R. *v.* Burke, [1996] 1 S.C.R. 474

**Joseph Burke** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

**Indexed as: R. *v.* Burke**

File No.: 24071.

1995: May 26; 1996: March 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

on appeal from the court of appeal for newfoundland

*Criminal law -- Verdict -- Unreasonableness -- Accused convicted of indecent assault -- First complainant's testimony containing exaggerations and blatant falsehoods -- Trial judge not accepting his allegations of sexual assault without corroboration -- Trial judge finding corroboration in respect of one incident in testimony of second complainant describing similar incident -- Second complainant's testimony containing frailties and inconsistencies -- Strong possibility of collusion -- Whether accused's convictions can be reasonably supported by evidence -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(a)(i).*

*Criminal law -- Verdict -- Unreasonableness -- Accused convicted of indecent assault -- Alleged assaults bizarre in nature -- Photographic identification of accused -- Whether accused's conviction can be reasonably supported by evidence -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(a)(i).*

*Constitutional law -- Charter of Rights -- Fundamental justice -- Abuse of process -- Court of Appeal correct in not entering stay of proceedings on grounds of abuse of process -- Canadian Charter of Rights and Freedoms, s. 7.*

The accused, a former Christian Brother, was convicted of three counts of indecent assault upon E, C and L, and one count of assault causing bodily harm on E. The complainants were all residents of the orphanage where the accused worked between 1974 and 1981. At trial, E testified that the accused had beaten him and had also committed several indecent sexual acts, including an incident where, in order to prevent the spreading of chicken pox, the accused applied, in his private office, an ointment not only to E's legs, which were affected by the pox, but also to his penis and his buttocks, and inserted a finger in E's rectum. With respect to the beating incident, the trial judge found that the accused had used excessive force. With respect to the other claims, the trial judge, faced with the many inconsistencies and blatant falsehoods in E's evidence, concluded that he was not a credible witness and added that these claims could not be accepted without some form of corroboration. The trial judge found corroboration for the "ointment incident" in the evidence given by C in which he described a strikingly similar incident. Despite frailties and "impreciseness respecting dates" in C's testimony, the trial judge found him to be a credible witness. As a result, she accepted the accounts of the "ointment incidents" given by C and E. L testified that the accused

would often punish him by "hauling" him into a private office, forcing him to undress and pinching his armpits. In addition, L claimed that the accused would sometimes fondle his penis. The trial judge found L's evidence credible and accepted it. The Court of Appeal upheld the convictions.

*Held*: The appeal should be allowed with respect to the convictions for indecent assault. The appeal should be dismissed with respect to the conviction for assault causing bodily harm.

The Court of Appeal's decision on the abuse of process issue and the lower courts' decisions regarding the accused's conviction for assault causing bodily harm were agreed with. However, in light of the evidence at trial, the convictions for indecent assault were unreasonable and must be set aside pursuant to s. 686(1)(*a*)(i) of the *Criminal Code*. The standard of review under that section is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. It is only where the appellate court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that it can invoke s. 686(1)(*a*)(i) and overturn the trial court's verdict. Although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(*a*)(i) where the "unreasonableness" of the verdict rests on a question of credibility. Here, the trial judge arrived at an unreasonable verdict by accepting the evidence of E, C and L. No properly instructed jury acting in a judicial manner could reasonably have accepted the claims of these complainants.

It is clear from a review of the evidence that some of E's claims against the Christian Brothers, and particularly those concerning the accused, were gross exaggerations or blatant falsehoods. Most of E's claims were either positively disproved by other witnesses or were unsupported by the evidence. While the trial judge was right in concluding that E was not a credible witness, she erred in finding corroboration for the "ointment incident" in C's evidence. C's history of chronic dishonesty, coupled with critical inconsistencies in his testimony, clearly made him a less than credible witness. Among other things, he initially stated in his testimony that the ointment incident took place in the early 1970s. The accused, however, was not present at the orphanage at that time. More importantly, C had previously refused to speak with the police, claiming that he had nothing to say regarding the Christian Brothers. It is only after he was contacted by E's lawyer -- who had already been retained by E for the purpose of carrying out a civil action against the accused -- that C came forward with his claim. There is thus a possibility that C may have learned the details of E's story through contact with their common lawyer. The obvious inconsistencies and falsehoods in C's testimony render the trial judge's finding of credibility unreasonable. A trier of fact, acting judicially, could not have found any merit in the claims of either C or E. Moreover, on the assumption that the evidence is admissible, the trier of fact is obliged to consider the reliability of the evidence having regard to all the circumstances, including the possibility of collusion or collaboration. Given the crucial importance assigned by the trial judge to C's evidence, her failure to consider the possibility of collusion or collaboration arising out of the "lawyer connection", when assessed in light of the other frailties in C's evidence, rendered the convictions relating to the sexual assaults on E and C unreasonable.

With respect to L's claims, the curious nature of the assaults and the fact that the scabs allegedly left under his arms as a result of these assaults were never observed by other residents of the orphanage, despite the common use of communal showers, cause great concern about the reliability of L's evidence. Further, L was never asked to identify the accused during the trial but rather made a photographic identification -- a most unsatisfactory method of identification in cases such as this, where the events in question are alleged to have occurred many years before the trial. The reliability of the photographic identification was further undermined by the evidence given by another complainant, who incorrectly identified the accused by using photographs that were similar to the ones used by L. The trial judge made no comment on the frailty of the identification evidence. Given the unsatisfactory nature of L's evidence in general, this uncritical reliance on the unorthodox identification evidence renders the conviction unreasonable.

**Cases Cited**

**Referred to:** *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Hoch v. The Queen* (1988), 165 C.L.R. 292; *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421; *Director of Public Prosecutions v. P.*, [1991] 2 A.C. 447; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717; *R. v. H.*, [1995] 2 A.C. 596; *R. v. Carter*, [1982] 1 S.C.R. 938; *R. v. Evans*, [1993] 3 S.C.R. 653; *R. v. Sutton*, [1970] 2 O.R. 358; *R. v. Spatola*, [1970] 3 O.R. 74.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 7.

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

**Authors Cited**

*Cross on Evidence*, 7th ed. By the late Sir Rupert Cross and Colin Tapper. London: Butterworths, 1990.

APPEAL from a judgment of the Newfoundland Court of Appeal (1994), 117 Nfld. & P.E.I.R. 191, 365 A.P.R. 191, 88 C.C.C. (3d) 257, dismissing the accused's appeal from his convictions for indecent assault and assault causing bodily harm (1991), 92 Nfld. & P.E.I.R. 289, 287 A.P.R. 289. Appeal allowed with respect to the convictions for indecent assault. Appeal dismissed with respect to the conviction for assault causing bodily harm.

*Marvin R. V. Storrow, Q.C.*, *Joanne R. Lysyk*, and *Brian Casey*, for the appellant.

*Wayne Gorman*, for the respondent.

The judgment of the Court was delivered by

SOPINKA J. --

I. Introduction

1 The appellant in this case is Joseph Burke, a former Christian Brother at the Mount Cashel Orphanage in St. John's, Newfoundland. Mr. Burke was convicted at trial of three counts of indecent assault and one count of assault causing bodily harm. Each of the assaults for which Mr. Burke was convicted allegedly took place during the period in which he worked at the Mount Cashel Orphanage. The complainants, S.E., D.C. and K.L., were all residents of the Mount Cashel Orphanage during the relevant period.

2 The appellant raises two issues in appealing his convictions. First, the appellant argues that the manner in which the charges against him were pursued amounted to an abuse of process and a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*. Secondly, the appellant argues that the trial judge's verdict was unreasonable in light of the evidence before her, and that the verdict should therefore be set aside. On the abuse of process issue, I respectfully agree with the decision of the Newfoundland Court of Appeal: (1994), 117 Nfld. & P.E.I.R. 191, 365 A.P.R. 191, 88 C.C.C. (3d) 257. In addition, I agree with the decisions reached in the courts below with respect to Mr. Burke's conviction for assault causing bodily harm on the complainant, E. With respect to the convictions for indecent assault upon E., C. and L., however, I must respectfully disagree with the trial judge ((1991), 92 Nfld. & P.E.I.R. 289, 287 A.P.R. 289) and the majority of the Newfoundland Court of Appeal. Instead, I would agree with Gushue J.A.'s dissent in the Court of Appeal and hold that Mr. Burke's convictions for indecent assault were unreasonable in light of the evidence at trial. As a result, I would hold

that the convictions on these counts must be set aside pursuant to s. 686(1)(*a*)(i) of the *Criminal Code*, R.S.C., 1985, c. C-46.

II. Review under Section 686(1)(*a*)(i)

3 Under s. 686(1)(*a*)(i) of the *Criminal Code*, a court of appeal may allow an appeal against conviction where the court is of the view that the verdict reached below was unreasonable in that it cannot be supported on the evidence. Section 686(1)(*a*)(i) of the *Criminal Code* provides as follows:

> **686.** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence. . . .

The standard of review under s. 686(1)(*a*)(i) was first established by this Court in *Corbett v. The Queen*, [1975] 2 S.C.R. 275. At p. 282 of that decision, a majority of this Court determined that the question to be asked in reviewing the "reasonableness" of a verdict is

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

Following this Court's decision in *Corbett*, some degree of confusion arose as to the appropriate standard of review where the "reasonableness" of a verdict was in

question. One possible interpretation of *Corbett* was that the court of appeal could only intervene where it took the view that no jury acting judicially could have possibly reached the verdict rendered at trial. Clearly, this interpretation of the *Corbett* decision set the standard of review so high that it was virtually unattainable. Another view of the *Corbett* decision was that a court of appeal could intervene in any case where no jury acting judicially could reasonably have reached the verdict rendered at trial. The confusion concerning the standard of review was finally settled by the unanimous Court in *R. v. Yebes*, [1987] 2 S.C.R. 168. In that case, McIntyre J. settled the issue as follows, at p. 185:

> ... to adopt literally the proposition that the appellate court could only consider whether the impugned verdict could possibly have been reached would render review on appeal under the subsection almost impossible. "Reasonably could have reached" must be the test, and from a reading of the whole of Pigeon J.'s judgment [in *Corbett*] I am of the view that it was what was intended. [Emphasis in original.]

As a result, the Court in *Yebes* concluded (at p. 185) that "curial review is invited whenever a jury goes beyond a reasonable standard".

4 In undertaking a review under s. 686(1)(*a*)(i) of the *Criminal Code*, the appellate court must carefully consider all of the evidence that was before the trier of fact. As I stated for a majority of this Court in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 915:

> 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.

As a result, it is only where the Court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can invoke s. 686(1)(*a*)(i) and overturn the trial court's verdict.

5 According to this Court in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, special concerns arise in cases such as this where the alleged "unreasonableness" of the trial court's decision rests upon the trial judge's assessment of credibility. In these cases, the court of appeal must bear in mind the advantageous position of a trial judge in assessing the credibility of witnesses and the accused. As McLachlin J. stated in *W. (R.)*, at p. 131:

> ...in applying the test [under s. 686(1)(*a*)(i)] 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: *White v. The King*, [1947] S.C.R. 268, at p. 272; *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, at pp. 465-66.

Despite the "special position" of the trial court in assessing credibility, however, the court of appeal retains the power, pursuant to s. 686(1)(*a*)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence. As McLachlin J. stated in *W. (R.)*, at pp. 131-32:

> ... 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.

Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(*a*)(i) of the *Criminal Code* where the "unreasonableness" of the verdict rests on a question of credibility.

6 I acknowledge that this is a power which an appellate court will exercise sparingly. This is not to say that an appellate court should shrink from exercising the power when, after carrying out its statutory duty, it concludes that the conviction rests on shaky ground and that it would be unsafe to maintain it. In conferring this power on appellate courts to be applied only in appeals by the accused, it was intended as an additional and salutary safeguard against the conviction of the innocent.

7 Having carefully considered the above principles and reviewed the evidence, I have concluded that this is one of those rare instances where the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence. While I am fully aware of the advantages enjoyed by the trier of fact, I am nonetheless persuaded that the trial court in the case arrived at an unreasonable verdict by accepting the evidence of the complainants E. and C. In my view, no properly instructed jury acting in a judicial manner could reasonably have accepted the claims of these complainants. My reasons for arriving at this conclusion are discussed at length below. The nature of review under s. 686(1)(*a*)(i) demands that I undertake a thorough review of the evidence of the complainants.

III. Evidence of S.E.

8 The complainant E. arrived at Mount Cashel in 1973 when he was six years old. He was sent to the orphanage at Mount Cashel with his brothers W. and R. after a most unfortunate breakup in their family. The brothers remained at Mount Cashel until 1987, with one temporary absence in 1975.

9 E. was one of the first Mount Cashel residents to make allegations of improper conduct concerning the Christian Brothers. In 1975, E. went to the police and described the brutal treatment that had been suffered by the residents of Mount Cashel. The appellant Joseph Burke was among the Christian Brothers implicated by E.'s allegations.

10 According to E., Joseph Burke had beaten him with such force that E. had required hospitalization. In addition, E. alleged that Burke had committed several indecent sexual acts. The details of these sexual activities appeared to become more scandalous and shocking each time that E. retold his story. E.'s allegations, coupled with allegations made by other Mount Cashel residents, eventually led the police to investigate activities at the orphanage. The investigation was short lived, however, and resulted only in the transfer of two of the Christian Brothers out of the orphanage.

11 In 1989, fourteen years after the first investigation had closed, E. came forward with startling new revelations concerning the apparently brutal treatment he had received at the hands of the Christian Brothers. As a result of E.'s claims, the investigation was eventually re-opened and E. was called to testify before a commission of inquiry (the Hughes Commission). During the course of this inquiry, it became apparent that at least some of E.'s claims regarding the Christian

Brothers, particularly those concerning Mr. Burke, were gross exaggerations to say the least. Indeed, at least some of the allegations made by E. were eventually proved to have been completely false.

12 Prior to his appearance before the Commission of Inquiry, E. appeared on the widely viewed "Oprah Winfrey" television program. While being interviewed on that program, E. gave detailed descriptions of the forms of abuse that he had suffered at the hands of the Christian Brothers. Perhaps the most shocking of these allegations was E.'s claim that the Christian Brothers had repeatedly engaged in sexual intercourse with the children who were entrusted in their care. Needless to say, the public outrage resulting from E.'s claim was overwhelming.

13 When E. finally appeared before the Commission of Inquiry, it became clear that his claims of sexual intercourse between the orphans and Christian Brothers were untrue. E. eventually admitted that the events he had described on "Oprah Winfrey" had simply never occurred. In explaining why he had invented the allegations in question, E. claimed to have been "tired" at the time the interview was conducted. The trial judge wisely refused to accept this feeble explanation.

14 The Hughes Commission uncovered further exaggerations and lies in the statements of E. For example, E. had claimed during an interview that Burke had beaten him with a belt buckle to the point that he required hospitalization. It would be generous to call this claim a gross exaggeration. While E. did visit a hospital following an instance of discipline at the hands of Joseph Burke, subsequent evidence revealed that this visit to the hospital was little more than a check-up, and that no treatment was prescribed by the attending physician (Transcript of the trial

proceedings, vol. IX, at pp. 1115-16). In addition, E. claimed that the beating administered by Burke had left him cut, bruised and bleeding, and had produced visible scabs. Although it appears that excessive force may have been used by Mr. Burke in disciplining E., the medical reports prepared by the doctor examining E. make it clear that no cuts or scabs were produced by the beating. While this does not lessen Burke's degree of fault for having used excessive force, it does serve to contradict several statements made by E., including his claims that other Mount Cashel residents had noticed the cuts and abrasions that were inflicted at the hands of Joseph Burke.

15 Several of E.'s "clear memories" of the goings-on at Mount Cashel appear to have been complete fabrications. For example, during one interview, E. claimed that he had received a teddy bear from the Christian Brothers in order to prevent him from telling authorities of the abuse that he had suffered. Like many of E.'s claims, the "teddy bear" story later proved to be at best an exaggeration. In testimony at Joseph Burke's trial, E. admitted that while he may have received a teddy bear at some point during his stay at Mount Cashel, the gift had nothing to do with any instances of abuse. Another of E.'s "clear memories" of abuse at the orphanage concerned a particular instance when Joseph Burke had used a "Levi belt" to administer a beating. E. gave a vivid description of the belt, stating that he clearly remembered the buckle as well as the "Levi inscription" on the belt. E. further claimed that he had been forced to hand the belt to Mr. Burke before the beating. However, when E. initially reported the beating in question to the police, he claimed that he had been beaten with a stick. No acceptable explanation for this contradictory evidence has been given.

16 During the course of the Hughes Inquiry, as well as in his statement of claim in a civil action against the appellant, E. claimed that group beatings of the Mount Cashel children took place whenever a teacher sent a note to the Christian Brothers to inform them that the children had misbehaved. According to E., the notes and subsequent beatings took place on a daily basis, and were a part of the regular routine at Mount Cashel. At trial, however, E.'s teacher gave evidence that notes concerning the boys' behaviour had only been sent to the Christian Brothers on one or two occasions. This evidence was unchallenged, clearly proving that the allegedly "daily" beatings that were described by E. had occurred, if at all, on no more than two occasions. When faced with this contradictory evidence at trial, E. retreated from his earlier claims and admitted that he could no longer allege that beatings had occurred on a daily basis (Transcript of the trial proceedings, vol. IX., at p. 1106).

17 E. graphically described several other instances of abuse at the hands of Joseph Burke. At trial, E. claimed that Mr. Burke would come to his bunk every night except for Saturday, make the sign of the cross and fondle E. all over his body. E. subsequently altered his allegation, and stated that these instances of "fondling" occurred less frequently than he had initially claimed. However, subsequent evidence given at trial, including the testimony of E.'s brother W., made it clear that the episodes in question could not have occurred at all, as E.'s bed was in plain view of many other children in the dorm, none of whom claimed to have witnessed the "nightly" fondling. Indeed, residents of E.'s dormitory came forward and testified at trial that such instances of abuse had <u>never</u> happened, as they would have been readily observed by the many children whose beds were in close proximity to E.'s.

18 Another shocking claim made by E. concerned instances of sexual intercourse between the children at Mount Cashel. According to E., during the time he spent at the orphanage he had occasionally engaged in sexual intercourse with other children. In addition, E. claimed that at least one of the episodes in question had been observed by Christian Brothers who made no effort to prevent this kind of behaviour. Like almost all of E.'s testimony, this evidence was later contradicted by the unchallenged evidence of other witnesses. For example, the other children with whom E. claimed to have had intercourse denied that the incidents in question had ever occurred. In addition, one of the Christian Brothers whom E. had "clearly remembered" as having observed a particular instance of sexual contact between the children clearly established that he was nowhere near Mount Cashel at the time of the incident in question.

19 The final instance of abuse alleged by E. involved an occasion when the appellant was required to apply an ointment to E.'s legs in order to stave off a chicken pox infection. According to E., all of the Mount Cashel orphans (other than C.) had fallen victim to the chicken pox and required the application of an ointment to the affected parts of their body. E. further testified that the only part of his body that was affected by the disease was the upper part of his legs. Mr. Burke, who was in charge of the dormitory in which E. resided, was charged with the duty of applying the ointment to E. The ointment was applied in Burke's private office within the dorm. As a result, no one other than Burke and E. observed the application of the ointment.

20 According to E., Burke applied the "chicken pox ointment" not only to E.'s legs, but also to his penis and his buttocks. As noted above, the chicken pox infection

only affected E.'s legs, so there would seem to be no reason to apply the ointment elsewhere on his body. According to E., however, the appellant claimed that the application of ointment to E.'s buttocks was required in order to prevent the spreading of the pox. E. further alleged that Burke had inserted his finger into E.'s rectum while applying the chicken pox ointment, once again claiming that this was necessary to prevent the pox from spreading. Not surprisingly, these allegations were vehemently denied by Mr. Burke.

21 As noted above, Mr. Burke applied the ointment to E. in a private office within the orphanage. As a result, unlike the other instances of abuse alleged by E., the "chicken pox" incident could not be disproved by observations made by other Mount Cashel residents.

22 Whatever one may claim about E., it is clear that he has a vivid imagination. When faced with the many inconsistencies and blatant falsehoods in E.'s evidence, the trial judge rightly concluded that E. was not a credible witness. According to the trial judge, the many lies and exaggerations in E.'s evidence caused her to "wonder where the core of truth is and where the exaggeration begins" (p. 299). In my opinion, the trial judge should have considered an even more fundamental question, namely whether or not there was <u>any</u> core of truth to E.'s claims.

23 As a result of her doubts concerning E.'s veracity, the trial judge came to the sensible conclusion that E.'s claims could not be accepted without some form of corroboration. While most of E.'s claims were either positively disproved or unsupported by the evidence, the trial judge found corroboration for the "chicken pox incident" described by E. The corroboration in question came from C.,

another former resident of Mount Cashel. The supposedly corroborative evidence of C. is analyzed below.

IV. Evidence of D.C.

24 C. arrived at Mount Cashel at the age of 5 or 6, and was a resident of the orphanage during the same period as E. C. moved into the orphanage with his two brothers in 1970 or 1971 as a result of the death of his mother. C. remained a resident of the orphanage until he was 14 years old, when he was finally ejected from Mount Cashel for dishonesty and theft.

25 As noted above, C. was the one Mount Cashel resident who was not afflicted with chicken pox at the time that E. was suffering from the disease. However, C. testified at Mr. Burke's trial that he was suffering from some form of skin disorder which also required the application of ointment to his legs. Like E., C. testified that Joseph Burke had applied the ointment not only to his legs, but also to his penis and buttocks which were not affected by the disorder. Like E., C. claimed that Burke had explained the application of the ointment to those areas by claiming that it was necessary to prevent the spread of the rash. Finally, C. claimed that Burke had placed his finger in C.'s rectum while treating him with the ointment, once again claiming that this was required to prevent the skin disease from spreading.

26 According to the trial judge, C.'s account of Burke's application of ointment to his penis, buttocks and rectum was sufficiently similar to the claims of E. to constitute valid corroboration of E.'s earlier testimony. As a result, the trial judge accepted

the accounts of the "ointment incidents" given by C. and E., and accordingly convicted the accused of indecent assault in relation to those incidents.

27 At first glance, the evidence of C. does appear to be "strikingly similar" to, and accordingly corroborative of, the account of the "chicken pox" incident given by E. However, the more closely one examines the evidence given by C., as well as the character of C. himself, the less "corroborative" his evidence seems to be.

28 As noted above, C. was ejected from Mount Cashel for dishonesty and theft. However, the extent of C.'s dishonesty goes far deeper than isolated instances of childhood petty larceny. In fact, during the time he spent at Mount Cashel, C. was placed in a psychiatric ward of the Janeway Hospital where he was treated for a chronic stealing problem.

29 Obviously, the fact that C. has had trouble remaining honest does not necessarily mean that his testimony at trial was untrue. However, critical inconsistencies in his testimony further erode the "corroborative value" of his evidence.

30 When C. first reported the "ointment" incident, he alleged that it had taken place when he was six or seven years old. This would have placed the incident sometime within 1971 or '72. Hospital records confirm that C. was admitted to Janeway hospital in 1972 for a skin condition on his legs. When further questioned regarding the time at which the incident took place, C. re-affirmed his earlier claims, agreeing that he remembered the incident as having occurred "some considerable time" before the 1975 police investigation into the Mount Cashel affair.

31 After C.'s initial testimony regarding the "ointment incident", it was later pointed out that Joseph Burke had not been present at the orphanage during the period in which the incident was alleged to have taken place. In fact, Mr. Burke did not arrive in Newfoundland until some time in 1974: at least two years after the "ointment incident" described by C. While C. never departed from his statement that he recalled that he was six or seven, he ventured the opinion that he was nine or ten after apparently having been told that Burke was not in Newfoundland at the time. The following is his evidence-in-chief:

> Q. Do you know when it was that this happened, that you had to go and get a prescription for the rash on your legs?
>
> A. I don't understand the question.
>
> 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 ten.
>
> Q. All right. 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 he gave the following answers:

> Q. And you have told us today about an incident in which you were assaulted while Brother Burke was applying some ointment to your legs.
>
> A. Yes.
>
> 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.

32 Aside from inconsistencies regarding the "ointment" incident, there were several other "frailties" in the evidence given by C. For example, C. alleged that Burke had forced him to punch another boy in the back of the head for no apparent reason. This account was later challenged by other Mount Cashel residents who had witnessed the event described by C. According to these eyewitnesses, Burke had merely happened upon a fight between the children. The testimony of these eyewitnesses was unchallenged.

33 Obviously, C. is not the kind of witness the prosecution would hope for when bringing a case to trial. His history of chronic dishonesty, coupled with the inconsistencies in his testimony, clearly make him a less than credible witness. If there were ever a witness upon whose evidence it is unsafe to rely as the basis for a conviction, C. must be that witness. However, factors going beyond C.'s credibility should also have prevented the trial judge from using C.'s evidence to corroborate that of E. Perhaps the greatest impediment to any possible "corroborative value" in C.'s evidence concerns the manner in which he came forward with his claims against the appellant.

34 When the police investigation into the Mount Cashel affair was reopened, C., like many Mount Cashel residents, was contacted by police who sought to determine whether or not he knew anything that could help the investigation. C. refused to speak with the police, claiming that he had nothing to say regarding the Christian Brothers. It was not until July 1989 that C. first came forward with his allegations of abuse at the hands of the accused.

35 According to the evidence given at trial, C.'s sudden urge to come forward with his claims was prompted by a call from Harry Kopyto, a lawyer who at the time was a member of the bar in Ontario. Mr. Kopyto had already been retained by E. for the purpose of carrying out a civil action against the accused. C.'s "strikingly similar" accounts of abuse at the hands of the appellant did not arise until after he had been contacted by Kopyto, giving rise to the strong possibility that C. had been informed of the facts alleged by E. prior to coming forward with his story. C. also had the opportunity of learning the details of E.'s claims through the media, as at least one local newspaper had graphically described E.'s account of the "chicken pox incident". As a result, there was clearly a possibility that C. merely parroted E.'s widely reported claims, or tailored his evidence to coincide with that of E. as a result of conversations with their common lawyer Kopyto. There was no finding by the trial judge excluding the latter possibility.

36 Notwithstanding the many weaknesses in the evidence given by C., the trial judge found C. to be a credible witness. According to the trial judge, C.'s "impreciseness respecting dates" did not "lessen his credibility" (p. 298). In addition, the trial judge found that C.'s past dishonesty did not bring C.'s credibility into question. As a result, the trial judge accepted C.'s evidence and found it to corroborate the evidence of E. in respect of the "ointment incident". The accused was therefore convicted of having indecently assaulted both complainants. It is significant that the trial judge was not prepared to accept E.'s evidence except in respect of the one incident which was, in her view, corroborated by C.

37 In my view, the obvious inconsistencies and falsehoods in the testimony of C. render the trial judge's finding of credibility unreasonable. I simply cannot accept

that any trier of fact, acting judicially, could have found any merit in the claims of either C. or E. Moreover, given the frailties in the evidence of these two witnesses and the strong possibility of collusion, reliance by the trial judge on the evidence of C. to corroborate E.'s testimony was unreasonable.

38 In finding that there was no collaboration between the complainants C. and E., the trial judge stressed the fact that C. had never had access to the newspaper reports in which E.'s statements had appeared. Because there was nothing in the evidence to suggest that C. had learned the details of E.'s allegations through the media, the trial judge held that C.'s account of abuse had not been tainted by prior knowledge of the statements made by E. With respect, this ignores the possibility that C. may have learned the details of E.'s story through contact with their common lawyer, Harry Kopyto. The trial judge appears to have failed to notice that both complainants had been in contact with Kopyto. Without referring to the obvious possibility of contact through a common lawyer, the trial judge took the view that there was "no evidence that prior to [S.E.] or [D.C.] making their respective complaints to the police there was any contact between the two" (p. 300). Clearly, contact between the complainants and Harry Kopyto constitutes evidence of possible contact between the complainants, or at least the possibility that C. was exposed to the details of E.'s allegations. Obviously, this raises a risk or possibility that C.'s claims against the accused arose from his knowledge of the statements made by E.

39 There is a considerable body of authority to the effect that when an issue of the possibility of collusion or collaboration is raised, evidence of similar acts should not be admitted absent a finding by the trial judge that there is no real possibility

of collusion or collaboration. See *Cross on Evidence* (7th ed. 1990), at pp. 364-65, and *Hoch v. The Queen* (1988), 165 C.L.R. 292 (H.C. Austr.).

40 In *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421 (H.L.), at p. 444, Lord Wilberforce stated that where a real possibility of collusion can be found:

> ... something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed. This is well illustrated by *Reg.* v. *Kilbourne* [1973] A.C. 529 where the judge excluded "intra group" evidence because of the possibility, *as it appeared to him*, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out. [Emphasis in original.]

41 As a result of its more recent decisions in *Director of Public Prosecutions v. P.*, [1991] 2 A.C. 447, and *R. v. H.*, [1995] 2 A.C. 596, the House of Lords is now of the view that, generally, the possibility of collusion is not a factor to be applied by the trial judge in determining the admissibility of this type of evidence. This Court has not decided the question although it was my view in my dissent in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, that before similar fact evidence is admitted, the risk of collusion must be negatived by a finding by the trial judge. The majority did not express an opinion on the point.

42 The appellant did not contest the mutual admissibility of the evidence of E. and C. in respect of the counts relating to each. It is therefore not appropriate for this Court to attempt to resolve this difficult legal question in this case. But, assuming the evidence is admissible, the question arises as to what weight, if any, ought to have been given to it as corroborative evidence.

43 This question was considered by the House of Lords in *R. v. H.*, *supra*. The appellant was charged in separate counts with sexual offences committed upon his adopted daughter and stepdaughter respectively. There existed sufficient similarity between the evidence of the two complainants to meet this requirement for admission as similar act evidence. Admissibility was, however, contested on the ground that a real possibility of collusion existed. The trial judge directed the jury that, if they were sure that the complainants had not collaborated, then the evidence of one of them could corroborate that of the other. The House of Lords dismissed an appeal from a judgment upholding the charge. Lord Mackay of Clashfern L.C. stated, at p. 612, that where a question of

> collusion has been raised the judge must clearly draw the importance of collusion to the attention of the jury and leave it to them to decide whether, notwithstanding such evidence of collusion as may have been put before them, they are satisfied that the evidence can be relied upon as free from collusion and tell them that if they are not so satisfied they cannot properly rely upon it as corroboration or for any other purpose adverse to the defence.

44 Lord Lloyd of Berwick and Lord Nicholls of Birkenhead agreed with Lord Mackay. Lord Griffiths and Lord Mustill would apparently have left it to the jury to determine what weight, if any, should be given to the evidence. The majority reasons of Lord Mackay would, therefore, leave it to the jury to decide as a preliminary question of fact whether the evidence is tainted by collusion. If the answer is in the affirmative, the evidence must be disregarded. This would in effect leave it to the jury to decide whether the evidence was admissible. While unusual, a similar approach has been approved by this Court in relation to the co-conspirator exceptions to the hearsay rule. See *R. v. Carter*, [1982] 1 S.C.R. 938. See also *R. v. Evans*, [1993] 3 S.C.R. 653. The more conventional approach

adopted by Lords Griffiths and Mustill is that once the trial judge decides that the evidence is admissible, it is the trier of fact who determines what weight, if any, is to be given to the evidence having regard to all the circumstances, including the possibility of collusion.

45 For the purposes of this appeal, it is not necessary to choose between the two approaches referred to above. On the assumption that the evidence is admissible, I am prepared to adopt the more conventional approach which would leave it to the trier of fact to determine what weight, if any, is to be given to evidence that is alleged to have been concocted by means of collusion or collaboration. Under this approach, the trier of fact is obliged to consider the reliability of the evidence having regard to all the circumstances, including the opportunities for collusion or collaboration to concoct the evidence and the possibility that these opportunities were used for such a purpose.

46 The evidence of C. relating to the "chicken pox" incident was the sole basis for the conviction of the appellant on the counts relating to both E. and C. In view of the crucial importance assigned by the trial judge to this evidence, it was incumbent on the trial judge to scrutinize this evidence with special care. It was, therefore, important for the trial judge to consider any circumstances which affected the reliability of the evidence. I have concluded that the failure by the trial judge to consider the possibility of collusion or collaboration arising out of the Kopyto connection, when assessed in light of the other frailties in C.'s evidence, rendered unreasonable the convictions relating to the sexual assaults on E. and C.

47 I have already referred to the other frailties in C.'s evidence. The trial judge excused as mere impreciseness the fact that both in chief and on cross-examination C. swore that the incident took place at a time when the appellant could not have committed the act. The version espoused by the trial judge was apparently proffered only after this awkward fact was drawn to C.'s attention. Even then the extent of the evidence of C. which was accepted in preference to his sworn recollection was "I think I was nine or ten". In evaluating the import of this inconsistency, the trial judge did not refer to the fact that C.'s evidence was proved to be faulty in respect of the incident referred to above in which he alleged that Burke forced him to assault another boy. Nor was any reference made to his refusal to speak to the police claiming he had nothing to say. On the basis of this exceedingly generous assessment of the uncorroborated evidence of a chronic and convicted thief, the trial judge convicted the appellant of indecent assault on E. and on C. The trial judge found that in other respects E.'s evidence could not be accepted and dismissed other allegations made by him as merely raising suspicions or probabilities. E.'s evidence was not even considered to be corroborative of C.'s in respect of the "ointment incident".

48 The appellant testified and denied that the alleged sexual assaults took place. The appellant was not cross-examined on his denials of the allegations. As well, he called impressive character evidence from former students and residents of Mount Cashel, including supportive character evidence from E.'s brother, W. This evidence was summarily dismissed. The trial judge's sole reference to this evidence was as follows:

> As must be clear, I have generally rejected the denial of Joseph Burke. He is an intelligent man who, for some children, had 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.

V. K.L.

49 The final count of indecent assault for which Mr. Burke was convicted arose from the somewhat bizarre testimony of L., another former resident of Mount Cashel. According to L., Burke would often punish him by "hauling" him into a private office, forcing him to undress and pinching his armpits. In addition, L. claimed that Burke would sometimes fondle his penis. As these incidents were alleged to have taken place in a private office, they were not subject to verification by other witnesses.

50 According to Gushue J.A. of the Newfoundland Court of Appeal, the evidence given by L. was "too bizarre to accept" without some collateral verification. In Gushue J.A.'s opinion:

> ... given the nature of the evidence of K.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.
>
> ((1994), 117 Nfld. & P.E.I.R. 191, at p. 215.)

It would appear that Gushue J.A.'s concerns regarding L.'s evidence resulted from the rather curious nature of the assaults that L. described. In addition, Gushue J.A. appeared to be concerned that the scabs allegedly left under L.'s arms as a result of the assaults were never observed by other residents of Mount Cashel, despite the

common use of communal showers within the orphanage. I agree that these circumstances cause great concern about the reliability of the evidence given by L. This unease is substantially magnified when considered in connection with the manner in which L. purported to identify the appellant.

51 During the course of the trial, L. was given a photograph which he identified as Burke. However, L. was never asked to identify the appellant during the trial. No explanation has been given why this standard method of identification was not employed in this case. This raises the question whether L. would have been able to identify the appellant in person. In my view, photographic identification is most unsatisfactory in cases such as this, where the events in question are alleged to have occurred many years before the trial. The dangerous nature of photographic identification in such cases can be demonstrated by the evidence of another Mount Cashel resident, D.T. Like L., T. was shown a series of photographs and identified a photo of the accused as a picture of his assailant. Further evidence made it clear that Mr. Burke could not have been the individual who had assaulted T. The use of photographic identification had led T. to incorrectly identify the appellant.

52 The cases are replete with warnings about the casual acceptance of identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection": *R. v. Sutton*, [1970] 2 O.R. 358 (C.A.), at p. 368. In *R. v. Spatola*, [1970] 3 O.R. 74 (C.A.), Laskin J.A. (as he then was) made the following observation about identification evidence (at p. 82):

> Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be erroneous.... The very question of admissibility of identification evidence in some of its aspects has caused sufficient apprehension in some jurisdictions to give pause to uncritical reliance on such evidence, when admitted, as the basis of conviction.... [Emphasis added.]

53 The trial judge made no comment on the frailty of the identification evidence other than the general statement that she found L.'s evidence credible and accepted it. No reference is made to the fact that the appellant was not identified in court and that no explanation for failure to ask L. to do so was given. No reference is made to the erroneous identification made by T. using the photograph of the appellant. Given the unsatisfactory nature of L.'s evidence in general, this uncritical reliance on the unorthodox identification evidence renders the conviction unreasonable. Pursuant to s. 686(1)(*a*)(i), I would quash the conviction.

VI. Conclusion and Disposition

54 For each of the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and quash the convictions for indecent assault upon the complainants E., C. and L. With respect to the conviction for assault causing bodily harm, I would dismiss the appeal for the reasons given by the Newfoundland Court of Appeal.

*Appeal allowed with respect to the convictions for indecent assault. Appeal dismissed with respect to the conviction for assault causing bodily harm.*

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*Solicitor for the respondent:  The Department of Justice, St. John's.*