NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. R.T.H.***, 2007 NSCA 18

Date: 20070209
Docket: CAC 248144
Registry: Halifax

Between:

R.T.H.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: pursuant to s. 278.9(1) and s. 486(3) [now s. 486.4(1)] of the **Criminal Code.** **See Next Page**

Judges: Cromwell, Saunders, and Oland, JJ.A.

Appeal Heard: November 28, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Terrance G. Sheppard, for the appellant
Daniel A. MacRury, Q.C., for the respondent

Publishers of this case please take note that Section 278.9(1)) of the **Criminal Code** applies. The subsections provide:

> 278.9 (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:
>
> > (*a*) the contents of an application made under section 278.3;
> >
> > (*b*) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
> >
> > (*c*) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

> (a) any of the following offences:
>
> > (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
> >
> > (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988;

Reasons for judgment:

I. INTRODUCTION:

[1] The appellant was convicted of five sexual offences committed while the three female complainants were children. He appeals. The issues are:

1. Is the verdict unreasonable?
2. Did the judge err in law by:
    a. failing to order separate trials?
    b. unduly limiting the scope of a hypothetical question posed to the defence expert witness?
    c. not ordering the Children's Aid records of one of the complainants to be produced to the defence?
    d. failing to properly instruct the jury about the use of evidence from one count in relation to other counts and about the use of evidence about the appellant's uncharged discreditable acts?

[2] The appellant's submissions that the verdict is unreasonable and that the judge erred by failing to order separate trials or in limiting the scope of the expert evidence, in my view, have no merit. While I conclude that the judge did err in one aspect in his instructions to the jury and by not ordering production of the Children's Aid Society ("CAS") records to the defence, these errors, in my view, could not have affected the jury's verdict. I would, therefore, dismiss the appeal.

II. EVIDENCE:

A. Overview:

[3] The appellant was charged with five sexual offences alleged to have been committed between 1979 and 1985 against three children. The three complainants were sisters of the appellant's then wife. Each of the complainants had resided with the appellant and his wife for a considerable period of time, including periods either before or during the commission of the alleged offences.

[4] Three of the charges related to S.T. (age 31 at the time of trial): sexual intercourse while she was under 14, gross indecency and indecent assault. One count of indecent assault related to B.S. (41 at the time of trial), and the final count, also of indecent assault, related to P.B. (35 at the time of trial).

[5] The Crown evidence consisted of testimony by the three complainants and a Children's Aid Society social worker, Mr. MacDonald, who had been assigned as the worker for two of the complainants. The defence evidence consisted of testimony by the appellant, who denied all of the charges, and by four other witnesses: the therapist of one of the complainants, two police officers who had been involved in the investigation and an expert in the field of recovered memories and delayed recall of traumatic memories in sexual abuse cases.

[6] At trial, there was a lot of attention to the long delay between the time of the alleged offences and the time when the complainants ultimately came forward with their allegations. None of the allegations of sexual abuse came to light until the complainants reached adulthood and then only as a result of a police investigation into other matters. (One incident in relation to S.T. had been investigated in 1985, but, as we shall see, at the time there was no disclosure of any sexual aspect to the activity.)

[7] In late 1999, one of the appellant's step sons complained to the police about being physically abused by the appellant. In the ensuing police investigation, questions were asked of the complainants about sexual abuse. B.S. first made her allegations in the context of that investigation and made a statement to the police in March of 2000, some 21 years after the incident she reported. At about the same time, the police contacted S.T. and she made her first disclosure of sexual abuse, although she did not mention an incident of forced sexual intercourse until after she had started undergoing counselling. P.B. first disclosed the abuse to the police when they contacted her in 2002 or 2003.

[8] The Crown theory was that the complainants' long silence was perfectly understandable in the situation in which they found themselves. They were, said the Crown, vulnerable children who had few options other than to live with their sister: both they and the appellant knew that would end unless they kept quiet about the abuse.

[9] The defence theory was that the allegations were concocted. In support of this position, the defence pointed to evidence that the complainants had not complained about the abuse for years even though they had the means to do so through regular contact with Children's Aid workers and with the police who had been called to the residence on innumerable occasions. The defence elicited from the complainants' evidence about disgusting behaviour by the appellant towards

the children and his spouse apart from the alleged sexual abuse. This was done apparently to support the defence argument that what the complainants described did not sit comfortably with their having chosen to remain in the house as they got older or, in the case of P.B., to actively seek to be placed in the home even after she had allegedly been abused.

B. The Complainants' and the Appellant's Evidence:

1. S.T.:

[10] S.T. testified about three types of sexual abuse by the appellant: repeated sexual abuse while sharing the shower, one incident while camping and one incident of forced sexual intercourse. These incidents, on her evidence, took place over a period starting before she was 7 and extending until she was about 12. She turned twelve in 1985. She continued to live with the appellant and his wife until she was 18, that is, until about 1991.

[11] S.T's evidence was that the appellant used to take showers with her and that she had to wash his penis after which he would ejaculate on her back. She was unable to say over what period of time this occurred. She said that it happened frequently until the social worker, Mr. MacDonald, became aware that the appellant was sharing the shower with her and told him to stop. Mr. MacDonald's intervention came in the fall of 1985 when S.T. was about 12 years old. At the time, there was apparently no suggestion of any sexual misconduct as was later alleged.

[12] The appellant testified that he had indeed shared the shower with S.T. on rare occasions starting when she was about six and continuing, very occasionally, until she about 12. His evidence was to the effect that she used to follow him around and would become upset if not allowed to join him when he took a shower. The appellant denied any sexual aspect.

[13] S.T. also described an incident in which the appellant sexually abused her while the family was camping. He put their sleeping bags together, got her to join him, touched her vagina and rubbed his penis on her behind. She said this incident occurred sometime before August of 1980 (which she identified in relation to the birth of a niece) so that, on her evidence, it took place before she turned 7 years old.

[14] The appellant denied that any such incident had taken place.

[15] Finally, S.T. testified that the appellant had forced sexual intercourse with her when she was 10, placing it therefore about 1983. She said that while the appellant's wife (S.T.'s sister) was at work one night, the appellant called her into his room. He was naked on the bed. He pulled her to his body, wrapped his arms around her, rolled her over onto her back and pushed his penis inside her.

[16] The appellant denied that any such incident had ever occurred.

[17] S.T. was asked in chief why she did not tell her sister, the appellant's wife, about the sexual abuse. S.T. replied that if the appellant's wife couldn't protect herself, she wasn't going to be able to protect S.T. When invited to elaborate on this, S.T. testified that the appellant used to "beat on" his wife, that there was a lot of domestic violence in the house and the police were constantly coming out to the house. She said that sometimes the appellant would "smack" the children in the head to the point that her head would "bounce off the freaking wall ..." (214)

[18] The defence cross-examined S.T. at length – for nearly 2 full days. There was much attention to the various prior statements which S.T. had given and in particular to the fact that, even when she initially disclosed the abuse, she did not mention the act of forced sexual intercourse.

[19] There was also much attention in cross-examination to living conditions which S.T. said existed in the appellant's household. At defence counsel's invitation, S.T. described how the appellant would "pretty much" throw the boys down the stairs and sometimes hit them with hammers; that she was worried for her sister's safety and even her life (261); that the appellant would punch her; that there was a lot of fighting as she grew up (259); that the appellant sometimes called his wife "black bitch" and that he would discipline the children by hitting them on the back of the head or kicking them in the legs or beating them with an extension cord or a belt on their bare bottoms. (294 and 298) S.T. described, in response to defence counsel's questioning, how she ran barefoot through the snow to a neighbour's house to call the police when the appellant was beating his wife. She described how the appellant once put a bowl on the floor for one of the children to eat from, remarking that if the child wanted to act like an animal he would be treated as an animal (297). She described how the appellant would pull

down her jogging pants and laugh and often talk about her breasts. (298- 99) The witness described, at defence counsel's invitation, how she frequently had nightmares about the appellant trying to kill her. She described a fight she had witnessed involving the appellant, his wife and two of the step-children which involved an axe and (she thought) a chainsaw. (304) Defence counsel also returned to the theme of the police being called, with S.T. acknowledging that the police were frequently at the home.

[20] There was also evidence that the social worker, Mr. MacDonald, had interviewed S.T. about the shower incidents in 1985 but that S.T. had not alleged any sexual aspect at the time.

[21] The defence's submissions to the jury made much of S.T.'s delayed and sequential disclosure, which defence counsel referred to as being reminiscent of the "dance of the seven veils". The defence also suggested to the jury it was improbable that S.T., who conceded that she had regularly called the police, would suffer the abuse she alleged in silence or that she would have failed to tell Mr. MacDonald about the abuse when he inquired.

2. P.B.:

[22] The second complainant was P.B. She testified about one incident of sexual abuse that occurred before she went to live with the appellant and his then wife, P.B.'s sister. She placed this incident in the time period of 2 to 3 years before her brother died in September of 1983. Therefore, on her evidence, the incident would have taken place around 1980 - 81 while she was roughly 11 or 12 years old, although she also testified that she thought it had happened when she was approximately 9 or 10 years of age. P.B. lived with the appellant and his wife until roughly 1988 when the CAS provided her with an apartment.

[23] P.B.'s evidence was that, while on a family camping trip (as mentioned around 1980 - 81) she woke in the night to find that her clothes had been removed and the appellant was rubbing her breasts and putting his hands in her vagina. He took her hand and made her grab his penis. When she started to cry, he put her head on the pillow so that she would not wake the other kids in the tent and said to her: "This is how babies are made when a man's cock is hard." The next thing she knew, her back was all wet.

[24] P.B. was asked in chief how she was treated in the appellant's household. She replied "not good", that the appellant would refer to the children as his slaves, that there was constant touching of her breasts and buttocks and lots of derogatory racial comments. (148)

[25] This testimony, however, was arguably inconsistent with what the social worker, Mr. MacDonald, reported in his testimony. As noted, P.B. testified that she had been assaulted by the appellant around 1980 or 1981. That was some two or three years before she moved in with the appellant and his wife in either 1983 (according to P.B.) or the late summer of 1984 (according to Mr. MacDonald). She was asked in cross-examination whether she had told Mr. MacDonald that she wanted to move in with the appellant and his wife. P.B. responded that she did not recall. Mr. MacDonald's evidence, however, was that P.B. had been "... desperately trying to find ways of getting back to natural family, especially [the appellant's wife]..." and that when the opportunity came to move in with the appellant and his wife in the late summer of 1984 (as a result of B.S. moving out), P.B. was "... very happy to be going back with [her sister and her husband, the appellant]."(482)Mr. MacDonald also testified that, in October of 1985, P.B. had denied any sexual abuse by the appellant and said that she was happy living there. (494)

[26] The appellant denied that he had ever sexually abused P.B. or that she had ever been on a camping trip with the family. He testified that, after P.B. had grown up and had two children of her own, he had babysat her children at her request. He also said that he had a 3 month sexual relationship with P.B. in 1997 when P.B. was about 28 and his marriage to her older sister was breaking up. He testified that this relationship started when P.B. made sexual advances to him in a tent. P.B. denied ever having asked the appellant to babysit her children or having an affair with him.

[27] In his address to the jury, defence counsel noted that P.B. had wanted to move into the household even though the alleged abuse had occurred before the opportunity arose. The defence also referred to evidence that P.B. had run away from the foster home where she was living to go to the appellant's house. As counsel put it, "Can you imagine for a moment why anyone who says they were sexually assaulted in a tent would want to move into the house with the person who did it?" (1066)

3. B.S.:

[28] B.S. testified about an incident that occurred when she was 16, which would place it about 1979. According to her, she and the appellant had been fighting. He put her down on the ground, put his arm down her pants, touched her vagina and then tried to put his penis in her mouth. When he got off her, he gave her a hug and said that he was doing it for her own good so that if somebody came after her, she could protect herself. B.S. lived with the appellant and his wife until she was nearly 21, that is roughly until 1984.

[29] B.S. was asked in chief what was going on at the time she spoke to the police in the year 2000. She replied that the police came to see her because her nephew, who was the appellant's step son, had complained that the appellant was abusing him. There was also evidence that the appellant was physically abusive of his wife and the children living in the house. For example, in response to a question from Crown counsel about how things went at home with the appellant, B.S. testified that there had been a lot of fighting and that the appellant beat the kids. (75- 76).

[30] In his cross-examination of B.S., defence counsel brought out evidence that the military police had frequently been at the house and that B.S. had called them "quite a few times" – as many as 120 times. B.S. said that she knew how to call the police and knew that they would come if she did.(85) There was also evidence that B.S. had picked up a knife and gone after the appellant in order to protect her sister, the appellant's wife, from being beaten by the appellant. (87).

[31] Defence counsel used this evidence to argue to the jury that if B.S would repeatedly call the police and even take after the appellant with a knife, it was unlikely that she would be a passive victim of abuse. Defence counsel also argued that, if the abuse had actually occurred, it was improbable that B.S. would have voluntarily stayed in the house, as she had, after she was old enough to make choices.

III. ISSUES:

[32] The issues are these:

1. Is the verdict unreasonable?

2. Did the judge err in law by:
    a. failing to order separate trials?
    b. unduly limiting the scope of a hypothetical question posed to the defence expert witness?
    c. not ordering P.B.'s Children's Aid records to be produced to the defence?
    d. failing to properly instruct the jury about the use of evidence from one count in relation to other counts and about the use of evidence about the appellant's uncharged discreditable acts?

IV. ANALYSIS:

A. Overview:

[33] In my view, the appellant's submissions respecting unreasonable verdict, severance and the scope of expert testimony have no merit. However, I conclude that the judge erred in failing to instruct the jury not to use evidence of the appellant's uncharged bad conduct as evidence of guilt on these charges and also in failing to order an edited version of P.B.'s CAS records produced to the defence. I would nonetheless dismiss the appeal because these two errors, on this record, could not possibly have affected the jury's verdict.

B. Unreasonable Verdict:

[34] The appellant submits that the jury reached an unreasonable verdict with respect to S.T. In essence, the appellant's position is that no reasonable jury could have believed S.T. because her history of prior statements should have raised a reasonable doubt in any jury acting reasonably and judicially.

[35] Respectfully, this ground of appeal has no merit. The appellant, in effect, is challenging the jury's assessment of S.T.'s credibility. Those findings are accorded great deference on appeal. To succeed in showing that a jury's finding based on credibility is unreasonable, the appellant must show that it cannot be supported on any reasonable view of the evidence: **Burke v The Queen**, [1996] 1 S.C.R. 474 at paras. 5 - 7. In my view, the appellant has not done so.

[36] The appellant refers to S.T.'s long delay in disclosure, the changes over time in the versions of events she reported and her failure to mention the incident of

forced sexual intercourse until a considerable time after she first disclosed other acts of sexual abuse to the police. These aspects of her evidence were fully explored before the jury over nearly two days of cross-examination by defence counsel. S.T. had explanations which she offered in her testimony. It was for the jury to accept or reject some, all or none of her testimony. Their decision to accept her evidence about the critical issues cannot be said to be unsupported by any reasonable view of the evidence. At most, the appellant points to various factors which could have led a jury not to accept or to doubt S.T.'s evidence. This does not come close to showing that her testimony was not credible on any reasonable view of the evidence.

[37] I would reject this ground of appeal.

C. Alleged Legal Errors:

1. Severance:

[38] The appellant submits that the judge erred by failing to sever the counts relating to S.T. and P.B. and ordering separate trials for them. I do not agree.

[39] Before trial, the appellant asked the trial judge to sever the counts relating to S.T. and to try those three counts separately from the other two relating to B.S. and P.B. (The application also sought separate trials for the individual counts relating to B.S. and P.B.). The Crown opposed the application. Crown counsel indicated that there would be no reliance on similar fact evidence at the trial.

[40] The principal arguments made on appeal are that the judge erred by giving undue weight to the factual and legal nexus among the counts, insufficient weight to the possibility that the accused wished to testify in relation to some counts but not others and the risk of prejudice from evidence on one count being improperly used by the jury as evidence of guilt on another count.

[41] The appellant's counsel puts particular emphasis on the fact that the count of sexual intercourse in relation to S.T. was a much more serious charge than those in relation to P.B. or B.S. Counsel says that the prejudice of trying counts together is particularly acute where, as here, the jury hears evidence in relation to one count that is "much more serious" than the others: **R. v. Regan (G.A.)** (1998), 174 N.S.R. (2d) 268; N.S.J. No. 322 (Q.L.)(S.C.) paras. 21 -24.

[42] The appellant's counsel also submits that the newly produced CAS records show that the count involving P.B. should have been severed because they make it more probable that the appellant would not have testified in relation to the count involving P.B.

[43] The judge's decision to sever or not sever counts for trial was a matter for his judicial discretion. On appeal, the judge's exercise of that discretion will only be interfered with if he failed to consider proper principles, considered improper principles, exercised his discretion unreasonably or the decision gave rise to an injustice: **R . v. Litchfield**, [1993] 4 S.C.R. 333 at 353-4; **R. v. Savoury** (2005), 200 C.C.C. (3d) 94 (Ont C.A.) at para. 26.

[44] In my opinion, the judge's reasons show that he applied the proper principles and his decision to refuse severance was a reasonable exercise of his discretion. While there was a risk of prejudice to the appellant because the jury would hear evidence which was not admissible on some counts, there was also a fair degree of factual connection among the various charges: they all arose out of the family situation of the appellant and his wife who was the complainants' sister. There was never any clear indication that the appellant wanted to testify on some counts but not others. Counsel simply indicated that the appellant would be testifying in relation to some of the counts. The newly produced records do not, in my view, strengthen this point. The judge has not been shown to have made a reviewable error in permitting these five counts to be tried together.

[45] I would dismiss this ground of appeal.

2. Hypothetical question for the defence expert:

[46] The appellant complains that the judge unduly interfered with the nature of the hypothetical question which the defence wished to put to its expert witness, Dr. Côté.

[47] Dr. Côté was qualified to give opinion evidence about recovered memory and delayed recall of memories. Her evidence related most directly to the testimony of S.T. Dr. Côté noted a number of factors that could result in unreliable memory of traumatic events. She did so in the context of answering a hypothetical question that contained assumed facts modelled on S.T.'s evidence.

Dr. Côté's opinion was that these "hypothetical" facts showed the person's process of recall was unreliable which could lead to false memories. (978) She also testified, however, that delayed disclosure is fairly common among victims of sexual abuse.

[48] Defence counsel at trial originally put forward a hypothetical question which consisted of some four and one-half typed, singled spaced pages containing 31 paragraphs. This "question" attempted to exactly mirror the trial testimony of S.T. The judge was concerned that if this question were put, Dr. Côté's evidence would exceed the proper ambit of expert testimony. He thought Dr. Côté's response to it would, in effect, be her opinion about S.T.'s credibility as a witness, an opinion which she ought not to be allowed to give. Ultimately, defence counsel prepared a new version of the hypothetical question which satisfied the trial judge's concerns.

[49] The appellant has not persuaded me that the evidence of the expert was unduly limited. He has not shown the form of question used at trial in any way hampered the defence in presenting its case.

[50] I would dismiss this ground of appeal.

3. Production of P.B.'s CAS records

[NOTE: The application to produce records is subject to the publication ban imposed by s. 278.9 of the **Criminal Code**].

[51] *Editorial note- paragraph*

[52] *Editorial note- paragraph removed*.

[53] *Editorial note- paragraph removed*.

[54] *Editorial note- paragraph removed*.

[55] *Editorial note- paragraph removed*.

[56] *Editorial note- paragraph removed.*

[57] *Editorial note- paragraph removed*.

[58] *Editorial note- paragraph removed*.

[59] *Editorial note- paragraph removed*.

[60] *Editorial note- paragraph removed*.

[61] *Editorial note- paragraph removed*.

[62] *Editorial note- paragraph removed*.

[63] *Editorial note- paragraph removed*.

[64] *Editorial note- paragraph removed*.

4. Jury directions on use of evidence count to count and evidence of the appellant's uncharged discreditable acts:

(a) Introduction:

[65] This issue was raised by the Court.

[66] As noted earlier, all five counts were tried together, similar fact evidence was not relied on and there was a considerable amount of evidence, mostly elicited by the defence, that the appellant had engaged in highly discreditable acts which were not charged. Thus, there was a risk of prejudice to the appellant's right to a fair trial from two sources. Evidence of the commission of the offences charged with respect to one complainant was not admissible with respect to the charges in relation to the others. This created a risk that the jury might use evidence on other counts to draw an inference that the appellant was the sort of person who was more

likely to commit these offences. The risk of that sort of misuse of the evidence was also inherent in the evidence relating to uncharged misconduct of the appellant in relation to the complainants and others.

[67] As I have discussed earlier, the jury heard evidence that the appellant beat his wife and children, imposed humiliating discipline and made derogatory sexual and racial comments to the children and his wife. While this evidence was potentially unfairly prejudicial to the appellant, much of it also fed the defence theory of the case. As noted, the defence contended before the jury that they ought not to believe that these three complainants would remain in the house under the intolerable conditions they described once they were old enough to choose otherwise or that they would fail to report the abuse to a social worker involved with two of the complainants or to the police who were regularly called to the home.

[68] Did the charge adequately deal with this evidence? On reviewing a jury charge for alleged legal error, the Court must address two related, but distinct issues. The first is what legal principles or other information ought to have been included in the charge. The second is whether those matters were adequately communicated by the charge.

[69] In this case, the jury ought to have been told about three related legal principles: that they must not use evidence from one count as evidence of guilt on another; that they must not use a finding of guilt on one count as evidence of guilt on another; and that they must not engage in propensity reasoning: that is, they must not use evidence of other bad acts to infer that the accused is the type of person who is more likely to have committed the charged offences.

[70] The judge's charge dealt fully and appropriately with the first two principles. I conclude, respectfully, that it failed to address the third and that in the circumstances of this case, that failure was an error of law.

(b) The legal principles that should be in the charge:

[71] I turn first to the legal principles which ought to have been included in the charge. In **Farler v. The Queen** (2006), 243 N.S.R. (2d) 237; N.S.J. 138 (Q.L.)(C.A.), a decision not available to the trial judge when he charged the jury in this case, the Court outlined three elements of a proper jury charge where, as here,

evidence which is properly admissible on one count in a multi-count indictment is not admissible on other counts and is potentially highly prejudicial with respect to them. The jury should be told about three related legal principles: evidence on one count must not be considered when determining guilt on another count; a finding of guilt on one count cannot be used in determining guilt on another; and, the jury must not engage in propensity reasoning, that is, they must not use evidence of discreditable conduct or criminal acts other than those charged to infer that the accused is a person likely to have committed the offences for which he is being tried: **Farler** at paras. 31 - 32.

[72] Instructions along these lines were required here. There was in this case a risk of prejudice to the appellant from improper use of evidence. He was portrayed in the complainants' testimony as a man who beat and hurled racial epithets at his wife and the children living with them and preyed upon the children sexually. The appellant's behaviour which the Crown witnesses described could only instil revulsion in the minds of a right-thinking person. Similar fact evidence was not in issue but five counts involving three complainants were tried together. The risk of improper use of this prejudicial evidence required cautionary instructions.

[73] The Supreme Court discussed the applicable principles in **R. v. B.(F.F.)**, [1993] 1 S.C.R. 697 and **Rarru v. The Queen**, [1996] 2 S.C.R. 165. In **B. (F.F.)**, the accused was charged with six sexual offences against his niece. He resided with his sister and her children including his niece, the complainant. At trial, the jury heard evidence from the complainant's brothers and sisters concerning the violent control the accused exerted over the household and the abuse which they suffered at the accused's hands. Defence counsel at trial did not object to the admission of this evidence, did not request any special charge in relation to it and the judge did not make any reference to the use to which the jury could put it in his charge. One of the issues on appeal was whether the judge erred by not instructing the jury on the limited use they could make of this sort of evidence. A majority of the Court held that he had.

[74] Iacobucci, J. for the majority, held that trial judges are obliged to instruct juries as to the proper use of admissible but potentially highly prejudicial evidence bearing on the accused's character. The jury should be told that they must not infer from such that the accused is guilty because he is the sort of person who is likely to commit the offences in question:

> ...Given that the testimony might have a strong prejudicial effect on the jury and that the jury might then convict on the basis that the accused is a bad person of the sort likely to commit the offences in question, clear directions to the jury about the use that they could make of the testimony were essential. More specifically, the judge was required to explain clearly in the instructions to the jurors that they must not infer from the evidence that tended to show the appellant's bad character that the appellant was guilty because he is the sort of person who is likely to commit the offences in question. (p. 734)

[75] Iacobucci, J. also made it clear that this obligation applies not only when similar fact evidence has been admitted, but that it applies generally when the jury has heard evidence that "... is of a highly prejudicial nature with respect to the accused's character ...": at 735

[76] The Court made the same point in **Rarru**. Rarru was convicted of five out of twelve counts of sexual and related offences in relation to six complainants. The trial judge ultimately ruled that similar fact evidence was not admissible. The question became whether his charge to the jury about the evidence they were entitled to consider was adequate in those circumstances. Sopinka, J., for the Court, held that the trial judge ought not only to have instructed the jury that evidence from one count was not to be used on another, but also to have warned them "... about the dangers of the potential influence of evidence of numerous alleged criminal acts which were not the subject of a particular count.": at 165.

[77] There was at this trial much evidence about the appellant's allegedly bad behaviour, both charged and uncharged, that risked prejudice to him. Cautionary instructions about the proper use of this sort of evidence ought to have been given.

(c) Were the appropriate principles adequately explained in the charge?

[78] The next question is whether the charge adequately explained these principles to the jury. This question must be examined by considering the whole of the charge in the context of the whole trial. As stressed by the Supreme Court in **R. v. Jacquard**, [1997] 1 S.C.R. 314, a reviewing court must take a functional, not an idealized, approach. An accused is not entitled to a perfect charge, if there is such a thing, but a proper one assessed realistically in light of the whole trial record. As noted in **Farler**, the precise content of instructions must be tailored to the particular circumstances of each case: para. 30. This is not a mechanical or formulaic exercise. To be asked is whether, in light of the charge as a whole and in

the context of the entire trial, there is a reasonable likelihood that the jury misunderstood the relevant legal principles: **R. v. Rhee**, [2001] 3 S.C.R. 364 at paras. 21 - 22.

[79] In my view, this charge, assessed realistically in the context of the whole trial, fully and properly communicated two of the legal principles about which the jury needed to be instructed. Respectfully, however, I conclude that it did not do so with respect to the third one.

[80] In his charge, the judge reviewed the evidence of each witness at trial, making only passing reference to any of the evidence about uncharged discreditable acts. He then separately (although very briefly) reviewed the evidence that was properly before the jury with respect to each count of the indictment. He did not refer at all to any of the uncharged alleged bad behaviour of the appellant. The judge instructed the jury that he had told them about the evidence that applied to each count and that they must return a verdict on a particular count based on the evidence that applied to that count. He told them that it would be wrong for them to supplement the evidence relating to one count with evidence from an entirely different count or to look at the whole of the evidence for determining guilt on a particular count. He instructed that they should "treat each count as if it were contained in a separate indictment and reach a verdict based solely on evidence that applies to that count."

[81] This brief summary of the charge shows that the judge admirably dealt with the first two of the required legal principles. He told the jury in strong and clear terms that they must only use evidence which was properly admissible in relation to a count on the indictment in considering the appellant's guilt or innocence of that count. He summarized what that evidence was. Although he did not say in so many words that evidence of guilt on one count could not be used as evidence on another, he clearly communicated this principle by instructing the jury that they should approach the charges as five separate indictments. He said:

> [236] ... Earlier I told you about the evidence that applies to each of these counts. You must only return a verdict on a particular count based on the evidence that applies to that count.
>
> [237] It would be wrong for you to supplement the evidence relating to one count with evidence from an entirely different count, or to look to the whole of the

> evidence for determining guilt on a particular count. You should treat each count as if it were contained in a separate indictment and reach a verdict based solely on evidence that applies to that count. ...

[82] It is with respect to the third principle – that the jury must not engage in propensity reasoning – that, in my respectful view, the charge is deficient. At no point is this principle mentioned explicitly in the charge and I do not think that the substance of it was ever fully communicated in some other way.

5. No substantial wrong or miscarriage of justice?

[83] I have concluded that the judge erred by failing to order production to the defence of the relevant portions of P.B.'s CAS records and by failing to instruct the jury that they should not engage in propensity reasoning. The remaining question is whether, in spite of these errors, the appeal should be dismissed because there has been no substantial wrong or miscarriage of justice: s. 686(1)(b)(iii) of the **Criminal Code**.

[84] The test is whether there is any reasonable possibility that the result of the trial could have been different had the errors not been made: **R. v. Bevan**, [1993] 2 S.C.R. 599. This may be said in two main types of cases: those involving errors that could not have affected the result because they were trivial or immaterial to the outcome and those involving more serious or potentially material errors the significance of which is overborne by overwhelming evidence of guilt: **R. v. Arradi**, [2003] 1 S.C.R. 280 and **R. v. Khan**, [2001] 3 S.C.R. 823. In my view, the *proviso* may only be applied in this case on the first of these two bases. This case turned on credibility and the appellant testified. The Crown's case, while strong, was not overwhelming for the purposes of applying the *proviso*.

[85] The cumulative effect of the two errors I have identified must be considered, but I will initially discuss each in turn starting with the records.

[86] The appellant submits that these records were potentially important for three reasons.

[**NOTE:** The discussion of the records is subject to the publication ban in s. 278.9 of the **Criminal Code**].

[87] *Editorial note- paragraph removed*.

[88] *Editorial note- paragraph removed*.

[89] *Editorial note- paragraph removed*.

[90] *Editorial note- paragraph removed*.

[91] *Editorial note- paragraph removed*.

[92] Turning to the judge's failure to instruct the jury about propensity evidence, I am also of the view, in the very particular circumstances of how this trial unfolded, that this non-direction did not occasion any substantial wrong or miscarriage of justice. A number of factors have combined to persuade me of this.

[93] First, the judge's charge accomplished most of what a proper charge required. The danger of improper use of evidence from count to count was addressed by the judge's strong instruction to the jury to keep their assessment of the evidence in relation to each count separate and to treat each count as a separate indictment. He told them that " [i]t would be wrong for you to supplement the evidence relating to one count with evidence from an entirely different count, or to look to the whole of the evidence for determining guilt on a particular count." (Emphasis added) This, in effect, told the jury to concentrate on the evidence which related to the commission of the offences charged and not to look to other evidence extraneous to that question. He also reviewed the evidence the jury should consider on each count and he did not refer in this summary to any of the most potentially damaging uncharged conduct. While the judge did not warn the jury against propensity reasoning, his charge clearly focussed them on the evidence bearing directly on the alleged abuse and directed them to consider only that evidence.

[94] Second, this is a case of non-direction rather than of any misdirection. Unlike **Farler**, **Rarru** and **B.(F.F.)**, there was in this case no instruction by the judge or any invitation from Crown counsel to engage in the very reasoning which the jury ought to have been warned against. While, of course, silence in a jury charge is not golden, silence in this case was much less potentially damaging than the instructions in **Farler**, or the invitations by the Crown as in **Rarru** and **B.(F.F.)**

to engage in the very type of reasoning which the jury ought to have been told not to engage in.

[95] Third, Crown counsel in his address to the jury, clearly told the jury that they must not engage in propensity reasoning by using a finding of guilt on one offence as evidence in relation to the others:

> ... It's the legal use you can make of each of the charges as it relates to each alleged victim.
>
> You can't follow, ladies and gentlemen -- and we won't ask you to do this -- a chain of reasoning that, if you find the accused Mr. [H.] to be guilty of an offence involving one victim, for example, that evidence and that finding can't be used by you to come to a conclusion or follow a chain of reasoning that he is guilty of another or other of the remaining offences involving the other alleged victims. So please bear that in mind. (1097)

[96] Submissions from counsel do not have the same weight as legal instructions from the judge. However, that a proper submission was made on the point is one factor among others that may be taken into account in deciding whether the charge, in the context of the whole of the trial record, resulted in a substantial wrong or miscarriage of justice. The Crown in submissions to the jury made a brief reference to the evidence of the appellant's discreditable conduct as a "harsh, brutal disciplinarian" who "ruled that household by fear". This, however, was in the context of submissions about why the complainants may not have come forward much earlier - a perfectly proper use of the evidence.

[97] Fourth, the potentially prejudicial evidence was elicited for the most part by the defence. The Crown touched on certain aspects of uncharged discreditable acts in a total of about five pages of transcript over the testimony of three complainants. By contrast, defence questioning of the same complainants about uncharged discreditable conduct encompasses about 34 pages of transcript. The defence questions were by no means "damage control", but deliberate and persistent elicitation of additional details and new allegations. This was apparently done for the purpose of supporting inferences that the complainants knew how to get help when they wanted it, that they were greatly exaggerating their claims given that they stayed in the home as they got older and to show an inconsistency between their trial evidence and their absence of contemporaneous complaints of any sort of

abuse. A more explicit instruction from the judge about this evidence might have risked undermining the defence position which was based on it.

[98] Fifth, and finally, defence counsel at trial did not object to the judge's charge in this regard and indeed the appellant's counsel on appeal, who was not trial counsel, did not raise this matter as a ground of appeal. Of course, an appellant in a criminal case does not waive a right of appeal based on errors or omissions in the jury charge simply by failing to raise objection to the charge at trial. Ultimately, the jury charge is the responsibility of the trial judge, not of defence counsel: **R. v. Jacquard** at para. 37. However, the absence of objection is still a factor to consider. As the Chief Justice said in **Jacquard** at para. 38, defence counsel's failure to object to the charge says something about both the accuracy of the instruction and the seriousness of any omission. In this case, it suggests that counsel thought that a more explicit warning was not in the appellant's interests in the particular context of this trial: see, e.g. **R. v. Johnson** (2002), 166 C.C.C. (3d) 44 (Ont.C.A.). Unlike the situation in **B. (F.F.)**, the evidence in question was mostly elicited by the defence to serve the tactical purposes of the defence.

[99] Taking these five considerations into account, I conclude that the failure of the judge to give a more explicit warning not to engage in propensity reasoning in this case did not occasion any substantial wrong or miscarriage of justice. I am also of the view that this conclusion holds considering the cumulative effect of the two errors I have found were made.

IV. DISPOSITION:

[100] I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Saunders, J.A.