To ensure that the publication ban is not violated I have removed the initials of the victim.

Sylvia

Date: 20010125
Docket: 98/114
Decision No: 2001 NFCA 6

SECTION 486(3) OF THE CRIMINAL CODE RESPECTING THE NON-PUBLICATION OF THE IDENTITY OF THE COMPLAINANT OR OF A WITNESS AND ANY INFORMATION FROM WHICH THEY MIGHT BE IDENTIFIED MAY APPLY TO THIS JUDGMENT.

IN THE SUPREME COURT OF NEWFOUNDLAND
COURT OF APPEAL

BETWEEN:

GERARD KEVIN BARRY APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Mahoney, Marshall & Roberts, JJ.A.
Court Appealed From: Supreme Court of Newfoundland, Trial Division
1997 St. J. No. 1835

Appeal Heard: September 1 and 7, 2000
Judgment Rendered: January 25, 2001

Reasons for Judgment by Roberts, J.A.
Concurred in by Mahoney and Marshall, JJ.A.

Counsel for the Appellant: David Eaton

Counsel for the Respondent: Wayne Gorman, Q.C.

Roberts, J.A.:

[1] The appellant was convicted on July 7, 1998, after a trial by judge alone, of three counts of indecent assault and one count of gross indecency, all involving the complainant[ ]. He was subsequently sentenced to three years imprisonment. He appeals the convictions and seeks leave to appeal the sentence.

Background

[2] The accused is a seventy-two year old American born former member of the Congregation of Irish Christian Brothers, a Roman Catholic teaching order. His first teaching assignment at the age of 20 in 1948 was at St. Bonaventures College in St. John=s. He was assigned to Mount Cashel Orphanage, also in St. John=s, in September 1953 and stayed there during the regular school years until June 1959. He remained with the Christian Brothers until 1964, teaching in Montreal and Victoria, B.C. He continued teaching after leaving the Brothers and taught in Nova Scotia and Ontario. He held administrative positions as either vice-principal or principal during that time . He retired in 1993.

[3] [ ]. is a former resident of Mount Cashel. He was born on December 16, 1942 and entered the orphanage on September 16, 1954, at age eleven. He left Mount Cashel in 1961 after completing grade XI.

[4] The incidents, that gave rise to the allegations against the appellant, and the subsequent convictions, took place between January 1, 1954 and December 31, 1959. The incidents, according to [ ], took place in three different locations: in the orphanage canteen, in the dormitory and at the Mount Cashel raffle site in downtown St. John=s.

[5] The incidents in the canteen, according to [ ]., would occur around laundry time, just before bed. He said the appellant was in charge of the laundry and would ask him to go to the canteen and wait for him there. He would use a key given to him by the appellant to gain access. [ ] described the appellant=s kissing him and putting his tongue in his mouth and then pulling down his pants and putting his penis between his legs from behind. [ ]. said that the appellant would ejaculate and try to ejaculate him. The appellant would send him back to bed when he was

finished with him. [redacted], testified that the events such as described took place more than five times.

[6] [redacted]=s evidence was that the dormitory incident occurred when he was about thirteen. He was in his bunk sick and, sometime during the afternoon, the appellant came and put his hand under the clothes, kissed him and felt his genitals. He said this went on for about five minutes.

[7] The incident at the raffle site, [redacted], testified, took place one night when he went there with the appellant by car, possibly to bring some tickets. He said that while at the site the appellant held him against the wall, kissed him and fondled his genitals.

[8] The appellant=s response to [redacted]=s allegations was that they were false. He was adamant that the incidents complained of never took place and that, furthermore, he had no recollection whatsoever of [redacted].

Issues on appeal

[9] This appeal raises six issues:

1. Whether the indecent assault provisions of the **Criminal Code** under which the appellant was charged violated ss. 7 and 15 of the **Charter of Rights and Freedoms**?

2. Whether the appellant was improperly cross-examined by Crown counsel?

3. Whether the trial judge misapplied the standard of proof beyond a reasonable doubt?

4. Whether the pre-charge delay affected the fairness of the trial?

5. Whether the verdict was unreasonable?

6. Whether the sentence imposed was excessive?

Analysis of the issues on appeal

(1) Whether the indecent assault provisions of the Criminal Code under which the appellant was charged violated ss. 7 and 15 of the Charter of Rights and Freedoms?

[10] As indicated above, the appellant was convicted of three counts of indecent assault occurring between January 1, 1954 and December 3, 1959. The relevant section of the **Criminal Code** in 1954 was s. 293. That section became s. 148 as of April 1, 1955. The sections read as follows:

> S. 293 Everyone is guilty of an indictable offence and liable to 10 years imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person.
>
> S. 148 Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for 10 years and to be whipped.

[11] The appellant argues that these former indecent assault provisions under which he was charged violate ss. 7 and 15 of the **Charter**. In particular, he submits that since only a male could be charged thereunder the sections are unconstitutional. He thus argues that the **Charter** has retrospective application.

[12] The question of the **Charter=s** retrospective application was dealt with by the Supreme Court of Canada in **R. v. Stevens** (1988), 41 C.C.C. (3d) 193. In **Stevens**, the accused was charged with having sexual intercourse with a girl under the age of 14 contrary to former s. 146(1) of the **Criminal Code** which provided that A[e]very male person who has sexual intercourse with a female person who (a) is not his wife and (b) is under the age of 14 years, whether or not he believes that she is 14 years of age or more, is guilty of an indictable offence and is liable to imprisonment for life@. The offence was committed by the accused in late 1981 and early 1982, prior to the proclamation of the **Charter** in April 1982. At trial, the accused sought to quash the information on the ground that denial of the defence of mistake of fact as to the victim=s age violated s. 7 of the **Charter**. His request was denied and he was found guilty. The accused=s appeal to the Ontario Court of Appeal was dismissed.

[13] LeDain J., for the majority of the Supreme Court and holding that the appeal should be dismissed, wrote at pp. 215-217:

> I would dismiss the appeal on the ground that s. 7 of the *Canadian Charter of Rights and Freedoms* is not applicable to s. 146(1) of the *Criminal Code* because its application in this case would be a retrospective one. This court has recently affirmed, in dismissing the appeal from the judgment of the Ontario Court of Appeal in *R. v. James* (1988), 40 C.C.C. (3d) 576, [1988] 1 S.C.R. 669, that the Charter cannot be given retrospective application. In *James*, the Court of Appeal held that s. 8 of the Charter could not be applied to seizures carried out before the Charter came into force and that in consequence, s. 24 of the Charter could not, at the trial which took place after the Charter came into force, be applied to exclude evidence obtained from such seizures. Tarnopolsky J.A., who delivered the judgment of the Court of Appeal, said that Aone applies the law in force at the time when the act that is alleged to be in contravention of a Charter right or freedom occurs@ and that Ait is important that actions be determined by the law, including the Constitution, in effect at the time of the action@: 27 C.C.C. (3d) 1 at pp. 21 and 25, 55 O.R. (2d) 609, 86 D.T.C. 6432.
>
> .....
>
> The criminal liability to imprisonment for the offence created by s. 146(1) was imposed by s. 146(1), in respect of the offence committed by the appellant, at the time the offence was committed. The liability imposed by law would ordinarily be established at trial in a particular case in accordance with the relevant substantive law, including any applicable constitutional provisions, as it existed at the time the offence was committed. It would give a retrospective application to s. 7 of the Charter to apply it to s. 146(1) of the *Code* merely because the liability imposed by s. 146(1) continued after the Charter came into force. It would be to change the applicable substantive law with retrospective effect.

[14] The issue of retrospective application of the **Charter** was again considered by the Supreme Court of Canada in **Gamble v. The Queen** (1988), 45 C.C.C. (3d) 204. Wilson J., for the majority, wrote at p. 226:

> Under both the majority and minority formulations in **Stevens**, the crucial question becomes: What is the event which is alleged to be in contravention of the Charter? At what point in time does the event which deprives a person of his or her life, liberty or security of the person occur?

[15] In the instant case, the Aevent@ which would arguably be in contravention of the **Charter** was the offence(s) involving [redacted]. The event was not, as the appellant contends, the laying of the charges. As Wilson J. stated at p. 242 of **Gamble**:

> ... It is fundamental to any legal system which recognizes Athe rule of law@ (see the preamble to the Charter) that an accused must be tried and punished under the law in force at the time the offence is committed.

[16] Earlier, at p. 229, Wilson J. made reference to this fundamental rule as it applied to **Gamble**:

> In the context of this case the appellant=s Charter claim would surely fail if she were invoking s. 7 Ato reach back and reverse the liability which clearly existed on the basis of the facts and the law in existence at the time the offences were committed@: **R. v. Lucas** (1986), 27 C.C.C. (3d) 229 at p. 237, 51 C.R. (3d) 296, 20 C.R.R. 278 (Ont. C.A.).

[17] In **Lucas**, the Ontario Court of Appeal held that s. 15 of the **Charter** cannot apply retrospectively to proceedings for offences committed prior to its proclamation into force on April 17, 1985.

[18] **Gamble** is a case where the application of the fundamental rule that an accused must be tried and punished on the law in force at the time the offence is committed operated to the offender=s benefit.

[19] Ms. Gamble had originally been charged in March 1976 with murder punishable by death, it being alleged that she was a party to the killing of a police officer. Following a preliminary inquiry, however, the Crown preferred an indictment charging her and a co-accused with first degree murder pursuant to amendments to the **Criminal Code** proclaimed in force on July 26, 1976. This was an error since the transitional provisions of the amending statute only applied to proceedings commencing after July 26, 1976. The difference was an important one for Ms. Gamble. Under the old provision she would have been eligible for parole during a period of ten to twenty years as fixed by the trial judge. Under the 1976 amendment she was not eligible for parole until after twenty-five years.

[20] Ms. Gamble had already served twelve years of her sentence when the Supreme Court of Canada heard her appeal. She claimed a continuing violation of her liberty interest which was not in accordance with the principles of fundamental justice. As indicated above, Wilson J., writing for the majority, said that the crucial issue was to identify the event alleged to be in contravention of s. 7 and the point in time when the event depriving Ms. Gamble of her liberty occurred. She held that the current application of the condition of Ms. Gamble=s sentence that she not be eligible for parole for twenty-five years infringed her residual liberty interest. That deprivation was not in accordance with the principles of fundamental justice since it violated the fundamental rule that an accused must be tried and punished under the law in force at the time the offence is committed. If that fundamental rule had been applied, Ms. Gamble would have had the opportunity of having the period of parole eligibility set at between ten and twenty years. The court gave Ms. Gamble the benefit of any doubt and granted immediate parole.

[21] The appellant argues, as alluded to above, that the event which put his liberty in jeopardy was the laying of the charges in 1996. He submits that it was at that time, and not when the offences were committed, that he assumed the status of an accused person facing a trial and loss of liberty on charges which, he contends, where based on a discriminatory section of the Criminal Code. It is the current application of these historic Criminal Code provisions which he challenges. The appellant cites **Brenner v. Canada**, [1997] 1 S.C.R. 358 as support for this argument.

[22] In **Brenner** the Supreme Court of Canada was considering the issue of retrospectivity as it relates to s. 15 of the **Charter**. Iacobucci J., for the entire court, wrote at paras. 44-46:

> 44. Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Gamble, supra.* Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

> 45. The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?
>
> 46. I realize that this distinction will not always be as clear as one might like, since many situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of Adetainee@. Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a current condition or status will involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and the *Charter* right which the applicant seeks to apply.
>
> [Emphasis added.]

[23] I do not find that **Brenner v. Canada** assists the appellant=s argument. The law as stated therein is entirely consistent with **Stevens** and **Gamble**. The most significant or relevant feature of the appellant=s case is the past events which gave rise to the charges being laid and convictions being entered. The former >indecent assault on a male= provisions in no way Aimpose [their] effects on new applicants today@. They have no Acontemporary application@. The indecent assaults committed by the appellant were discrete acts which took place before the **Charter** came into effect. As was said in **Lucas** (above), the **Charter** cannot Areach back and reverse the liability which clearly existed on the basis of the facts and the law in existence at the time the offences were committed.@

[24] The indecent assault provisions of the **Criminal Code** on which the appellant was charged can not have violated s. 7 or s. 15 of the **Charter** since the offences were committed long before the **Charter** came into existence.

(2) Whether the appellant was improperly cross-examined by Crown counsel?

[25] The appellant argues that he was improperly cross-examined by Crown counsel. He refers, in particular, to the following exchange:

Q. I want to ask you now about [ ], and you heard from [ ], you saw [ ] on the witness stand, and you heard what he had to say.

A. Uh hum.

Q. Allegations of abuse towards you, which you have denied in your evidence. Correct, sir?

A. Right

Q. Have you had any contact with [ ] since he left the Orphanage in 1959, or I believe in 19, in the 1960s? You had any ...

A. No.

Q. ... contact with him whatsoever?

A. No.

Q. Since you left in 1959, have you had any contact ...

A. No.

Q. ... with [ ]? Do you ever recall in your time at Mount Cashel ever having a problem with [ ]?

A. Not that I can recall, since I don=t remember him.

Q. Okay. You have nothing that you could put forward to the Court that would indicate that at any time you ever had a problem with [ ] ...

A. No.

Q. ... [ ]. Is that correct?

A. No.

Q. And similarly, you would be unaware of any grudge or problem that [ ] may have towards you. Is that correct?

A. No.

Q. You would have no evidence to that effect. You=d be unaware completely ...

A. No.

Q. ... of that. Okay. And yet, sir, he has indicated under oath, and you heard him under oath, sir, he put forth these allegations of abuse towards you at the dormitory, at the canteen, at the raffle. What do you have to say, sir?

[26] At this point, counsel for the appellant objected and, after several exchanges, the trial judge asked the Crown prosecutor to reformulate his question. The Crown prosecutor continued:

Q. You=ve heard the allegations against you. What do you say to them?

A. False.

Q. They=re false. And yet there=s no bad feelings that you=re aware of or no evidence you could put to the Court of bad feelings between you and [ ].

A. No.

[27] In **R. v. R.(A.)** (1994), 88 C.C.C. (3d) 184 (Man. C.A.), one of the grounds of appeal was that Crown counsel had improperly posed the following question to the accused:

> I=m compelled to ask you because you say that J. was lying, do you have any theory or opinion as to why J. would lie about this?

[28] Twaddle J.A., writing for the court, dealt with the argument as follows, at pp. 188-189:

> As a general rule, the opinion of an accused as to the veracity of a Crown witness is irrelevant: see *Mardadonis v. The King* (1935), 64 C.C.C. 41, ... Although the accused had already asserted his belief that the complainant was a liar when asked the question, the cross-examiner was wrong to pursue the issue by inviting the accused to advance a theory or opinion as to the complainant=s motives. He might well have asked, if he thought it helpful, whether the accused was aware of any facts which supported his assertion, but the question as it was framed was, to use the words of Hewart L.C.J. in *R. v. Baldwin* (1925), 18 Cr. App. R. 175 at p. 178, Areally of the nature of an invitation to an argument@.
>
> Quite apart from the irrelevancy of the accused=s opinion, this type of question is mischievous in that it tends to place an improper burden on the accused to account for another=s conduct. The inability of the accused to explain a conflict between his evidence and that of a Crown witness is not, of itself, a ground for disbelieving the accused. Sometimes, the motivation of an untruthful witness is obscure even to the trained mind of a psychologist.
>
> The mere fact that an improper question was asked does not, however, resolve the issue. As was said by the Ontario Court of Appeal in *R. v. Daly* (1992), 57 O.A.C. 70 at p. 75, 16 W.C.B. (2d) 622 (Ont. C.A.):
>
> > Improper cross-examination does not necessarily require reversal. The effect of the improper cross-examination must be considered in the context of the full cross-examination and the entire trial.
>
> [Emphasis added.]

[29] Unlike in **R. v. R.(A)**, Crown counsel in the present case did not ask the appellant if he had any theory or opinion as to why [redacted]. would lie. When asked what he had to say about the allegations against him, the appellant=s answer was simply, AFalse@. Crown counsel then asked about evidence of bad feelings between himself and the complainant. The appellant=s reply was ANo@, and that was the end of it.

[30] To paraphrase Steele J.A. of this Court in **R. v. A.J.S.** (1998), 167 Nfld. & P.E.I.R. 183, at p. 199, the cross-examination by Crown counsel objected to did not place a burden on the appellant to refute the Crown=s argument regarding [redacted]=s credibility. In other words, I do not accept that the question of Crown counsel which was objected to, in the context of the whole of the cross-examination and of the entire trial, prejudiced the appellant in his defence.

[31] Counsel for the appellant raises as an ancillary issue the fact that the trial judge referred to the lack of animosity of [redacted]. in his decision, and links this to the question of Crown counsel to which he had objected.

[32] The trial judge dealt with [redacted].=s credibility in paras. 37 to 39:

> I now turn to [redacted]=s credibility. In my view, having listened to his evidence, he displayed neither animosity towards Mr. Barry nor to Mount Cashel as an institution in which he spent about eight years, nor did he display any desire to do harm to Mr. Barry or punish him. In fact, in his evidence he said that when the police came to him and he told them about what happened, he did not realize that there would be a trial arising out of these matters. The most he wanted, was to meet face-to-face with Mr. Barry to tell him what had happened, to bring it to his mind, and tell him something of the harm and the pain which his (Mr. Barry=s) actions had caused him.
>
> On the account of his life as given, with all his difficulties, I am satisfied as to his general integrity and intelligence. I find no indication of any animosity either toward Mount Cashel or to Mr. Barry. He found many aspects of life at Mount Cashel to be rewarding. He did not wish to see Mr. Barry tried. Rather, he hoped that he could meet Mr. Barry face-to-face and explain to him the hurt and harm that his actions had caused. I find in his evidence no suggestions of evasiveness, reticence or bias. In fact, the contrary was the case. I find that he was honestly endeavouring to tell the truth and did tell the truth even when it was embarrassing to him or painful to recall.
>
> As with any witness when describing events, he could not remember all peripheral details and persons or dates, but on the essential issues of identity, time frames, places and what he says occurred, I find nothing in his demeanour, attitude, or powers of recall, which casts doubt upon the essential parts of his evidence or his credibility.

[33] I find nothing objectionable in the observations of the trial judge regarding [redacted]=s credibility. His comments pertaining to [redacted]=s lack of animosity were based on [redacted]=s evidence and the observed demeanour of [redacted] as he was giving it. They did not have their genesis in the questions to the appellant on cross-examination. The trial judge had every right to consider this evidence along with all of the other evidence before him.

(3) Whether the trial judge misapplied the standard of proof beyond a reasonable doubt?

[34] The appellant alleges that the trial judge misapplied the standard of proof beyond a reasonable doubt. In particular, he suggests that the trial judge used improper factors in assessing the credibility of [redacted], thereby boosting his credibility, and used a higher standard when assessing the credibility of the appellant. He further argues that the trial judge did not consider the appellant=s unchallenged evidence that contradicted the evidence of [redacted]., nor deal with any of the inconsistencies between the evidence of [redacted] at trial and his statements given on prior occasions.

[35] In his lengthy oral decision given on July 7, 1998, the trial judge made specific and extensive reference to the evidence, to the importance of considering both the Ademeanour@ of a witness when giving testimony and the Areliability@ of the testimony. He used as his guide for the appropriate standard and onus of proof the directions given by the Supreme Court of Canada in **R. v. W.(D.)** (1991), 63 C.C.C. (3d) 397 and **R. v. Lifchus** (1997), 118 C.C.C. (3d) 1. The fact that the trial judge did not refer to every piece of evidence was not a fatal flaw. McLachlin J. (as she then was), writing for the Court in **R. v. Burns** (1994), 89 C.C.C. (3d) 193 (S.C.C.), stated, at p. 199:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: ... The judge is not required to demonstrate that he or she knows the law and has considered all relevant evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused=s guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.

[36] In **R. v. H.(N.G.),** [1998] 1 S.C.R. 318, the accused was convicted of gross indecency and indecent assault. The British Columbia Court of Appeal set aside the convictions and ordered a new trial. The Supreme Court of Canada, however, reinstated the conviction. The brief judgment of the Court was delivered by Cory J.:

> On our review and analysis of the evidence we find that the British Columbia Court of Appeal erred in concluding that the trial judge misapprehended the evidence. There was evidence in the testimony of L.E. upon which the finding of guilt could be properly based.
>
> Much of this case turned on credibility on which the trial judge properly made clear findings particularly in accepting the complainant=s testimony and rejecting that of the accused.
>
> [Emphasis added.]

[37] In **R. v. Murphy** (1994), 114 Nfld. & P.E.I.R. 148 (Nfld. C.A.), the accused had been convicted by the trial judge of sexual assault. The accused and the complainant gave different versions of the same events. The complainant was a nine year old girl. Goodridge C.J.N. observed that where the complainant was found to be credible, it remained only for the trial judge to say that no reasonable doubt had been raised by the evidence of the accused or otherwise. Unlike the lengthy decision of the trial judge in the present case, the decision of the trial judge in **Murphy** was brief in the extreme:

> ... I have heard all of the evidence, and I=ve assessed all of the evidence, and I=ve considered the burden of proof on the Crown and assessed the credibility in weighing the evidence. And I will say that this Court finds that the Crown has proven its case and that the complainant told the truth and that she was assaulted in just the way she described. You are convicted as charged [Mr.] Murphy.

[38] In commenting on the trial judge=s reasons, Goodridge C.J.N. said, at para. 50:

> [The trial judge] might have added that he believed the appellant or that nothing in the evidence created a reasonable doubt. He did not. In a relatively straight-

> forward case such as this, it cannot be said that, because a trial judge has not used the standard phraseology in framing his decision, his decision is incorrect ....

[39] The chief justice added, at para 52:

> Contrary to the decision of the summary conviction appeal judge, there is no responsibility or duty upon a trial judge in rejecting the evidence of an accused person to give reasons for that rejection. This is not to say that such a practice is not desirable. In this case the trial judge said that he believed the complainant and, by subsequently convicting the [accused], his decision carries a clear implication that he disbelieved the [accused] and that there is nothing in the evidence that raised a reasonable doubt.

[40] In **R. v. Barrett** (1994), 86 C.C.C. (3d) 266, the Ontario Court of Appeal, per Arbour J.A., at p. 287, stated that:

> Reasons must be given for findings of facts made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent.

[41] Because the court found the trial judge=s reasons to be deficient in that regard, it allowed the accused=s appeal and ordered a new trial. On further appeal to the Supreme Court of Canada ((1995), 96 C.C.C. (3d) 319), that Court restored the original convictions. Iacobucci J., citing **R. v. Burns**, made the following clear statement, at p. 320:

> The issue is the reasonableness of the finding not an absence or insufficiency of reasons. In this case, the basis for the ruling of the trial judge on the *voir dire* is clear. The only issue was credibility. The trial judge=s ruling demonstrated that he did not accept the evidence of the accused. In these circumstances, the failure of the trial judge to state the basis of his decision on the *voir dire* did not occasion an error of law or miscarriage of justice ....

[42] In **R. v. Jussila** (1997), 124 C.C.C. (3d) 262 (Alta. C.A.), the accused was convicted of sexual assault. One of the grounds of appeal, as in the instant appeal, was that the trial judge failed to instruct himself on the issue of credibility. Russell J.A., writing for the majority, responded to that contention, at pp. 266-267:

> It is evident from those reasons that the trial judge not only found the complainant to be a credible witness, but that in doing so, he also measured the

reliability of his evidence, mindful of the frailties of the complainant=s memory due to his mental state at the time the events were unfolding. As a result, we cannot conclude that the trial judge failed to appreciate that issue.

The trial judge was also alert to the inconsistencies in the evidence between the testimony of the appellant and that of the complainant. It is apparent,

> however, that he rejected the evidence of the appellant. We defer to his findings in that regard.
>
> [Emphasis added.]

[43] The accused=s further appeal to the Supreme Court of Canada was dismissed ((1998), 124 C.C.C. (3d) 261).

[44] In summary, the law is eminently clear that a trial judge does not have to refer to each piece of evidence or to every statement of every witness, nor does he have to deal with contradictions, apparent or otherwise. This case turned on credibility. The trial judge pointedly accepted the evidence of the complainant and rejected the evidence of the appellant.

(4) Whether the pre-charge delay affected the fairness of the trial?

[45] The appellant claims that the charges against him should have been stayed because of the long forty and more year delay between the dates of the offences and the trial. In particular, he argues that he was not able to make full answer and defence because the two Brothers in charge during his time at Mount Cashel were both dead and that they could have confirmed his evidence concerning the protocol for access to the canteen and use of the community car. No explanation was given why other Brothers and lay people who were at the orphanage at the same time, and who are still alive, were not called.

[46] On reviewing the evidence, I am forced to agree with the trial judge that there was no evidence that the delay affected the appellant=s ability to make full answer and defence. As was noted by Goodridge C.J.N. of this Court in **R. v. G.(W.G.)** (1990), 58 C.C.C. (3d) 263, at p. 273:

> A trial judge may not add surmised facts to proven facts and conclude therefrom that the trial of an accused person at a late date would be unfair or that the accused person would be prejudiced in his defence. The trial judge must be satisfied on a balance of probabilities based on the proven facts that such unfairness or prejudice exists.

[47] The trial judge in the instant case wrote, at paras. 53-57:

In this case a review of the evidence and the argument presented, does not indicate to me that relevant evidence is no longer available to the accused, which had it been available could have influenced the outcome of the trial.

Sexual assaults are not usually observed by other persons. In fact, those who commit sexual assaults usually take pains to ensure that such assaults take place in private.

It is true that Brothers Carroll and Murray are deceased, but Brothers Lasic, Gilchrist and Keenan are still alive, I am told, and capable of testifying. Nevertheless, it has not been shown, or in fact even suggested, that evidence of any of these men, could have had a significant effect in this trial which was about sexual activity which, on [redacted]=s evidence, occurred in private and on Mr. Barry=s evidence, did not occur at all.

As was said in R. v. L.(W.K.) [(1991) 64 C.C.C. (3d) 321 (S.C.C.)]:

> AThere must be an air of substantial reality about the claim that any particular piece of lost evidence or all of it cumulatively together would actually assist the accused in his defence. If there is no such air of substantial reality, it cannot be said the delay which caused the loss of evidence is likely to preclude a fair trial for the accused.@

In my view, such is the case here and the application must fail.

[48] Stevenson J., who wrote for the court in **R. v. L.(W.K.),** also had this to say about the effect of delay on the fairness of criminal proceedings, at p. 328:

> Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J.C. in Rourke [(1997, 35 C.C.C. (2d) 129] are equally applicable under the Charter.
>
> Sections 7 and 11(d) of the Charter protect, among other things, an individual=s right to a fair trial. The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear. The comments of Lamer J., as he then was, in R. v. Mills [(1986), 26 C.C.C. (3d) 481], supra, at p. 558, are apposite: APre-charge delay is relevant under ss. 7 and

> 11(d) because it is not the *length* of the delay which matters but rather the *effect* of that delay upon the fairness of the trial@ (emphasis added). Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused=s rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.

[49] I agree with the trial judge that in the present matter the delay did not have harmful consequences on the fairness of the trial.

(5) Whether the verdict was unreasonable?

[50] Section 686(1)(a)(i) of the **Criminal Code** permits a Court of Appeal to set aside a conviction if it is unreasonable or cannot be supported by the evidence. The test for unreasonableness is whether a properly instructed finder of fact acting judicially could have rendered it, i.e., is the conviction reasonably supported by the evidence? In assessing the conviction, the court must re-examine and, to some extent, re-weigh the effect of the evidence, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge=s conclusion. Where an allegation of an unreasonable verdict is based on determinations of credibility, the court must show great deference to the findings made at trial and ought not to intervene unless the record reveals an error in principle, or a manifest error in the appreciation of the evidence. (See: **R. v. Pumphrey** (1995), 127 Nfld. & P.E.I.R. 286 (Nfld. C.A.), **R. v. Byrne** (above), **R. v. C.D.G.** (1995), 128 Nfld. & P.E.I.R. 312, (Nfld. C.A.) and **R. v. Yebes** (1987), 36 C.C.C. (3d) 417) (S.C.C.))

[51] The appellant argues that the trial judge=s verdict was unreasonable because the uncorroborated evidence of the complainant suffered from the passage of time and from the complainant=s inability to provide surrounding circumstances or to put the allegations in any sequence or particular time frame. Furthermore, it is argued that the complaint=s evidence was inconsistent on essential details with prior statements, one of which was under oath.

[52] My review of the evidence and the trial judge=s decision convinces me that the trial judge was Aalive@ to all of the difficulties raised by the appellant. I adopt as my own the words of Arbour J, writing for the majority, in **R. v. A.G.**, [2000] 1 S.C.R. 439, at para. 30:

> [The trial judge] was entitled to believe the uncorroborated evidence of the complainant in this case as in any other case, and he did. If it were unreasonable for him to do so, it would be impossible to convict in the many similar cases where there is a long delay in the disclosure of the uncorroborated allegations of a complainant in a sexual assault case. This is not the law.

[53] In **R. v. A.G.**, the accused was convicted of one count of sexual assault. The complainant, his niece, was between six and eight years old at the time of incident and sixteen years old when she testified at the accused=s trial. The accused denied the allegations and testified that the red couch in the basement of his home on which the complainant said the first two incidents took place was not in the basement at any time during the period stated in the information because renovations were taking place. He also testified that he had not been alone with the complainant in the absence of another adult. His appeal was dismissed.

[54] The verdict of guilty reached by the trial judge in the instant case was not an unreasonable one.

(6) Whether the sentence imposed was excessive?

[55] A sentence imposed by a trial judge is entitled to a considerable degree of deference by a court of appeal. That principle has been confirmed by the Supreme Court of Canada in **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193, in **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327, and, more recently, by Lamer C.J. in **R. v. Proulx** (2000), 140 C.C.C. 449. In **R. v. Shropshire**, Iacobucci J., writing for the court, said, at para. 46:

> ... an appellate court should not be given free reign (sic) to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the Court of Appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.
>
> [Emphasis added.]

[56] In **R. v. M.(C.A.)** Lamer C.J., writing for the court, said at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an over-emphasis on the appropriate factors a Court of Appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit ....

[57] The appellant argues that the sentence of three years was excessive having regard to the nature of the offence and the circumstances of the appellant. In particular, the appellant says that the trial judge did not consider any of the individual factors of the appellant, that he over-emphasized the principles of deterrence and denunciation and gave no weight to the principle of rehabilitation, that he relied upon aggravating factors which were not properly proven, i.e., [redacted]=s victim statement, and that the sentence was excessive having regard to sentences imposed for similar offences and upon similar offenders. The appellant also submits that the trial judge placed too much emphasis on **R. v. Thorne** (1991), 92 Nfld. & P.E.I.R. 310 (Nfld. S.C. T.D.) and **R. v. Ralph** (1993), 105 Nfld. & P.E.I.R. 220 (Nfld. C.A.) without distinguishing the differences in the offences and the individuals. The trial judge had imposed the sentences in both of these cases.

[58] A review of the trial judge=s sentencing decision rendered on August 21, 1998 shows that he reviewed the evidence, the principles of sentencing set out in s. 718 of the **Criminal Code**, the appellant=s lack of a criminal record, the factors to be considered in imposing sentences in sexual assault cases listed by Goodridge C.J.N. in **R. v. Atkins** (1988), 69 Nfld. & P.E.I.R. 99, and the impact on the complainant.

[59] The trial judge=s reference to **R. v. Thorne** was proper. His quote from the case, at para. 8, reads in part:

> [Decided cases] clearly demonstrate a willingness on the part of the courts to impose sentences of up to four and five years when such offenders have been in positions of authority and trust, for example, clergy and teachers. ...

[60] The trial judge had this to say concerning **R. v. Ralph**, at paras. 9-11:

> In R.v. Ralph, 94 Nfld. & P.E.I.R. and 298 A.P.R.. 175, the offences were very similar to those in this case. The difference in ARalph@, was that instead of four convictions as we have here, there were eleven convictions involving three

or four boys; but the nature of the offences is essentially the same. In Ralph, as in this case, there was no previous criminal record, no subsequent criminal record or any criminal record at all. One of the differences in the Ralph case was that Brother Ralph, before the matter went to trial, admitted what he had done and changed his pleas to guilty on all counts, apologized to the victims and came before the court having done so. I took these matters into consideration, as I think it was proper to do so. In considering the sentence, for reasons which I gave and with which counsel are familiar, Ralph was sentenced to a totality of four years.

The Crown appealed the Ralph sentence, taking the position that the sentence was not severe enough; and it is important that I read into the record the remarks of the Court of Appeal on the final page of their unanimous judgment (105 Nfld. & P.E.I.R. and 331 A.P.R. 220), in which they said in respect of the four-year sentence;

> Awe are of the view that the sentences in totality were inordinately low and that, given the few mitigating circumstances to which reference has been made, the totality should have been six years. To achieve this, it is necessary to alter the sentences in the second group and make them consecutive to the sentences in the first group. The appeal is, therefore, allowed. The sentences imposed in respect of the last five counts are altered to the end that each shall be two years= imprisonment, which shall be served concurrently to each other but consecutively to the concurrent sentences imposed in respect of the first six counts.@

And;

> AThe increased totality is intended to reflect public abhorrence at the conduct of the respondent. The cruelty which was manifested by the sexual assaults against young defenceless orphans belief and only the slightly mitigating circumstances to which reference has been made prevent an even greater sentence.@

The difference in terms of mitigation in this case, as Crown counsel pointed out, is only the fact there is no criminal record. Ralph had changed his plea, acknowledged his guilt and apologized and that was taken into consideration by me as the sentencing judge and by the Court of Appeal. Therefore, there were more and greater mitigating factors in Ralph than there were in the present case and yet the Appeal of court, as I have said, felt that the mitigation was not sufficiently strong to justify a sentence of four years only, but rather that it should be increased to six years.

[61] The trial judge then addressed the impact of the appellant=s actions on [redacted], at paras. 13-15:

> In this case, there were physical, personal and sexual violations of the complainant, which took place over a considerable period while he was a young adolescent. There is no question as to the physical and personal violation, but there was an added dimension also. [redacted] was a heterosexual adolescent boy and the sexual assaults, which were performed upon him were of a homosexual nature; and he described in his evidence the additional hurt and pain, which that factor occasioned to him. There was also another important factor. The complainant held strong religious beliefs. He believed in the teachings of the church and he believed that the acts in which he was forced to engage were mortal sins, so that in addition to the pain and anguish of the sexual assaults themselves, he had to live with the fact that in his belief he was committing mortal sins. This ongoing belief did not leave him and he described in his evidence and in his Victim Impact Statement how he was unable to go to Communion. He was unable to participate as he wished to, in a religious life and the religious life of Mount Cashel and of the Church because of what had happened. As a boy and young adolescent, he was unable to appreciate that these acts were forced on him, but how he felt about them is a fact that I accept as described by him in his evidence and in his Victim Impact Statement. That added a further dimension to what must have been an acute agony for him.
>
> We have the evidence of what occurred later in what must be described as a turbulent emotional life. He had to seek the help of psychiatrists. I find that it was only because of his intellectual and musical abilities that somehow he was able to hold his life together to the extent that he could acquire a higher education and training to become a music teacher and thus have a career. I am satisfied on his evidence, that throughout his life he suffered and suffered greatly, as a result of what happened to him at Mount Cashel.
>
> There was a discussion of similar facts in R. v. French (No. 3), (1992), 93 Nfld. & P.E.I.R. 34, which was decided by Puddester, J., of this court. In that case the argument was advanced that there were other factors in the cases of the victims, which had nothing to do with the events of Mount Cashel and that all of the difficulties in the lives of the victims did not necessarily arise from the abuse which they suffered at Mount Cashel. That may be so, but I am satisfied that much of the complainant=s difficulty had a basis in what happened to him at Mount Cashel at the hands of Brother Barry; and as Puddester, J., said in French, Ait defies common sense to think otherwise@.

[62] The trial judge was entitled to consider [redacted]=s victim impact statement in imposing sentence. Indeed, the court is required by s. 722 of the **Criminal Code** to consider any statement prepared by a victim in accordance with the section.

[63] In summary, I am satisfied, having regard to the proven facts, the position of trust of the appellant at the time of the offences and the impact on [redacted], that this Court should not interfere with the sentence imposed. In other words, I find that the sentence is neither clearly unreasonable nor demonstrably unfit.

Disposition

[64] The appeal from conviction is dismissed. Leave to appeal on the question of sentence is granted and the appeal is dismissed.

D.M. Roberts, J.A.

I concur: J.W. Mahoney, J.A.

I concur: W.W. Marshall, J.A.