

** Unedited **

Indexed as:

R. v. Vallieres (Ont. Ct. (Gen. Div.))

Between

Her Majesty the Queen, Appellant, and
Mario Vallieres, Respondent

[1992] O.J. No. 2947

Action No. 3839/92

**Ontario Court of Justice - General Division
Toronto, Ontario
Bolan J.**

January 5, 1992.

(8 pp.)

Criminal law — Appeals — Crown appeal of accused's acquittal on charges of sexual assault, exposing his genitals, and invitation to sexual touching — Whether the judge had erred in continuing the trial without an interpreter when the interpreter who was aiding the complainant in giving her evidence became ill — Whether the trial judge had erred in directing a verdict of acquittal — Whether the Crown had discharged the onus on it to show that the verdict would not necessarily have been the same had the judge not so erred.

The Crown appealed the respondents' acquittal on charges of sexual assault, exposing his genitals to a person under the age of 14 years, and invitation to sexual touching.

HELD: The appeal was dismissed. The first ground of appeal was that the judge had erred in law in continuing the proceedings without a French-English interpreter for the complainant when the interpreter became ill during cross-examination of the complainant. No objection was taken by the Crown or the complainant when the interpreter was required to leave. The complainant had testified in English except on eight occasions when the interpreter was required to translate words or phrases. The court found that the complainant's ability to communicate was not impaired, and the appeal on this ground failed. The next ground advanced was that the trial judge had erred in granting a motion for a directed verdict of acquittal. The court was satisfied that in so doing, the judge had usurped the function of the jury. There was evidence upon which a jury, properly instructed in the law, could have found the respondent guilty. Thus the judge had erred in law. The final issue was whether the verdict would not necessarily have been the same had the error not occurred. The onus was on the Crown to satisfy the court that the verdict would not have been the same. The Crown had not satisfied that onus.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, ss. 14, 19. Criminal Code, R.S.C. 1985, c. C-46, ss. 152, 173(2), 271.

Wm. Johnson, for the Crown (Appellant).
Brian Greenspan, for the Accused, (Respondent).

BOLAN J.— This is an appeal by the Crown from the respondent's acquittal by His Honour Judge G.N. **Glaude** of three counts in an information against the respondent. The counts read as follows:

1. On or about the 4th day of December in the year 1990 at the City of Elliot Lake in the said region did commit a sexual assault on S.D. contrary to section 271 of the Criminal Code of Canada.
2. on or about the 5th day of December in the year 1990 at the City of Elliot Lake did for a sexual purpose expose his genital organs to S.D., a person under the age of fourteen years, contrary to section 173(2) of the Criminal Code of Canada.
3. on or about the 5th day of December in the year 1990 at the City of Elliot Lake did for a sexual purpose invite S.D., a person under the age of fourteen years to touch directly with a part of her body, to wit: her hand, the body of Mario Vallieres contrary to section 152 of the Criminal Code of Canada.

The trial was held on October 11, 1991 and January 24, 1992 at the City of Elliot Lake in the Province of Ontario. At the completion of the Crown's case, counsel for the respondent moved for a directed verdict of acquittal on the basis that there was no case to meet.

In allowing the motion and entering the acquittal the Provincial Court Judge made the following remarks: "... I must agree that a directed verdict would be appropriate in the circumstances. I say that because I find that if I were to be instructing a jury, that it would be taken from the jury given that the evidence is not sufficient to warrant it being presented. If I'm in error I suppose then, well I won't comment about proof beyond reasonable doubt, I think it stands for itself."

The first ground of appeal I wish to deal with is set out in paragraph 1(b) of the Notice of Appeal which reads as follows:

(b) The
learned trial judge erred in law in continuing the proceedings without an interpreter (French-English) for the complainant, when the interpreter present in court was unable to continue performing her duties as an interpreter due to health problems.

The facts as gleaned from the transcripts disclose that on the first day of the trial - October 11, 1991 - the complainant, S.D., affirmed to the court to tell the truth and proceeded to give evidence in the English language. At one point she asked if she could say some words in the French language. No interpreter was available on that day and after much discussion between counsel and the court the matter was adjourned to set a new trial date and to arrange for a French-English interpreter to be present.

The continuation of the trial resumed on January 24, 1992. Eileen Belzine was sworn in as a French-English translator, and the complainant proceeded with her evidence in English. During

the course of her evidence in-chief, there were eight occasions when the interpreter was required to interpret in English certain words or phrases spoken by the complainant in the French language.

The interpreter fell ill during cross-examination and the trial continued without an interpreter. However, at no time during the entire cross-examination - whether the interpreter was present or not - was any request made for interpreting any word or phrases. Furthermore, neither the witness nor the Crown objected to the trial continuing after the interpreter absented herself because of illness.

There are two sections of the Canadian Charter of Rights and Freedoms which I must consider.

Section 14 provides that:

"14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf, has the right to the assistance of an interpreter."

It would appear from the transcript that an interpreter was required to assist the witness to translate from French to English certain words and/or phrases on eight occasions throughout her entire evidence. It cannot be said that there was a breach of Section 14 when (a) no objection was taken by the Crown or the witness when the interpreter was required to leave and (b) the purpose for the interpreter was of such limited use.

Section 19 of the Charter provides that:

"19. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament."

Any person appearing in any court in Canada has a right to give evidence in either the French or English language. In this case the complainant chose to give her evidence in the English language. She never asked to be affirmed in French and the problem did not arise until she asked if she could say a word or phrase in the French language. It is at this point that the trial was adjourned to a new date to arrange for an interpreter. It is also evident from the transcript that an interpreter was as much a benefit to counsel as it was to the complainant.

When the trial resumed on January 24, 1992, the complainant once again chose to give her evidence in the English language and there were eight occasions when she uttered a word or phrase in French and which required interpretation. At no time does it appear from the transcript that the complainant had difficulty expressing herself. There is no indication that she hesitated, stammered or had problems giving her evidence. Neither the Crown nor the complainant objected to the trial continuing after the interpreter became ill and was required to leave.

I am satisfied that the complainant's ability to communicate was in no way impaired. The appeal on this ground fails.

Whether the learned judge erred in granting a motion for a directed verdict

At the conclusion of the Crown's case, counsel for the respondent brought a motion for a

directed verdict. I have already set out from the transcript Judge **Glaude's** reasons for granting the motion.

On an application for a directed verdict the issue is whether there is before the court any admissible evidence which, if believed by a properly charged jury acting reasonably, would justify a conviction. (see *Monteleone vs. The Queen* (1980) [35 C.C.C. \(3d\) 193](#)). Questions of credibility and the weight that should be given to evidence are peculiarly the province of the jury. (See *Mezzo vs. The Queen* [27 C.C.C. \(3d\) 97](#) at p. 108.)

A perusal of the transcript satisfies me that the learned Provincial Court judge clearly usurped the functions of the jury.

There is evidence upon which a jury, properly instructed in the law, could find the respondent guilty. Judge **Glaude** exceeded his function in weighing the evidence and he clearly took over the role of a jury. I am satisfied that he did err in law.

Whether the verdict would not necessarily have been the same had the error not occurred

The respondent argues that having regard to the position advanced by Crown counsel at trial (i.e. the Crown made no submissions to the court on the application for a directed verdict) the frailties and contradictions inherent in the evidence and the expressed view of the trial judge with respect to the issue of reasonable doubt, a verdict of acquittal would have been inevitable.

The correct approach on an appeal by the Crown is for the Crown, in order to obtain a new trial, to satisfy the Appellate Court that the verdict would not necessarily have been the same if the trial judge had properly directed the jury. (See *Vezeau vs. The Queen* [28 C.C.C. \(2d\) 81](#)) (See also *R. vs. Leclerc* [50 O.A.C. 232](#)) in which Lacourciere J.A., speaking for the Ontario Court of Appeal said at page 240:

"The error in law does not automatically require the direction of a new trial. It becomes necessary to consider the effect of the self-misdirection in the light of the findings of fact which the learned trial judge made and which are supported by the evidence."

In the case of *R. vs. Bedgood*, [60 C.C.C. \(3d\) 92](#) Chipman J.A. speaking for the Nova Scotia court of Appeal said at page 95:

"In order to obtain a new trial, where evidence has been improperly received, or an instruction improperly given by the trial judge, the Crown must satisfy the Court of Appeal that the verdict would not necessarily have been the same had the impugned evidence or instruction been excluded. The onus upon the Crown is a heavy one and it must satisfy the Court of Appeal that there should be a new trial with a reasonable degree of certainty."

What started out as a trial involving three incidents on December 4 and 5, 1990 turned into a trial involving some 200 allegations ranging from December 1989 to February 1991, by the time the complainant finished her evidence. There are no dates and no specifics. In her evidence she says she told the police that there had been 200 incidents; yet the written statement given to the police by the complainant speaks of incidents on December 4 and 5, 1990. (see specifically the transcript of proceedings at trial, January 24, 1992, pages 12 - 20.)

These were some of the major discrepancies which confronted the trial judge. It is reasonable to infer that he could not see how this evidence could lead to a conviction. He was the

trier of fact. He was in a position to observe the complainant and assess her evidence. His views on the quality of the evidence is expressed when he said: "If I'm in error I suppose then, well I won't comment about proof beyond reasonable doubt, I think it stands for itself."

The silence of the Crown on the motion for a directed verdict speaks volumes. The Crown Attorney was there throughout the trial. She heard the evidence with the discrepancies and tenuous allegations. It is reasonable to infer from the Crown's silence that the only expectation was for an acquittal.

As pointed out in R. vs. Bedgood, supra, the onus on the Crown is a heavy one. In my view, the Crown in this case has not satisfied this onus.

For these reasons, this ground of appeal fails. The appeal is dismissed.

BOLAN J.