Supreme Court of Newfoundland — Court of Appeal
R. v. Burke
Date: 19940315
Docket: 1991no.123

GOODRIDGE C.J.N.:—The appellant has appealed his conviction on three charges of indecent assault and one charge of assault causing bodily harm. I have read the decision of Gushue J.A. and, while I agree with his decision on the preliminary issues, I disagree with his conclusion that the indecent assault verdicts were unreasonable.

The appellant was indicted upon eight counts of assault and gross indecency involving four boys who were resident at Mount Cashel Orphanage. Four of the charges were either stayed by the court or dismissed; in respect of the remaining four, the appellant was convicted.

The table that follows this paragraph is a summary of the charges. The complainant in each charge is identified by initials only although the full names of three of them will be provided later. The dates of birth of the three boys in respect of whom convictions were entered against the appellant are disclosed. The various offences are identified by initials which represent gross indecency, assault causing bodily harm and indecent assault. The relevant sections of the *Criminal Code, R.S.C.* 1970, *c.* C-34, in force at the time of the various offences are set out. The period during which the offences are said to have been committed are noted. Finally, the verdict of the court, guilty, not guilty or stayed, is provided and, in respect of each count in which a guilty verdict was rendered, the sentence is given.

No.	Complainant	Offence		Dates	Verdict	Sentence
1.	SME (66.[…].[…])	1A	156	74/09/01-75/12/07	G	5 mo.
2.	SME	GI	157	74/09/01-75/12/07	stay	
3.	SME	ABH	245(2)	75/11/01-75/12/07	G	1 mo.

4.	DVC (65.[…].[…])	1A	156	71/04/19-80/03/14	G	7 mo. concurrent
5.	DVC	GI	157	71/04/19-80/03/14	stay	
6.	DT	GI	157	75/04/19-76/06/17	NG	
7.	DT	A	156	75/04/19-76/06/17	NG	
8.	KL (67.[…].[…])	1A	156	78/09/01-79/09/03	G	18 mo. consecutive

Sections 156, 157 and 245 provide:

> 156. 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 ten years.
>
> 157. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.
>
> 245(1) Every one who commits a common assault is guilty of an offence punishable on summary conviction.
>
> (2) Every one who unlawfully causes bodily harm to any person or commits an assault that causes bodily harm to any person
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for five years; or
> >
> > (b) is guilty of an offence punishable on summary conviction.

Under s. 613 (now s. 686), a court may allow an appeal from conviction where the verdict is unreasonable or unsupported by the evidence or based on a wrong decision in law, but may dismiss an appeal, notwithstanding an error of law, in the circumstances described in that section.

The appellant

The appellant was born in Glasgow, Scotland, on July 17, 1948. At the age of seven he moved to Vancouver. He attended Simon Fraser University for about two years and then joined the Order of the Christian Brothers and moved to Ontario where he subsequently graduated from Guelph University.

He was assigned to Mount Cashel Orphanage at St. John's in 1974. He was in charge of St. Aloysius Dormitory at Mount Cashel but taught at Brother Rice High school during that period.

He left Mount Cashel in June, 1976, and returned in August of 1978. During the period from 1976 to 1978, he taught at St. Bonaventure's Grammar School in St. John's.

When he returned to Mount Cashel in 1978, he was in charge of St. Pius Dormitory. In August of 1981, he left St. John's and returned to the Vancouver area. In 1982, he left the Order of Christian Brothers but continued teaching.

According to the testimonials which were provided in court or referred to, his teaching career was highly successful. A large number of people spoke favourably of him in this respect.

He became assistant principal of the middle school at Vancouver College, an educational institution run by the Christian Brothers.

He was arrested, apparently without advance notice, on April 17, 1989, charged with the above-mentioned offences. He was brought back to Newfoundland unaware, according to his testimony, as to what he was alleged to have done.

The appellant in his evidence denied that the assaults described or any assaults had taken place, with one exception. The sole exception was that he admitted administering corporal punishment to S.M.E., although he did not admit that it was a criminal assault. This was the incident that gave rise to count 3.

S.M.E.

Mr. E. went to Mount Cashel as a boy in 1973. He stayed at St. Al's dorm.

Mr. E. testified in respect of count 1 that the appellant, while applying a lotion to soothe the itch caused by a chicken-pox rash, applied the lotion to the penis and the rectal area and, while doing so, inserted his finger in the boy's rectum. In this respect the trial judge found corroboration for his evidence in the evidence of D.V.C. when testifying with respect to count 4.

He testified in respect of count 2 that the appellant periodically fondled his genitals after he had settled down to bed at night. He had spoken on the Oprah Winfrey Show, had testified at the Hughes Inquiry, had given a detailed interview

to Michael Harris, the publisher of the Newfoundland Express, and had testified at the preliminary inquiry.

The evidence which he gave in court was so much in conflict with statements that he had made on other occasions that the trial judge found that the Crown had not proven its case in respect of count 2 beyond a reasonable doubt [92 Nfld. & P.E.I.R. 289, 16 W.C.B. (2d) 369].

She evidently felt that the evidence of Mr. E. in this case was such that she could not accept it without corroboration.

For some reason, however, she entered a stay of proceedings with respect to count 2 and did not expressly find the appellant not guilty.

There is no issue in this appeal, however, with respect to count 2 and, for the purposes of this appeal, the finding of the trial judge must be regarded as one of not guilty.

Count 3 involved the assault causing bodily harm. Mr. E. testified that he had been whipped by the appellant as punishment for the loss of cards inserted in library books. The evidence in respect of this is clear and cannot be termed either unreasonable or contrary to the evidence. That conviction must stand.

Counts 1 and 4 which involved D.V.C., will be considered together subsequently.

D. V. C.

Mr. C., like Mr. E., began his life at Mount Cashel in St. Al's dorm. He testified that, at the time of the chicken-pox epidemic at Mount Cashel, he developed some form of dermatitis on his legs. He was not apparently infected with chicken-pox but by coincidence he was being treated for the rash on his legs at the same time that other boys at the orphanage were being treated for the chicken-pox rash.

He said that the appellant applied the prescribed ointment to his legs, to his genitals and to his rectal area and, in so doing, inserted his finger in the rectum.

The trial judge believed him and found the appellant guilty of indecent assault on count 4 and, as the same evidence had been used to sustain the charge in count 5, properly stayed the latter.

(There is a question as to whether a judicial stay on the *Kienapple* principle should be entered before a finding of guilt or after a finding of guilt but before entering a conviction. That is not an issue here: see *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, [1975] 1 S.C.R. 729.)

Counts 1 and 4

Mr. E. testified that everybody in St. Aloysius Dormitory except one boy had chicken-pox. They were treated with a lotion.

He said that the appellant took him to a closet in the dormitory and was told to remove his pyjamas and to lie on a counter which the appellant had covered with a towel.

He then testified:

> He was putting [the lotion] on the sores on my upper body and then he started working his way down ... he was putting lotion on my penis area, and then he told me to spread my legs, and then he put his finger up my rectum ... he asked me did it hurt? Did it tickle?

This, according to the recollection of Mr. E., happened once.

In the press interview with Mr. Harris, Mr. E. had given a slightly different account of this incident but it was not so significantly different as in itself to give the trier of fact any difficulty.

Mr. C. was apparently the one boy in the dormitory who did not get chicken-pox. However in checking the boys for chicken-pox, the appellant discovered that Mr. C. had a rash on his legs. Mr. C. testified that he was sent to the Dr. Charles A. Janeway Child Health Centre (the "Janeway") to be examined. Ointment was prescribed and applied by the appellant. He said:

> I would stand on a chair and [the appellant] would apply the ointment to my legs and he would also apply it to my genitals, my penis and my buttocks.

He continued that the rash was just on his legs and not on his genitals or buttocks. He said that the appellant had explained that it was necessary to apply the ointment in these areas to prevent the rash from spreading.

The witness continued: "He also inserted his finger up my rectum."

Mr. C. testified that this happened 10 or 12 times over a three-week period.

Counsel for the appellant contended that the trial judge should have disbelieved, or at least have had a reasonable doubt in respect of, the evidence of both Mr. E. and Mr. C. in connection with the alleged rectal assaults. Mr. E., as already mentioned, had made a great number of inconsistent statements, so much so in fact that the trial judge found it necessary to state:

> It is clear that there is much truth in which Mr. E. has said but his own evidence containing exaggerations and untruths causes me to wonder where the core of truth is and where the exaggeration begins.

Mr. C. had been expelled from the orphanage and was subsequently convicted of a criminal offence.

S.E. had commenced legal action in respect of the alleged assaults upon him by the appellant and other Christian Brothers. Defence counsel took the position that he might perceive that there could be a financial advantage to him if the appellant was convicted. This in their view affected his credibility.

According to the evidence, the two witnesses had not been in touch with each other prior to testifying at the preliminary hearing and, if this is accepted, there was no opportunity for them to fabricate the stories of the rectal assaults. However both men had been contacted by a mainland lawyer. The unspoken inference was that this contact might in some way have been a factor in their testifying as they did. There is nothing to substantiate this contention. Any conclusion with respect to the credibility of the witnesses based on that position is based on speculation and must be rejected.

The trial judge accepted the evidence of Mr. C. with respect to the rectal assault upon him and, because of the similarity between that incident and the rectal

assault upon Mr. E., considered that the evidence of Mr. E. in this respect was thereby corroborated.

There is a question as to whether it was reasonable of the trial judge to accept the evidence of Mr. C. in this respect in view of certain inconsistencies in respect thereof and in view of his expulsion from Mount Cashel and his criminal record.

Mr. C. was uncertain as to the time when the assault took place. He in fact made two conflicting statements at trial in this respect. The following is from the transcript of the evidence of Mr. C. at the trial:

> Q. About how old were you when that happened?
>
> A. Well, I thought I was younger when I gave earlier testimony, but since, I think I was nine or 10.
>
> Q. Alright. Could you tell us what your memory of your age was when these incidents happened?
>
> A. I thought I was about six or seven years old.
>
> On cross-examination, the following exchange took place:
>
> Q. And I think you said that your recollection was that this happened to you when you were about six or seven years old.
>
> A. Yes.

Mr. C. would have had his eighth birthday on December 6, 1973. Brother Burke did not arrive at Mount Cashel until 1974.

Mr. C. said that, when the rash on his legs was discovered, he was sent to the Janeway.

According to the records of the Janeway, Mr. C. visited there on December 27, 1972, and subsequently on January 24, 1973, in respect of warts on his right hand. These were apparently successfully removed.

The next record of a visit was on October 6, 1976, again at a time when the appellant was not at Mount Cashel.

The report of Dr. Joan Hogan given to Dr. Chaker Hobeika reads in part as follows: "At the present time he is using some sort of cream but again he does not know what it is."

This may be taken to confirm that some form of cream had been prescribed to Mr. C. for the treatment of dermatitis some time prior to October 6, 1976, but not at the Janeway.

He had expressly said in his testimony that, on the day that the rash was discovered or the following day, he was sent to the Janeway.

Finally, he had testified that the rectal assault had occurred some considerable time before a 1975 police investigation into events at Mount Cashel. As the appellant arrived at Mount Cashel in September, 1974, not much is to be made of the statement by Mr. C. that the event to which he testified occurred before he became aware of the 1975 police investigation. There was plenty of time after the appellant arrived and before the investigation for the event to which he testified to take place.

The evidence of Mr. C. is key to the guilt of the appellant with respect to both rectal assaults. The trial judge believed Mr. C. and, because she believed him, she regarded his evidence as corroborating that of Mr. E. and consequently believed Mn E. as well.

On the evidence of Mr. C. she said:

> There are some inconsistencies in the recollection of D.C. respecting this matter which is denied completely by the accused. Mr. C. states that he thought that this incident had occurred when he was six or seven. The medical records of the Janeway indicate that D.C. first visited the Janeway in December of 1972 and January of 1973 for warts. He was then seven. These, of course, are totally unrelated to the matter of the rash on his legs. The next visit to the Janeway recorded in the material provided to the court was in October, 1976, when D. was almost 11. On a referral by Dr. Hobieka, D.C. was seen by Dr. Joan Hogan, a specialist in dermatology. Dr. Hogan's notes confirmed the rash and that D. was already using a cream for the

> treatment of the rash at that time. The records at the Janeway note the problem continued into 1978 when he was seen regularly by a dermatologist. Of course, both visits to the Janeway were at time when Mr. Burke was not residing at Mount Cashel. However, it is clear that the prescription of [Dr.] Hogan ... was not the first treatment received by D.C. for the rash. There is no evidence respecting when D.C. was seen by Dr. Hobieka who practised both at the Janeway and at a private clinic in a building near the Janeway. There is evidence from a number of former residence at Mount Cashel that the chicken-pox hit St. Al's when Joseph Burke was the Brother in charge of that dorm. I found D.C. to be a credible witness. His impreciseness respecting dates after such a long term does not lessen his credibility for me.

She then went on to express the view with respect to the criminal record of Mr. C. She said that it is one thing to take advantage of opportunities to steal and another to commit perjury for uncertain gain.

A person's criminal record may be properly considered in assessing a person's credibility. It is clear that the trial judge gave consideration to this and decided that the witness was credible. It is not for this court to gainsay her decision in this respect.

There is always a problem when adult witnesses testify as to indecent assaults which were committed against them when they were young. It is not always easy to recall with accuracy the time of and the events surrounding an indecent assault which occurred many years previously when the witness was quite young.

It is not to be supposed that for this reason a person may be more easily convicted upon the inconsistent evidence of an adult witness with respect to events which occurred when he was a child than upon the evidence of an adult witness of events which occurred when he was an adult.

The cross-examination was directed not so much to the assault as to the time of the assault. The key question is whether there was an indecent assault committed by the appellant. Obviously the appellant did not indecently assault Mr. C. when he was six or seven because the appellant was not in the province at that time; nor probably did he assault him after he became aware of the 1975 police investigation. If the assault occurred, it would have been at the time of the chicken-pox epidemic, possibly in the late months of 1974, or the early months of

1975, when Mr. C. was nine or 10 years old. From a reading of his evidence he may have been attempting to correct an earlier statement in which he had said that the assault occurred when he was six or seven and affirming that it occurred when he was nine or 10.

With respect to attendance at the Janeway, Mr. C. visited Dr. Hobeika who practised both at the Janeway and at a private clinic in a building near the Janeway.

The important thing for the trial judge to determine is whether an indecent assault occurred. The events surrounding it, such as the time when it occurred and the place of initial treatment, are not crucial to the determination of whether there was an indecent assault but may tend to support or undermine evidence of its commission.

In this connection the trial judge considered the inconsistencies such as the age of the witness (which may not have been inconsistent at all) and the place of treatment (the Janeway rather than Dr. Hobeika's office) were not of sufficient significance to offset her belief in the core fact that an indecent assault was committed by the appellant on Mr. C. at the time of the chicken-pox epidemic at Mount Cashel.

Her conclusions cannot be said to be contrary to the evidence or unreasonable and, for this reason, her decision in this respect cannot be set aside.

Similar fact evidence may be used to corroborate other evidence. Details of the indecent assaults upon Mr. C. correspond almost precisely with details of the indecent assault upon Mr. E. and in fact are quite unlike the majority of other indecent and sexual assaults which are discussed in this court in other cases. In *D.P.P. v. Kilbourne,* [1973] A.C. 729, the House of Lords held that the sworn evidence of a child victim could be corroborated by the evidence of another child victim of alleged similar misconduct. In view of this, the trial judge found the evidence of Mr. E. to have been corroborated by that of Mr. C. The conviction of the appellant in respect of count 1 cannot be considered to be unreasonable or unsupported by the evidence.

The alleged assault on Mr. L. occurred some time after the assaults upon Mr. E. and Mr. C. He apparently entered Mount Cashel Orphanage in 1976 or 1977. Mr. L. was in St. Pius Dormitory at a time when the appellant was in charge of it.

Mr. L. said that if he did something wrong such as wetting his bed or failing a test he would be brought to the office of the appellant and physically abused. The appellant would pick his armpits, make him take off his clothes and touch his genitals. The office was adjacent to St. Pius Dormitory.

In touching the genitals, the appellant would ask Mr. L. if he liked it to which Mr. L. would reply no.

Mr. L. then said that he would continue to pick the armpits more, make him put his clothes back on and sit on the bed that was in the office.

By picking at the armpits, Mr. L. said that the. appellant would put his fingernails together and make him lift his arm and he would pinch with his fingers until he pulled off the skin.

Mr. L. testified that the appellant would ask him to touch his penis but Mr. L. always refused.

The witness said that the "picking" sessions lasted 15 or 20 minutes as frequently as weekly. The picking would cause bleeding and scabs would form. The appellant on a subsequent picking would take off the scabs causing more bleeding.

The witness testified at the trial that no one noticed the scabs. He had earlier testified that some people had noticed them.

If they were under the arm they are unlikely to have been noticed.

However, there was evidence that the boys showered together. There were apparently six shower heads in the shower bath area and any visible scars or

marks on a boy could be seen by the other boys. There was in this case no evidence that anyone ever saw any such marks on Mr. L.

The fact that no one saw them of course is not proof that they were not there. It is purely a matter to be considered in assessing the credibility of Mr. L.

Counsel for the appellant stressed the bizarre nature of alleged assault and that Mr. L. had been cruelly treated as a child before entering Mount Cashel.

The trial judge noted that another bed-wetter in the dormitory had not been punished as Mr. L. said he had been punished.

She said that she found the evidence of Mr. L. credible and accepted it.

Mr. L. had not initially come forward with a complaint voluntarily. He is in the army. The police contacted him at a military base in New Brunswick. He had first said that he wanted nothing to do with the investigation but later came forward with a complaint of the events above-described.

The strange events related by Mr. L. were denied by the appellant. The trial judge noted that she had generally rejected the denial of the appellant.

Upon what basis is her decision to be disturbed if she finds the complainant credible and the accused otherwise? There was evidence to support her conclusion that the assaults occurred and there is nothing unreasonable about the trial judge's finding in respect thereof.

There were as in the other cases some inconsistencies in the evidence but these did not relate to the criminal act.

The trial judge convicted the appellant of an indecent assault upon Mr. L. Just what acts, if any, in addition to the fondling of the genitals constituted that assault is a matter to be considered at the sentence appeal.

Summary

The appeal with respect to counts 1, 3, 4 and 8 is denied. The convictions are confirmed.

Sentence appeal

Either party may apply for a date for the hearing of the sentence appeal.

GUSHUE J.A. (dissenting):—The appellant has appealed his conviction by Cameron J. of three counts of indecent assault, contrary to the former s. 156 of the *Criminal Code of* Canada, and one count of assault causing bodily harm, contrary to the former s. 245(2) of the *Criminal Code [92* Nfld. & P.E.I.R. 289, 16 W.C.B. (2d) 369]. He also seeks leave to appeal and, if granted, appeals the sentences imposed in respect of the above convictions.

The appellant had been charged on an indictment alleging three counts of gross indecency, four counts of indecent assault and one count of assault causing bodily harm. He elected to be tried by a judge and jury, but ultimately re-elected to be tried by a judge sitting without a jury. He was convicted of the four offences indicated above and acquitted of the remainder of the charges. In respect of the indecent assault convictions, the appellant was sentenced to five, seven and 18 months' imprisonment respectively, the five and seven-month sentences to be served concurrently with each other, but the 18-month sentence to be consecutive. He was sentenced to one month concurrent on the assault causing bodily harm conviction, the total sentence therefore being 25 months' imprisonment. He is presently on judicial release pending disposition of the appeal.

At the time of the alleged commission of these offences, the appellant was a member of the Order of Christian Brothers, and was assigned to and living at Mount Cashel Orphanage in St. John's. He had been assigned to the Orphanage in September, 1974, when he was 26 years old. He remained there between September, 1974, and June, 1976, during which time he was in charge of a dormitory of boys, most of whom ranged in age between five and 12 years. He also taught at two schools in the St. John's area during that period of time. He left Mount Cashel in June, 1976, to teach in St. John's, returning periodically to Mount Cashel to look after boys on a temporary basis. He returned on a permanent basis to Mount Cashel in September, 1978, where he remained until September,

1981, when he returned to his home province of British Columbia. He left the Order of Christian Brothers in 1982. He, however, continued to teach until the time of his arrest in 1989.

The offences

The offences of indecent assault were found to have been committed against S.M.E., D.V.C., and K.L. The assault causing bodily harm was committed against S.E.

The sexual assault on S.E. was alleged to have occurred when E. was between eight and nine years old and happened on one occasion when the appellant applied lotion to E.'s body to counter chicken-pox. During the application, E. claimed that the appellant touched his penis area and put a finger in his rectum. The indecent assault on D.C. was of the same nature when apparently the lotion was applied to his body for a similar purpose. C. was at the time between 11 and 12 years old.

As to the indecent assault on K.L., the complainant stated that the appellant, on various occasions when the complainant was between nine and 10 years old, pinched the skin under his arms, causing them to bleed, and touched his genitals.

The assault causing bodily harm was a severe beating given with a belt to S.E. on his bare buttocks, resulting in considerable bruising.

The pre-trial decisions

The various offences were alleged to have occurred in 1975 or 1976, and in 1978 or 1979. The first charge was laid in April, 1989. Prior to the appellant's trial, applications were made on his behalf for a stay of proceedings, first on the grounds that the conduct of the Crown was so offensive as to amount to an abuse of process at common law, and was contrary to the principles of fundamental justice as enunciated in s. 7 of the *Canadian Charter of Rights and Freedoms;* secondly, a submission was made that the combined effect of delay and extensive publicity surrounding the matter leading up to the time of trial made a

fair trial impossible, thus violating the appellant's rights under s. 11(d) of the Charter.

The trial judge dealt first with the application made pursuant to s. 11(d) which states:

> 11. Any person charged with an offence has the right
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> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

In dealing with the issue of delay, the trial judge stated that she was not persuaded at that stage that any prejudice had been demonstrated to have been caused the appellant as a result of such delay. However, she left open this issue in the event that evidence unfolding at trial would indicate that there was, in fact, such prejudice.

The second issue was that of pre-trial publicity which, it was alleged, had infringed the appellant's right to obtain an impartial jury. In denying this aspect of the application, the trial judge relied on *R. v. Vermette* (1988), 41 C.C.C. (3d) 523 at p. 530, 50 D.L.R. (4th) 385, [1988] 1 S.C.R. 985 (S.C.C.), in which La Forest J. stated:

> In my view, a stay of proceedings was, in this case, premature. It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury.

While acknowledging that there had, indeed, been extensive pre-trial publicity, the trial judge found that it was only during the jury selection process that it could be determined that an impartial jury could not be subpoened.

In dealing with the abuse of process argument, the trial judge found that the applicant had based his application upon three broad categories:

> 1. The halting of a police investigation in 1975 and events up to February of 1989;
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> 2. the establishment of a Royal Commission known as the Hughes Commission, and
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> 3. recent executive actions.

Although she agreed that there had been an investigation in 1975 into the actions of certain Christian Brothers and that such investigation had been improperly halted, the trial judge found that there was no arrangement between the appellant and the Crown at that time that no charges would be laid against him; neither did he compromise his position in any way to his detriment under any such misapprehension. Nor, she found, was there any reason to believe that the charges were more serious in 1991 when the trial was held than they would have been in 1975 or 1976. She, accordingly, dismissed the application.

It was at this stage that the appellant re-elected trial before judge alone, rather than before judge and jury.

The trial 1.

S.E.

It may be said that S.E. was the principal complainant against the appellant. E., as the trial judge put it:

> ... has been at the centre of much of the attention surrounding events at Mount Cashel in the mid-70s. His was the first statement taken by the police in February of 1989 on the re-opening of the investigation of Mount Cashel. In March, a newspaper account detailing the allegations against Mr. Burke appeared in a local paper; subsequently, Mr. E. gave evidence at the Hughes Inquiry, a preliminary hearing and appeared on a widely circulated (American) television program.

The information in respect of S.E. and the appellant contained three counts: one alleging various indecent assaults, one alleging gross indecencies and one alleging assault causing bodily harm.

At the trial, E. gave evidence that the following assaults took place:

> (a) a strapping which is alleged to have taken place in a closet as a result of a lost library book;
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> (b) a series of sexual assaults involving fondling of E.'s genitals and rectum at bedtime on a regular basis;

(c) a sexual assault which the appellant was alleged to have committed in a closet in the course of applying ointment for chicken pox to E.'s body;

(d) a sexual assault alleged to have occurred while E. was in bed, involving the appellant touching E.'s penis and having E. touch the appellant's penis, and the appellant kneeling on the bed over the accused.

There were various discrepancies and exaggerations in the evidence of Mr. E. Significantly, on the American television show (the Oprah Winfrey show), he made a statement that sexual intercourse had taken place between boys and Brothers at Mount Cashel which he subsequently admitted was untrue. Further, the various claimed sexual assaults involving reciprocal genital fondling was not accepted by the trial judge in light of other evidence at trial. Despite these discrepancies, the trial judge accepted the evidence of E. with respect to the lotion incident, mainly because there was "a striking similarity" in E.'s evidence in this regard and that of D.C. She also accepted the evidence, which unquestionably was corroborated, in respect of the strapping incident.

2. *D. C.*

This complainant gave evidence only as to one type of alleged sexual abuse; namely, that during the application of ointment to his body by the appellant for a skin condition, which he said occurred every second night or so for about three weeks, that the ointment was applied to his legs, genitals, buttocks and that the appellant placed his finger in Mr. C.'s rectum. There was certain evidence of C. having been involved in dishonest activity and eventually having been expelled from Mount Cashel for these activities, but the trial judge nevertheless found him to be a credible witness and entered the conviction for indecent assault. She stayed proceedings in respect of the charge of gross indecency.

3. K .L.

Mr. L. stated that, if he did something wrong while he resided in the dormitory administered by the appellant, the appellant, in his office on the dormitory, pinched the skin under L.'s arms, causing them to bleed and would also touch his

genitals. L. claimed these incidents lasted about 15 to 20 minutes and happened at the rate of about once a week during the approximately one year that he was directly under the appellant's care. There were some discrepancies in his evidence, but the trial judge found L. to be, as she put it, "a direct, confident witness".

The remaining two charges of gross indecency were made upon the complaint of one D.T. These were not accepted by the trial judge as having been proven beyond a reasonable doubt.

In general terms, the evidence at trial indicated that, while the strapping incident had been known to certain of the authorities in 1976, no allegations of sexual assault were known or made at that time with respect to the appellant. Character evidence was called on the appellant's behalf and it was established that no allegations of impropriety, sexual or otherwise, have been raised against the appellant since he returned to British Columbia and resumed his teaching career. Certain persons who were students of his in the 1970's also gave evidence to the effect that they were unaware of any such transgressions by the appellant. There was also evidence of his good character. The appellant himself gave evidence and emphatically denied that any of the claimed sexual assaults ever occurred, while admitting that the incident giving rise to the charge of the physical assault charge by S.E. did in fact occur although he did not recall it being as severe as alleged.

In dealing with the evidence generally and the denials by the appellant, the trial judge stated that she was "rejecting" those denials. No reasons for her non-acceptance of the appellant's evidence were enunciated by the trial judge.

Issues on appeal

The notice of appeal filed by the appellant sets out 17 grounds of appeal. However, these may be narrowed to submissions that the trial judge erred in:

1. declining to stay the proceedings on the grounds of unreasonable delay in initiating the prosecution or on the grounds of excessive pre-trial publicity;

2. finding the complainant D.C. to be "a credible witness";

3. concluding that the "chicken-pox incident alone" supported a conviction on the first count of indecent assault on S.E. because the "application of the lotion" incident with D.C. constituted corroboration;

4. finding that K.L.'s evidence was credible in the light of the inconsistencies in it and direct contradiction of parts of it by other witnesses; and,

5. permitting the Crown to adduce evidence in rebuttal.

I shall deal with these in order.

1. *The stay of proceedings applications*

The factual background which gave rise to the various applications for stays of proceedings to be entered in this matter has been alluded to above. Similar applications were made before the Trial Division in several other "Mount Cashel prosecutions" and one, R. *v. English,* has been the subject of two appeals to this court, the latter one having been heard in full in June, 1993, and in respect of which a judgment was filed on September 1, 1993. The report of that case may be found at 84 C.C.C. (3d) 511, 111 Nfld. & P.E.I.R. 323, 20 W.C.B. (2d) 586. The historical background to the whole Mount Cashel affair is set forth by Goodridge C.J.N. in considerable detail in his judgment and it is likewise useful to repeat that here. I quote [at pp. 517-9]:

> History
>
> The Congregation of Christian Brothers was founded in Ireland by Edmund Rice in 1802. It was an educational order and in 1876 extended its work to Newfoundland. In 1892 it established Mount Cashel Orphanage in St. John's. The Order in Canada became known in 1962 as the Christian Brothers of Ireland in Canada, incorporated by Act of Parliament.
>
> The operation of the orphanage and the provision of education to its residents and to pupils at other schools in the province won general acclaim.
>
> In the early 1970's, as the Order was preparing to celebrate the 100th anniversary of its coming to Newfoundland, it fell under a cloud. There were reports, not widely circulated, that some of the Brothers were sexually abusing some of the residents at Mount Cashel.

Detective Robert Hillier of the Royal Newfoundland Constabulary was assigned to investigate the matter but the investigation was stopped upon orders from his superiors. At the time that the investigation was stopped, Detective Hillier had reasonable and probable grounds for laying charges against some of the Christian Brothers including the appellant.

Discussions took place between Department of Justice officials and officials of the Order and, as a result, the appellant and another Brother were transferred out of the Province of Newfoundland and no prosecutions were taken.

The matter then remained dormant for a number of years.

The boys who were alleged to have been sexually abused grew to become men and many of them brought with them to manhood problems which they attributed to sexual abuse at the Orphanage.

In February, 1989, the matter resurfaced as a consequence of a statement made on a radio program which was brought to the attention of the Associate Deputy Attorney-General who instructed the Royal Newfoundland Constabulary to reopen the investigation.

The police thereupon reopened the investigation. While this was underway the Lieutenant-Governor in Council appointed the Honourable Samuel Hughes, Q.C., a retired judge of the Supreme Court of Ontario, to conduct an inquiry relating to the investigation conducted by the Royal Newfoundland Constabulary into allegations of child abuse at Mount Cashel Orphanage in 1975, and in relation to two police reports dated December 18, 1975, and March 3, 1976, and into the handling of the said investigation by the Royal Newfoundland Constabulary and by the Department of Justice.

The terms of reference of the inquiry involved primarily an investigation of the conduct of the police in the 1974-75 period and the then prevailing policies of the Department of Justice and the Department of Social Services with respect to allegations of sexual and physical abuse of children. Whether the terms of reference were intra vires the Province is a matter to which brief reference will be made below. Whether or not they were, the hearings themselves ranged over a wide range of topics and the commission heard evidence from former residents of Mount Cashel of sexual abuse by Christian Brothers at that institution. Much of that evidence was also presented at the trials of the Christian Brothers, including the appellant, who had been, prior to the commencement of the hearing or during the course thereof, charged with various offences of a sexual nature.

The inquiry got underway and commanded extensive public attention from the commencement of the hearings of the inquiry on September 11, 1989, until their conclusion on June 29, 1990.

All of the former residents who testified against the appellant at trial had also testified at the Hughes Inquiry where they gave evidence, in public, incriminating the appellant. In addition to that there was evidence given, similarly in public, that the appellant had confessed to some of the allegations being made against him.

> At one point [English] was actually subpoenaed to testify before the commission but the subpoena was subsequently withdrawn.
>
> The Hughes Inquiry spawned at least two books — "Unholy Orders" by Michael Harris and "Suffer Little Children" by Derek O'Brien and a television special based on material emanating from the hearings.
>
> "Unholy Orders" was published and sold at bookstores in St. John's. Circulation of "Suffer Little Children" was prohibited by court injunction in the St. John's area and televising the special was likewise prohibited by injunction.
>
> The report of the Hughes Inquiry itself was withheld from general circulation until the trials of the Christian Brothers charged had been completed.
>
> With the completion of the trials, "Suffer Little Children" was allowed to be sold at bookstores in St. John's, the television special was telecast and the report of the Hughes Inquiry was released.
>
> Evidence that might not be admissible in a criminal trial was heard by the Hughes Commission —evidence which was not subject to the ordinary rules which prevail in criminal trials. The inquiry itself, while being conducted in public, was also telecast as it proceeded and the daily proceedings were re-telecast during the evening. The material presented to the Hughes Inquiry was widely reported by the news media.

Edward English was convicted of nine charges of indecent assault, two of gross indecency and two of assault causing bodily harm. His offences against the young boys he assaulted included genital fondling, masturbation and attempted intercourse. Without question, his actions were among the most serious of the Mount Cashel perpetrators. He was one of the two Brothers who were investigated in the mid-1970's and who were transferred out of the province in 1976.

Twenty charges were laid against English in 1989 and, as mentioned, he was ultimately convicted of 13 of them. Three pre-trial applications were taken in the Trial Division with respect to the charges against him, one on the basis of abuse of process because of pre-charge delay, one for a change of venue and one for a stay of the charges, again on the ground of abuse of process and on the ground that the continuation of the proceedings was contrary to ss. 7 and 11(b) of the Charter. All three applications were unsuccessful. This court, on appeal, confirmed the decisions refusing stays of proceedings on the basis that it had not been established that the passage of time had prejudiced the accused in his ability to make full answer and defence, an impartial jury had in fact been selected

and that the pre-trial publicity, including the holding of the Hughes Inquiry, was not used for any improper purpose and had no bearing or effect on the accused's ability to receive a fair trial.

The charges against English were much more serious than those brought against the appellant. That, however, has not been shown to be of any relevance. The reasons given in this matter by the trial judge for the refusal of the various applications taken before her are substantially the same as those given by the Trial Division judges on the applications taken by English and, likewise, the judgments of this court in English essentially provide the answer to the submissions of counsel for the appellant on appeal.

The onus is always on an applicant for Charter relief to demonstrate that his or her rights have been violated and it has not been shown here that delay in the institution of the charges against the appellant has had any prejudicial effect on him. The only charge which it is known could have been laid in the mid-1970's was that of the assault causing bodily harm. However, while there is no information as to the possibility of sexual charges being brought against him between 1975 and 1980, neither has it been demonstrated that the failure to do so at that time has had any prejudicial effect upon the ability of the appellant to make full answer and defence at his trial.

Nor has the issue of pre-trial publicity been shown to have been of any relevance. This is particularly so where the appellant re-elected to be tried before judge alone, rather than by judge and jury. If, as stated in *Vermette,* the impartiality of a jury can only be determined at the stage when the jury is to be selected then, obviously, that stage never having been reached, anything that could be said in this regard can be no more than speculation. With respect to the abuse of process argument, the halting of the police investigation in 1975 in essence had no effect on the appellant because he had not been the subject of investigation at that time, the only reference to him being that investigating officers were aware of the fact of the strapping of S.E. There is no suggestion, as already stated, that any charges in that regard were contemplated. Further, and obviously, the

appellant's position was not compromised in any way because there was no understanding or agreement between him and the Order of Christian Brothers or the government.

It must be added that the evidence of the two experts called by the appellant to the effect that they felt that an impartial jury could not be selected in my opinion added nothing of substance to the argument of his counsel in this regard. In any event, that question is in effect moot.

In summary, it must be said in relation to this ground of appeal that if Edward English was not entitled to a stay of proceedings on the basis of pre-trial publicity and delay, it is not possible, in the absence of any evidence of prejudice, to conclude that the appellant is entitled to a stay. There is no such evidence and this ground of appeal must be dismissed.

2. The trial

The appellant maintains that the various convictions should be set aside on the basis that they are unreasonable or cannot be supported by the evidence at trial *(Criminal Code, s, 686(1)(a)(i)).* His counsel argues that not only does the evidence not support the convictions, but additionally the trial judge erred in her assessment of the relative credibility of Crown and defence witnesses, principally the complainants and the appellant himself. The appellant further states that the trial judge did not give reasons for her acceptance of the pertinent evidence of the complainants and the rejection of that of the appellant. He submits that, in the circumstances of this case, she should have done so.

Three judgments of the Supreme Court succinctly and completely set out the role of an appellate court in a matter such as this. The first one is *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 at p. 430, 43 D.L.R. (4th) 424, [1987] 2 S.C.R. *168,* in which McIntyre J. stated:

> The function of the Court of Appeal, under s. 613(1)(a)(i) of the *Criminal Code,* goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could

> reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig D.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.

In R. *v. S (PL.)* (1991), 64 C.C.C. (3d) *193* at p. 197, [1991] 1 S.C.R. 909, 5 C.R. (4th) 351, Sopinka J. stated:

> In an appeal founded on s, 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test: see *R. v. Yebes (1987),* 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424; *[1987]* 2 S.C.R. 168.

And, in *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 at pp. 141-2, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257, McLachlin J. expanded the above concepts to the issue of credibility as follows:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility ... The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

The defence evidence

As stated, the appellant testified that the sexual assaults with which he was charged never occurred. He did, however, state that one of the boys, W.E.,

brother of S.E., complained to him that he (W.) was being sexually assaulted by one of the other Brothers which the appellant reported to his superiors and was told that it would be looked after. He also stated that at no other time in his life had any complaints of improper behaviour, sexual or otherwise, been made against him (other than the S.E. beating), although he continued to teach and in fact had risen to the position of vice-principal of Vancouver College in Vancouver.

Various persons testified as to the appellant's good character, including former students in St. John's and Vancouver. It was also stated that some 200 unsolicited letters had been written on his behalf, although those were not entered into evidence. With respect to the alleged assaults, W.E., a Mount Cashel resident at the relevant time, who himself had been subjected to sexual abuse by three other Brothers, testified that he felt the appellant was a caring person who could be relied upon. On direct examination, he stated the following:

> Q. Now, you've indicated, sir, that certain of the Brothers did certain things to you. Brother Burke had the opportunity to sexually assault you in the sense that you were alone with him from time to time on a number of occasions, weren't you, at Mount Cashel?
>
> A. Many times.
>
> Q. He never so much as laid a hand on you did he?
>
> A. He never ever ... I've never known him to sexually assault anybody, you cannot compare him with the other three Christian Brothers. Yes. There's certainly no comparison is there?
>
> A. No, there's not.

B.L., another resident, gave similar evidence when questioned by appellant's counsel:

> Q. What can you say about the years you were on the dorm with Mr. Burke?
>
> A. Good years, probably the best years of my life of growing up when I was a teenager.

> Q. How did Mr. Burke get along with the children in the dormitory? A. Really good, actually.
>
> Q. Was there ever in the time that you were there any sexual touching of you by Mr. Burke? Did you ever see it of any other children?
>
> A. No.

Before dealing with the specific assaults, one should repeat what the trial judge said with respect to the evidence of the appellant:

> It must be clear I have generally rejected the denials by Joseph Burke. He is an intelligent man, who for some children has been an important teacher, guide and role model. They will, no doubt, be shocked that I can reject the evidence of such a person or that it has not raised a reasonable doubt in my mind. The simple fact is that citizens who for years may live exemplary lives may commit crimes even the types of crimes alleged in this case. In this case, I have listened carefully to the evidence submitted and for the reasons stated I have accepted the evidence of the complainants and I have found reasonable doubt only in the evidence respecting counts 6 and 7 and as stated in respect of the evidence on counts 1 and 2.

The sexual assaults

A. S.E.

Reference has already been made to the evidence of S.E. He was demonstrated to have lied with respect to his allegations of sexual intercourse between Brothers and boys at Mount Cashel and his explanation of why he had lied was found by the trial judge not to be credible. The trial judge further did not accept his evidence in respect of sexual assaults involving fondling of E.'s genitals by the appellant or while E. was in bed. These alleged incidents were stated by E. to have continued over a considerable period of time, but other evidence cast doubt on whether they had ever occurred.

W.E. stated in evidence that his brother had never mentioned the sexual assault incidents to him. Further, he stated that it would not have been possible for the appellant to have gone to S.E.'s bed on a regular basis and to sexually assault him, as alleged by S.E., without other boys in the dormitory being fully aware of it.

There was no evidence of any such awareness. The evidence of B.L. in this regard is also significant.

Ultimately, the only allegation of sexual impropriety on the part of the appellant with respect to S.E. which was accepted by the trial judge was the incident of the applying of ointment to E.'s body by the appellant when E. was suffering from chicken-pox. The various other alleged incidents were supposed to have occurred on many occasions, but the "lotion incident", according to E., occurred only once. His evidence in this respect is as follows:

> A. ... he [the appellant] had a towel laid out on top of the counter and he asked me to lie up on it, and I was lying upon it and he started treating me with a lotion.
>
> Q. And when you say he started treating you with the lotion, what was he doing with the lotion?
>
> A. He was putting it on the sores on my upper body, and then he started working his way down.
>
> Q. And what happened as he was working his way down?
>
> A. He was putting lotion on my penis area, and then he told me to spread my legs, and then he put his finger up my rectum ... he asked me did it hurt? Did it tickle?

The trial judge noted that there was "a striking similarity between the complaint of D.C., and this complaint of S.E.". She further stated that she found "corroboration in the case of the application of the lotion incident but there is no corroboration on the other incidents".

The trial judge accepted the evidence of E. and C. that there had been no recent contact between them. This, to a great extent, appears to be the reason for her finding that E.'s evidence was corroborated.

However, one must look carefully at the above evidence. There is no doubt that the appellant was applying the lotion for valid, medicinal reasons. It was done on

one occasion only and it is not surprising that the lotion was applied to the whole of E.'s body. Even if, on reflection in later years, E. considered this to have been a sexual assault, he does not say so. He simply states that the appellant put lotion "on [my] penis area and then he put his finger up my rectum". There is no suggestion of digital manipulation whatever and it does not appear from that statement that there was necessarily any sexual connotation to what was done.

The meaning of sexual assault (which would encompass the previous offence of indecent assault), as stated by McIntyre J. in R. *v Chase* (1987), *37* C.C.C. (3d) *97* at pp. 103-4, 45 D.L.R. (4th) *98, [1987] 2* S.C.R. *293, is* worth repeating:

> Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?" *(7Uylor, supra, per* Laycraft C.J.A., at p. 162 C.C.C., p. 269 C.R.). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant ... The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

In all the circumstances here, it does appear that the conduct of the appellant was at least equally as consistent with the application of lotion for medicinal purposes only as it was for the purpose of sexual gratification or assault. When one adds to this the trial judge's own observation of E.'s evidence to the effect that she was having considerable trouble with his credibility, the pendulum appears to swing very much in favour of the appellant. The judge commented:

> It is clear there is much truth in what Mr. E. has said, but his own evidence, containing exaggerations and untruths causes me to wonder where the core of truth is, and where the exaggeration begins.

Her reference to the truthful part of E.'s evidence would appear to be to that pertaining to the physical assault. In any event, all of the above leads me inevitably to the conclusion that it was most dangerous on this evidence to register a conviction against the appellant. I shall have further to say below on the issue of credibility.

With respect, I find that the verdict entered by the trial judge was an unreasonable one in the circumstances and conclude that this conviction should be set aside.

B. *D.C.*

D.C. was a resident of Mount Cashel from April, 1971, to March, 1980. He was a resident of the dormitory of which, for a period of time, the appellant was in charge. He stated in evidence that he "got along pretty good" with the appellant. As stated by the trial judge, C. "was, by his own admission, often in trouble including for dishonest activity and eventually he was kicked out of Mount Cashel for his transgressions".

The claimed incident of indecent assault which he ascribes to the appellant was similar to that for which a conviction was registered against S.E. He refers to the period of time when he and other boys were suffering from chicken-pox or measles and the appellant took him to a room to apply ointment to his body. He stated that the ointment was prescribed for treatment of his legs and the appellant applied it to him every second night "for a while". He described the manner of application as follows:

> Q. In what manner would he apply the ointment to you?
>
> A. Well, he would take me into the storage room that was in the dormitory, and he would ask me to take off my clothes. I would stand on a chair and he would apply the ointment to my legs, and he would also apply it to my genitals, my penis, and on my buttocks.
>
> Q. What part of your body had a rash on it? A. To my memory, it was just my legs.

Q. Did you have any rash on, to your recollection, on your buttocks, your penis, or that part of your body?

A. No.

Q. Okay. Mr. C., what explanation, if any, was given for placing that on that part of your body other than your legs?

A. The explanation that was given me was that he had to do it so that the rash wouldn't spread. He also inserted his finger up my rectum.

It was estimated by C. that ointment was applied to his body "about 10 to a dozen times over a three-week period". (It may not, however, have been because of chicken-pox, but rather some form of dermatitis.)

Essentially the same comments that have been made regarding S.E.'s evidence relating to the application of the ointment can be made with respect to that of D.C. There is no evidence of any manipulation or fondling which would indicate touching for a sexual purpose or gratification on the part of the appellant. Even taken on its own, it is, with respect, difficult to appreciate how the evidence establishes the appellant's guilt of the commission of an indecent assault beyond a reasonable doubt. While the trial judge appeared to find mutual corroboration in the evidence of S.E. and D.C., the point is that the evidence establishes that many of the boys on the dormitory were suffering from chicken-pox at that time and were likewise treated with ointment by the appellant. There is no evidence of other such complaints.

There are other significant features to the evidence of D.C. as well. It appears that he has run afoul of the law and has been convicted of various criminal offences, some serious. Further, on being contacted by the police in 1989 concerning any possible sexual assaults which might have been inflicted on him at Mount Cashel, his initial response was that he "didn't want any part of it". C. was at this time living in Scarborough, Ontario, and it was only after having been contacted by a lawyer in relation to the matter that he came forward and made the allegation which led to the charge against the appellant.

The trial judge did consider these factors and, having found C. to be a credible witness, she further commented:

> In respect of Mr. C.'s character and motives — it is one thing to take advantage of opportunities to steal, it is another to make a false allegation and perjure oneself for an uncertain gain. Frankly, if he were going to create this history of sexual assault he would do a much better job than this allegation.

In any event, in my view, the verdict was an unreasonable one in the circumstances and that conviction must be set aside.

C. K.L.

The evidence of K.L. was found by the trial judge to have been given in a straightforward manner and was accepted by her. He apparently resided at Mount Cashel for approximately a year from September, 1978, to September, 1979, and was a resident of the dormitory of which the appellant had charge. He, with a younger sibling, had been removed from the custody of his father by the Director of Child Welfare because of physical abuse.

L. claimed that there had been "some physical abuse and sexual abuse" inflicted on him by the appellant. He described it as follows:

> Well, if I did something wrong, like, for instance, when I was in Mount Cashel, I had a bed-wetting problem, and for instance, if I wet the bed or failed a test in school or didn't get along with one of the Brothers — I'm sorry, one of the other kids that were in the dorm, maybe I'd get punished, like, get hauled into his office and he'd physically abuse me like, pick my armpits and make me take off all my clothes and touch my private parts.

From his evidence, it would appear that the sessions in the appellant's "office" always involved the picking of L.'s armpits and pulling off the skin, together with fondling of his genitals. He claimed this went on for "quite some time" once or twice a week and was always associated with punishment for bed-wetting, failing a test or having an argument with other residents of the dormitory. He also claimed that the appellant asked him to touch his (the appellant's) penis and that L. refused to do so. Apparently when he made such refusals, the appellant "probably would continue, like I said, pick my armpits".

L. also claimed that the armpit picking would cause his underarms to bleed and that scabs would form. These would then be picked off by way of punishment on the next meeting with the appellant in his office.

There is no corroboration of any of the above which, as pointed out by the trial judge, is not surprising. Nor was there any collateral evidence which might substantiate any aspect of the complainant's testimony. One witness who was also a resident of the dormitory at that time did, however, state that any scabs under L.'s arms would have been noticed had they been there.

The trial judge makes no comment on the rather bizarre nature of the complainant's evidence, but simply found that he was a "direct, confident witness" and that his evidence was credible.

With respect, I think that this evidence required some analysis. The impression one gets from reading it is that the main complaint was directed towards the physical aspect, with the reference to the fondling of the genitals being almost incidental. Certainly the latter aspect is not elaborated on in the evidence at all, nor in the judgment. The evidence is to say the least most unusual.

Having found the appellant guilty on the charge with respect to Mr. L., it is at this stage in her judgment that the trial judge makes the statement, already quoted, of her rejection of the evidence of the appellant. As is alleged by counsel for the appellant, she gives no reasons for doing so. Rather, she appears to be saying no more than that despite the fact that a person is respected and has played a significant role in his or her community, that person may still be capable of committing the types of crimes allegedly committed by him at Mount Cashel. Her various conclusions reached in the matter appear to be guided more by the evidence of the complainants and her acceptance or rejection of such evidence than by any reference to that of the appellant himself. This highlights the problem of an accused often being unable to elaborate on a denial of commission of a crime.

Without question, the law generally as to the necessity of a trial judge's giving reasons is as stated by E.G. Ewaschuk in his *Criminal Pleadings and Practice in Canada,* to the effect that:

> The trial judge is not required in a non jury case to render reasons for his judgment since there is a presumption, in the absence of evidence to the contrary, that the trial judge applied the proper and relevant principles, i.e., that he was alive to the law.
>
> ... a trial judge in rendering judgment need not refer to each item of evidence relied on by the accused.

This has been confirmed in a recent judgment of the Supreme Court of Canada *(R. v. Morin* (1988), 44 C.C.C. (3d) 193, [1988] 2 S.C.R. 345, 66 C.R. (3d) 1), and in three quite recent judgments of this court: *R. v. Blundon* (1994), 114 Nfld. & P.E.I.R. 178, 22 W.C.B. (2d) 480; *R. v. Hristov,* and *R. v. Murphy* (1994), 114 Nfld. & P.E.I.R. 148, 22 W.C.B. (2d) 443.

The rule, however, is not an inviolable one. As McLachlin J. stated in *R. v. W (R.), supra,* a Court of Appeal must show great deference to findings of credibility made at trial. However, it is still open to the appellate court to overturn a verdict based on findings of credibility, having due regard to the advantages afforded to the trial judge, if it concludes that the verdict is unreasonable. If the transcript of evidence reveals that there is evidence, whether of a complainant or the accused person himself, which could have affected the outcome of the trial and which does not appear from the reasons of the trial judge to have been considered by him or her in arriving at a decision, then it is open to the court to question that decision.

The difficulty in the present case is that the appellant gave his evidence in a straightforward and, on the face of it at least, forthright manner. There was considerable evidence as to his good character from former students and other persons who had dealings with him over the years, many of whom are highly respected in their community. On the other hand, that was not so with the complainants, as was indeed found by the trial judge herself. The evidence of both E. and C. had many flaws and must, in my view, be regarded with suspicion. Further, the evidence of L. accuses the appellant of most strange and unusual behaviour which appears to be out of character. If that evidence is to be accepted

and that of the appellant completely rejected, as the trial judge makes very clear she is doing, then it would appear that, given the peculiar circumstances of this matter, an explanation of the respective acceptances and rejections is called for.

The charges relating to E. and C. (other than the physical assault on E.) have, however, already been dealt with on other grounds. In my view, the evidence was not sufficient to establish guilt beyond a reasonable doubt. This leaves the court with the matter of L. However, given the nature of the evidence of L. and all the circumstances, one has to feel that it would be dangerous, and unjust to the accused, to allow this conviction to stand. In the absence of some collateral evidence, his evidence is too bizarre to accept. I would therefore find that this verdict was likewise unreasonable and quash it.

The assault causing bodily harm conviction

There can be no doubt that the evidence established that the appellant administered a severe beating to S.E. in December, 1975, causing considerable bruising on his buttocks. E.'s own evidence in this regard was corroborated by his brother W. and by a medical doctor who examined E. at the time. Why the beating was administered is somewhat in dispute, but that is in essence irrelevant because in any event, as was found by the trial judge, the punishment was not a reasonable one in the circumstances of the matter. Indeed, that the beating was administered was not denied by the appellant. Unquestionably, it was corporal punishment of an extreme nature which was unacceptable even by the standards of 1975 when physical punishment by persons standing *"in loco parentis"* was perhaps more common than it is now.

One gathers from the statements of counsel on the appeal hearing that the appeal laid in respect of this conviction is not being seriously pursued and nothing more need be said about it other than that the conviction must be affirmed. If the appellant wishes to proceed with the appeal against sentence, it is open to him to do so.

In the result, I would quash the conviction in respect of count 1 (S.E.), the conviction in respect of count 4 (D.C.) and the conviction in respect of count 8

(K.L.) and enter verdicts of acquittal. The conviction in respect of count 3 (S.E.) is confirmed.

STEELE J.A. concurs with GOODRIDGE C.J.N.

Appeal dismissed.

[ScanLII Collection]