up:

... this false complaint ... which consists of a statement of a hundred and fifty pages, and another statementof eighty pages, and a preliminary hearing transcript? That long, convoluted complaint that she has made?

Again, no objection was made either to this question or to Crown counsel's repeated reference to the complainant's prior statements.

Finally, when cross-examining the first of the three character witnesses, Crown counsel again asked whether, in preparation for ***[page466]*** giving evidence, the witness had read the entirety of the long statements previously made by the complainant.

When reviewing the evidence for the jury in his charge, the trial judge made specific reference to some of the evidence relating to the complainant's prior out-of-court statements. However, he did not give the jury any instructions limiting the use which they could make of such evidence.

The appellant argues that the evidence of Constable Logan as to the method of taking the first statement from the complainant, the duration of that event, and her variable emotional condition throughout it, was all led for no purpose other than to invite the jury to conclude that on that earlier occasion the complainant gave a detailed statement consistent with the evidence she ultimately gave before them under oath, and that for that reason they should draw the inference that the evidence given before them was true. That, it is argued, is an inference which the jury was not entitled to draw from the fact that a prior complaint was made, and there being no other relevant purpose for the evidence, it ought, therefore, never to have been adduced.

The same objection is taken to Crown counsel's repeated references to the length of the complainant's two previous statements, during cross-examination of both the appellant and his wife, and to her questions which either purported to put some of the content of those statements before the jury, or suggested the improbability that all of the "long, convoluted" prior complaints could be concocted.

Finally, it is argued that Constable Logan's statement that he had no problem with the credibility of the complainant, was inadmissible as a form of "oath- helping".

Constable Logan's opinion as to the credibility of the complainant was clearly inadmissible and should never have been offered in evidence. It was, in fact, a gratuitous remark and unresponsive to the question asked, although there can be no doubt that the question invited at least the risk that such an answer would be given.

What was required by way of a remedial response was an immediate instruction to the jury to disregard the answer together with an explanation to the effect that no opinion on the credibility of the complainant was of any consequence to their deliberations except that which they themselves formed after a consideration of the evidence as a whole.

No such instruction was given. In the result, inadmissible evidence on the critical issue in the case was left for the jury's consideration.

[page467] That brings me to the evidence of the complainant's prior "complaints". The question directly raised by this ground of appeal is what legal use can be made by the jury of evidence admitted under the narrative exception to the common law rule that evidence of a witness' prior consistent statements is generally not admissible.

In R. v. George (1985), 23 C.C.C. (3d) 42 (B.C.C.A.), a decision of this court, there was evidence not only of the fact that in the hours immediately following the alleged assaults the young female victim had complained to various of her relatives, but also of the detail of what was said by her in those statements. Speaking for the court, Macfarlane J.A. suggested that much of the latter ought not to have been admitted. However, "some" of what she said (at p. 45): "... was admissible as a necessary part of the narrative, and for a limited purpose".

From the report, it would appear that the "limited purpose" in that case was to give context to the admissions made by the accused when he was later confronted with the allegations the complainant had made to various relatives. In his reasons, Macfarlane J.A. noted (p. 45):

The trial judge told the jury that the evidence was advanced on that basis. He told them that it was not evidence of the truth of the matter. He told them also that they might consider that the "evidence showed a certain consistency of conduct on her part, but nothing more". If that direction means that the jury could properly consider the conduct of the girl, but not use the evidence to establish the truth of what she had said, then I see no harm in the direction. But what was missing was a direction as to the limited purpose of the evidence in question.

(Emphasis added.)

In R. v. Jones (1988), 44 C.C.C. (3d) 248, 66 C.R. (3d) 54, 5 W.C.B. (2d) 292 (Ont. C.A.), the admissibility of such evidence was considered in the context of a case in which the full content of the not so "recent" complaint by the young victim to her mother was put before the jury. At the conclusion of her evidence describing the full text of what her daughter told her, the mother was asked:

Q Has her account as to what happened ever changed substantially?

A Not really.

After reviewing the facts, Goodman J.A. noted [at pp. 255-6]:

It is a general rule at common law that a witness may not be called to prove that another witness has previously made a statement asserting certain facts in order to prove the truth of those assertions. That would offend the rule against hearsay. Nor can a witness be called to prove that another witness has made a prior statement consistent with the evidence which such other witness gives at trial. Such a prior statement falls within the category of self- serving evidence, which is easily fabricated and ***[page468]*** generally speaking is excluded on this basis or on the basis of the rule against self- corroboration. Evidence of a prior consistent statement made by a witness is generally speaking not admissible as evidence of the consistency of such witness

The common law rule that consistent statements are not admissible was subject to certain exceptions. Those exceptions may be found under the following categories:

(1) where recent fabrication is alleged;

(2) where the previous consistent statement is admitted as part of the res gestae or part of the narrative;

(3) recent complaints in sexual cases;
(4) statements on arrest;
(5) statements made on recovery of incriminatory articles;

(6) statements made with respect to previous identification of an accused.

After ruling out the application of (1), (4), (5), and (6), and acknowledging that (3) had been "abrogated" by the 1983 amendment, Goodman J.A. turned his attention to (2) (at p. 256):

It is equally clear that the evidence was not admissible as an exception under category No. 2. The complaint was made four days after the event and in the circumstances of this case it is not suggested that it formed part of the res gestae. Nor were the details of the alleged assault necessary as part of the narrative of the case. At best, the Crown was entitled to lead evidence from Mrs. H. that as a result of information she received from her daughter on the Wednesday, she contacted the police. To that extent only, it may have been admissible as part of the narrative. The question and answer which I have set forth above makes it quite clear that the evidence was adduced by counsel for the Crown to show consistency on the part of the complainant whom he would later call as witness. It was inadmissible for this purpose.

(Emphasis added.)

In a more recent decision, R. v. F. (J.E.) (1993), 85 C.C.C. (3d) 457, 26 C.R. (4th) 220, 16 O.R. (3d) 1 (C.A.), the complainant testified that she told several people the accused was "physically abusing" and "hurting" her while the sexual abuse in issue was ongoing, but gave no details because she knew if she did they would have to tell "somebody", a reference which presumably was meant to describe either the police or someone else whose knowledge of her trauma she would find embarrassing. She also described the events, some years later, which lead to the formal complaint to the police in that case, and which began with her affirmative response to a social worker who asked her if she had been sexually abused. She testified that this response led to an appointment with a police officer with whom she discussed the abuse and to whom she then gave a statement of what had occurred. In all instances the evidence given by the complainant of her prior complaints amounted to little more than the assertion ***[page469]*** that she told others she had been sexually assaulted, without anything more in the way of detail.

Apart from some statements characterized as "double hearsay", all of the complainant's evidence in F. (J.E.) was ruled admissible under the narrative exception to the rule against prior consistent statements. The limits of that exception were described by Finlayson J.A., who gave the reasons for the court, in the following terms (at p. 476):

To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his or her experience as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities. In all cases where evidence is admitted under the rubric of prior consistent

statements, the trial judge is obliged to instruct the jury as to the limited value of the evidence. The fact that the statements were made is admissible to assist the jury as to the sequence of events front the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.

(Emphasis added.)

Both George and F. (J.E.) conclude that evidence of prior complaints, admissible as narrative, can be used to assist the jury in understanding whether the conduct of the complainant was consistent or inconsistent with her evidence of what occurred, a circumstance relevant to her credibility as a witness. That, of course, is so with respect to the complainant in any criminal case, not just those involving sexual assaults; R. v. Short, May 25, 1989, unreported, CA009073 [summarized 7 W.C.B. (2d) 280]. At first blush, the decision in Jones would appear to reach a contrary conclusion. However, the highlighted passage from that judgment refers specifically to the mother's evidence that the complainant's account of what happened had never changed. Thus, it seems clear that in the passage quoted, Goodman J.A. was merely noting the well-established law that the truthfulness of a witness' evidence at trial cannot be supported by demonstrating its consistency with the content of a prior statement where such statement is admitted under the narrative exception to the rule against consistent statements.

In attempting to understand the scope of the narrative exception, it is helpful to consider the intent behind the 1983 amendment abrogating "the rules relating to evidence of recent complaint". One of the "rules" which that legislative initiative eliminated required judges to instruct juries that an inference adverse to the truthfulness of the complainant could be drawn by ***[page470]*** virtue of the fact there was no evidence of a complaint made at the first possible opportunity. The abrogation of this rule, which in practical terms had attained the persuasive quality of a rebuttable presumption rather than a permissive inference, resulted from a long overdue recognition that there are many reasons why victims of sexual assault do not complain at the first available opportunity, or even for many years, which have nothing whatever to do with the credibility of either their ultimate complaint, or their subsequent testimony.

If the full purpose underlying Parliament's abrogation of this particular rule relating to evidence of recent complaint is to be achieved, then evidence of when a complaint was first made, why it was not made at the first available opportunity if that was the case, and what it was that precipitated the complaint eventually made, must be receivable as part of the narrative, in order to ensure that the jury have all the evidence of the complainant's conduct necessary to enable them to draw the right inference with respect to her credibility. In this respect, the decisions in George and F. (J.E.) are consistent with the legislative purpose of the 1983 amendment.

When considering the legal use that can be made of prior complaint evidence admitted under the narrative exception, it is useful to keep in mind another of the rules peculiar to evidence of recent complaint which met its demise on January 4, 1983, namely, that the content of the actual complaint, although not admissible testimonially, could none the less be used by the jury to gauge the consistency, and thus the credibility, of the complainant's evidence at trial. It was on that basis that the complete text of what was said by the complainant was admitted under the pre-

1983 commonlaw rules of evidence, rather than merely the fact that a timely and spontaneous complaint had been made: see R. v. Lillyman, [1896] 2 Q.B. 167, and R. v. Osborne, [1905] 1 K.B. 551.

But, as the judgment in the Jones case makes clear, no such use of a prior complaint was ever sanctioned under the narrative exception to the rule against prior consistent statements.

As a result of the 1983 amendment to the Criminal Code, R.S.C. 1970, c. C-34 [as amended by 1980-81-82-83, c. 125, s. 19] the fact that the content of a prior statement made by a complainant in a sexual assault case is consistent with his or her evidence in court, is no longer a circumstance which can be used by the jury in assessing the credibility of that sworn testimony. Thus, in my view, unless it is necessary to provide the context for some other circumstance relevant to the jury's consideration, such as in the George case where the admissions of the accused when confronted ***[page471]*** with the substance of the victim's complaints to her relatives were clearly admissible, the actual content of the prior complaint now has no relevance, and is inadmissible. This is the thrust of the decision in Jones, which, in my view, correctly states the law in this respect.

However, when leading evidence of the fact that a pre-trial complaint was made, the Crown is obviously entitled to relate it to the allegations before the court. The fact that the complainant did complain of the accused's actions which have already been described is, therefore, admissible as long as the evidence of such prior complaint is described in general terms only and does not contain details of what was actually said so as to invite the jury to draw an inference of truthfulness in respect of the complainant's evidence at trial by reason of its apparent consistency with what was previously said.

To summarize, the fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters relevant and admissible to establish the conduct of the complainant in a criminal case, from which conduct the trier of fact is entitled to draw inferences relative to the credibility of that complainant's evidence. However, the content of any prior statement cannot be used to demonstrate its consistency with, and therefore, the probable truthfulness of, the complainant's evidence at trial, and thus, such content is inadmissible unless relevant for some other purpose such as providing necessary context for other probative evidence.

Turning to the evidence to which objection was taken in this case, it was clearly open to the Crown to lead evidence from the complainant that she eventually disclosed the appellant's assaults upon her, first to a family counsellor, then to her mother, then to her therapist, and finally to Constable Logan, and that her failure to go to the authorities earlier resulted from her fear the appellant would carry out the threats he had made to her at various times throughout the alleged assaults. In my view, it was also open to the Crown to lead evidence from those to whom she spoke, confirming the simple fact that such "complaints" were in fact made.

What ought not to have been admitted was any evidence of the specific content of such statements, and any other evidence the sole purpose of which was to invite the jury to conclude that these prior statements were both truthful and consistent with her sworn evidence before

them. That category includes the evidence led by the Crown from Constable Logan as to the manner in which the statement was takenfrom the complainant on May 11, 1989, ***[page472]*** including evidence of the length of time it took to complete that statement and her emotional condition at the time she gave it, which was some 13 years after the last of the alleged assaults; the evidence led by the Crown from the complainant's mother that the complainant told her about the times the appellant threatened and beat her, and the evidence led by the Crown from the complainant which suggested that her mother believed her after she gave "instances and things" to corroborate her disclosure. It also includes the content and thrust of the questions asked by Crown counsel on cross-examination of the appellant, his wife, and one character witness, which although not evidence, none the less had the effect of repeatedly suggesting to the jury that the complainant had given long and detailed prior statements to the authorities which were consistent with her sworn evidence in court.

Evidence which ought not to have gone before the jury was also elicited in cross-examination by appellant's counsel at trial, who was not counsel before us, specifically that evidence given by the complainant's mother of the statement her daughter made to her describing the appellant's threats and assault when he feared she was pregnant.

All of this evidence had no probative value except that for which purpose it was inadmissible, namely, the inference that a prior consistent statement makes the truth of sworn testimony more probable.

It is not unusual for inadmissible evidence occasionally to find its way, inadvertently and spontaneously, before the jury. Even less frequently such evidence is deliberately led in error. In most cases the problem can be rectified by a caution to the jury to ignore the evidence in question. However, it is unnecessary to consider whether such a caution would have sufficed in this case since, as I have noted, the trial judge did not give the jury any instruction, either that they must ignore that evidence which was patently inadmissible or that they could only use the evidence of prior complaint which was admissible for the limited purposes permitted under the narrative exception.

Even in cases where the evidence is strictly confined to the fact that a prior complaint was made, without any reference as to its content, it is essential that the trial judge instruct the jury that such evidence is admitted only to assist their understanding of what happened and that it cannot be used by them as proof of the truth of its implicit content, or as a prior consistent statement corroborative of the complainant's testimony at trial: R. v. George; R. v. Jones. Where, as in this case, the evidence goes beyond what is properly admissible, and includes at least some of the actual ***[page473]*** content of the prior complaint together with questioning by the Crown calculated to invite the jury to conclude that the content of the prior complaints were consistent with the complainant's testimony at trial, the need for a proper caution by the trial judge is that much greater.

Failure to give the required instruction in this case must be regarded as a serious error. This case is similar to many that have come before our courts in recent years involving allegations of sexual assault, made many years after the alleged abuse took place, in which the central and most difficult issue for the jury to resolve is the credibility respectively of the complainant and the

accused, neither of whose testimony is supported by any independent confirmatory evidence. Where inadmissible evidence touching the question of credibility of either goes before the jury without any caution from the trial judge to disregard it, or where no limiting instruction is given with respect to evidence which is properly admitted as part of the narrative but capable of being used improperly by the jury on the issue of credibility, there can be no confidence that the resulting verdict was not adversely influenced by such evidence.

The instructions on reasonable doubt and credibility

The trial judge began his charge to the jury on the law with the following remarks:

Now, in this case, as Counsel have told you, and as I'm sure you realize, there is one key question, and that is the credibility of the witnesses. If you accept Ms. [M]'s evidence on one or more of the charges and reject Mr. Ay's evidence, and if you are satisfied on the whole of the evidence that the Crown has proven its case beyond a reasonable doubt, then Mr. Ay must be convicted on that one or more of the charges. If you accept Mr. Ay's evidence, then Mr. Ay must be found not guilty. If you neither accept nor reject entirely, but are not sure and are left with a reasonable doubt, then you must acquit. If you conclude Mr. Ay's evidence could reasonably be true when considered together with the whole of the evidence, he must be found not guilty.

After giving some instructions on how to treat the evidence when determining what facts have been proved, the trial judge mentioned reasonable doubt:

By now you have heard several times it is the duty of the Crown to prove its case beyond a reasonable doubt, and you've heard that beyond a reasonable doubt means being very sure. Be certain that if you have found a doubt it is based upon the evidence in a rational way that is not speculative, nor guess, nor based upon biases you may have from your own life experiences.

After reviewing the essential ingredients of the five charges on the indictment, and offering some guidance on how to approach ***[page474]*** the all important issue of credibility, to which no objection can be taken, the trial judge reviewed the evidence and the respective theories of Crown and defence. He then concluded with instructions on the presumption of innocence and the standard of reasonable doubt:

... Mr. Ay sits here presumed to be innocent just as any one of us would be. That is a fundamental premise of our law and it is one that I trustwill continue. The only way that presumption of innocence can be set aside is if all of you together conclude beyond a reasonable doubt the Crown has proven all of the elements of either one, two, three, four, five of the charges.

I have told you, and I am sure you know as well as I do now, that proof beyond a reasonable doubt is not technical. We seldom are a hundred percent sure of anything in this life, but before there can be a conviction, you have to be very sure, very sure. A reasonable doubt is a doubt that is based with reason on the evidence. It is not guessing, speculation, not our own detective work, not our own biases, not our own knowledge from outside of the Court. It is a doubt based on the evidence: What's seen and heard in the courtroom.

The jury retired at 3:00 p.m. Counsel had no comments on the charge. After less than 10 minutes of deliberation the jury returned with a question which does not concern the issue raised by this ground of appeal. That question was answered and the jury returned to their deliberations at 3:18 p.m.

At 10:00 p.m., they returned with a request that the trial judge reclarify exactly what reasonable doubt is "in this particular case". The salient part of the trial judge's response is as follows:

A reasonable doubt may arise from the evidence, from a conflict in the evidence, or from lack of evidence. A reasonable doubt is a doubt based on reason. It is not an imaginary doubt. It is the sort of doubt for which you could give a logical and rational explanation if you were asked.

If you are morally certain, or feel sure that Mr. Ay committed the offences, then you do not have a reasonable doubt. If you believe that Mr. Ay is probably guilty, or likely guilty, but still have a reasonable doubt, you must give that reasonable doubt to Mr. Ay and return a verdict of not guilty. On the other hand, you must not set up a standard of absolute certainty that the Crown must meet in order to prove guilt. You must be satisfied beyond a reasonable doubt as to the guilt of the accused, and the requirement of proof beyond a reasonable doubt applies to each element, or essential part of the offence.

After the trial judge repeated that instruction a second time, the jury returned to their deliberations until court adjourned for the night at 11:10 p.m.

An hour after deliberations resumed the next morning, the jury sent out a request that the entirety of the evidence of the complainant's mother be read back. They also indicated that they had a further question: ***[page475]*** When you have a situation when one person says something happened and the other person denies it. Does this statement alone constitute reasonable doubt.

After a delay of an hour and a half, during which counsel and the trial judge discussed the best way to answer the question, the jury sent further word that they no longer required an answer, and desired a reread of only a portion of the evidence they had previously requested. They were recalled. The trial judge asked whether they wished, in any event, to hear the answer to their question, and when the foreman indicated they did, the following instruction was given:

The fact that two witnesses have given contradictory evidence does not mean in itself that there is a reasonable doubt. You have to decide whether there is, or not. Obviously, if you accept or reject all or part of a witness' evidence, there is no question of reasonable doubt because you have reached certainty, but if you are not certain, and can neither accept nor reject the evidence of either witness, then you are left with a reasonable doubt.

So, to expand that a bit, when you consider contradictory evidence, you may accept or reject some, none or all of a witness' evidence, but when you are not sure what to accept or what to reject, then you are left with a reasonable doubt, and it comes down to testing credibility. The credibility of each part of each witness' evidence, as individually given, and in the context of all of the evidence you have heard. You have to look at the whole of the evidence that you have heard before you decide what your verdict will be. The test of reasonable doubt applies to

individual pieces of evidence along the way, but it also must be applied to the evidence taken as a whole on each of the charges.

So, the simplest answer to your question is that reasonable doubt does not arise simply because there is contradictory evidence. Reasonable doubt depends upon your assessment of that evidence. Do you accept one version, or reject it, or are you not sure? It is when, with reason on the evidence you cannot be sure, that there is a reasonable doubt.

(Emphasis added.)

The requested evidence was then reread by the reporter, and the jury retired to continue their deliberations. Fourteen minutes later they returned with guilty verdicts on all five counts.

On behalf of the appellant it is argued that the initial charge to the jury, as well as the further instructions provoked by their subsequent questions, whether taken individually or collectively, failed to meet the minimum standard set by the decision of the Supreme Court in R. v. W. (D.) (1991), 63 C.C.C. (3d) 397, [1991] 1 S.C.R. 742, 3 C.R. (4th) 302.

In W. (D.) that minimum standard is to be found in the following passage (at p. 409):
[page476] In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Secondly, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole: see R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.); approved in R. v. Morin, supra, at p. 207.

(Emphasis in original.)

It can be seen that the opening portion of the trial judge's charge to the jury came very close to meeting the requirements established in W. (D.). While the precise instruction that the rule of reasonable doubt applies to the issue of credibility was not put directly, its substance was at least partially contained in the examples given. The jury were told that they were bound to acquit if they believed the evidence of the accused. While they were not clearly and directly told that even if they did not believe the accused, they were none the less bound to acquit if the evidence as a whole left them with a reasonable doubt, I agree with Crown counsel's submission that the substance of that direction is to be found in the statement:

If you accept Ms. [M]'s evidence on one or more of the charges and reject Mr. Ay's evidence, and if you are satisfied on the whole of the evidence that the Crown has proven its case beyond a reasonable doubt, then Mr. Ay must be convicted on that one or more of the charges.

However, it is apparent that throughout their deliberations the jury were troubled by the issue of credibility and how it related to the rule on reasonable doubt. The second question asked the judge to re-clarify what reasonable doubt is specifically in the context of "this particular case".

Unfortunately, the further instructions which resulted did not relate the rule to the principle issue in this case which was credibility. The third question left no doubt that the answer to the second had not provided the jury with the assistance they required. What was necessary at that point was a full instruction which made clear to the jury the substance of all the instructions set forth in W. (D.) and this court's decision in R. v. H. (C.W.) (1991), 68 C.C.C. (3d) 146, 7 W.A.C. 205, 14 W.C.B. (2d) 89, namely:

(a) If they believe the accused they must acquit.

(b) If they do not know whether to believe the accused or the complainant, they must acquit.

[page477] (c) If they do not reject the evidence of the accused they will have a reasonable doubt and must acquit.

(d) If they disbelieve the accused, that is if they reject his evidence as untrue, they have to be convinced beyond a reasonable doubt of the guilt of the accused on the whole of the evidence before they could convict.

Instead, while parts of the trial judge's response to the third question reflected the instruction in (b), the jury were in effect instructed that if they decided to accept or reject "a witness' evidence":

... there is no question of reasonable doubt because you have reached certainty...

If the jury had by then decided to reject the evidence of the accused, this instruction suggested to them that they had achieved certainty, and they would thus be induced to return a verdict of guilty without considering the evidence as a whole as required by (d). For this reason, in my view, the additional instructions on credibility and reasonable doubt contained in the trial judge's response to the jury's third question were seriously flawed.

In her able submissions before us, Crown counsel, who was not counsel at trial, argued that the effect of this error would have been insignificant in light of the fact that the jury indicated, before the further instruction was given, that they had solved their problem and no longer required an answer to their third question. Our attention was drawn to the decision of the Ontario Court of Appeal in R. v. Sit (1989), 47 C.C.C. (3d) 45, 31 O.A.C. 21, 7 W.C.B. (2d) 71. There, in circumstances quite similar to those in this case, the jury "withdrew" a question they had posed after arriving at a verdict while the trial judge and counsel were still considering an appropriate response. No further attempt was made to deal with the matter, and the verdict was taken. The court held that it was open to the jury to withdraw their question for any number of reasons which the trial judge was not entitled to question.

The situation in this case was quite different from that in Sit. Here no verdict had been reached when the question was "withdrawn" and the further instructions asked for were given. Those instructions were flawed in a manner prejudicial to the accused. Very shortly after they were given, the jury returned with verdicts of guilty. In those circumstances, the Sit case can have no application.

Before leaving this aspect of the appeal, it should be noted that the trial judge, who went to great efforts to assist the jury in this ***[page478]*** difficult case, did not have the advantage of the judgment in W. (D.), which was handed down by the Supreme Court only days before this trial began.

IV

Although the Crown did not advance an argument under s. 686(1)(b) (iii) of the Criminal Code, I have considered whether its curative provisions could be invoked in this case. In light of the potential impact which the errors could have had on the jury's conclusions with respect to the credibility of both the complainant and the appellant, I find that I cannot be satisfied that the verdict would necessarily have been the same if they had not occurred. Accordingly, the verdict cannot be salvaged under that section: Colpitts v. The Queen, [1966] 1 C.C.C. 146, 52 D.L.R. (2d) 416, [1965] S.C.R. 739; R. v. Broyles (1991), 68 C.C.C. (3d) 308, [1991] 3 S.C.R. 595, 9 C.R. (4th) 1.

This conclusion makes it unnecessary to consider the remaining grounds of appeal.

It follows that the verdict must be set aside and a new trial ordered on all counts.

Goldie J.A. concurs with Wood J.A. Appeal allowed; new trial ordered.