Date: 20010208
Docket: CAC 162143

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. G.A.L., 2001 NSCA 29]

Cromwell, Hallett and Chipman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
Respondent on cross-appeal

- and -

G. A. L.

Respondent
Appellant on cross-appeal

REASONS FOR JUDGMENT

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Counsel: Kenneth W.F. Fiske, Q.C. for the appellant
Daniel J. MacIsaac for the respondent

Appeal Heard: November 23, 2000

Judgment Delivered: February 8th, 2001

THE COURT: Leave to appeal granted and Crown appeal from sentence allowed per reasons for judgment of Hallett, J.A.; Chipman, J.A. concurring. Cromwell, J.A. dismissed leave to appeal but agreed with the result of the majority. Cross-appeal from conviction dismissed per reasons for judgment of Hallett, J.A.; Chipman and Cromwell, J.A. concurring.

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

HALLETT, J.A.:

[1] Mr. L. was convicted of sexually assaulting K.A.I. He was sentenced by Judge Embree to 14 months imprisonment followed by 18 months probation. L. appealed both his conviction and sentence to the summary conviction appeal court. Justice Hall dismissed the appeal against conviction but allowed the sentence appeal. He varied the sentence by providing that the term of imprisonment be served in the community rather than in a correctional centre and that L. perform 200 hours of community service and comply with other conditions imposed. The Crown has applied for leave to appeal and, if granted, appeals Justice Hall's decision on sentence. The Crown seeks restoration of the sentence imposed by the trial judge. L. has applied for leave to appeal and appeals Justice Hall's decision which affirmed the conviction.

FACTS:

[2] On the evening of Friday, June 6, 1997, L. visited his friend R. W. at W.'s house at *, near * in Guysborough County (**editorial note- text removed to protect identity*). The house was owned by W. and his two brothers and it was the residence of all three. K.A.I., W.'s girlfriend, was at the house. W., L. and K.A.I. were chatting and drinking. As the evening progressed others joined the party.

[3] At around midnight K.A.I., tired and having had her fill of partying, went downstairs to the bedroom she shared with R. W.. That bedroom was located adjacent to the family room. She crawled into bed and went to sleep. R. W., the respondent and the others likewise went downstairs but gathered in the family room. Eventually everyone retired to their respective rooms, except R. W. and L. who remained in the family room watching television. W. soon fell asleep in a chair.

[4] L. walked from the family room to W.'s bedroom. K.A.I. was asleep facing the wall. He slipped into the bed with K.A.I.'s back to him. She awoke to L. touching her. She believed the man next to her was R. W.. L. was attempting to engage her in sexual intercourse. Although she did not wish to do so, K.A.I. allowed the person she thought was her boyfriend to have intercourse with her. L. ejaculated inside her. The sex act completed, K.A.I. got out of the bed and walked to the washroom upstairs. On her way

out of the bedroom she noticed on the floor a coat which she believed belonged to L.. While using the upstairs washroom she heard L.'s truck leaving the property.

[5] When K.A.I. returned to the bedroom she observed the bed empty and her boyfriend asleep in the family room. Realizing that it might have been someone other than R. W. who had had sex with her, K.A.I. awoke her boyfriend. He told her that he had not been in bed with her. K.A.I. concluded that the man she thought was R. W. must have been G. L.. Realizing this, she became emotionally distraught and asked her boyfriend to take her to the hospital and to the police.

[6] A complaint was made that day to the local detachment of the R.C.M. Police. L. was arrested and he gave a statement to the police in which he denied having had sexual intercourse with K.A.I.. A subsequent DNA test, however, established L. as the donor of the semen discovered in K.A.I.'s vagina.

[7] In the course of the trial the Crown was granted leave by Judge Embree to call similar fact evidence and two witnesses, M. M. and P. G., described to the court their experiences involving the appellant some years previous.

[8] The appellant testified on his own behalf. He admitted that he had sexual intercourse with K.A.I. that Saturday morning, but said K.A.I. knew he was the person in bed with her and had willingly participated in the sexual activity.

[9] On August 12, 1999, Judge Embree found the appellant guilty of the sexual assault of K.A.I.. On September 30, 1999, he sentenced the appellant to serve a term of imprisonment of fourteen months in a provincial jail and probation for eighteen months.

[10] The appellant appealed both the conviction and sentence to the summary conviction appeal court pursuant to s.813 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The appeal was heard by Justice Hall of the Supreme Court on January 21, 2000. Justice Hall dismissed the appeal from conviction but modified the sentence to provide that the appellant serve the term of imprisonment of fourteen months in the community subject to the conditions of a conditional sentence order.

[11] By notice of application for leave to appeal dated February 16, 2000, the Attorney General of Nova Scotia applies for leave to appeal and, if granted, appeals under s.839(1) of the **Criminal Code** from that part of the judgment of the summary conviction appeal court allowing the appeal from sentence. By notice of application for leave to cross-appeal dated March 9, 2000, the appellant applies for leave to cross-appeal from the judgment of the summary conviction appeal court dismissing his appeal from conviction.

[12] The appeal was heard by this Court on November 23rd, 2000. As of that date L. had served approximately ten months of the 14 month conditional sentence and had performed 180 hours of the 200 hours community service ordered by Justice Hall.

[13] L. lives with his elderly mother on the family livestock farm which he operates in a remote rural area.

THE "SIMILAR FACT" ISSUE:

[14] With the agreement of the parties, a statement (rather than oral testimony) from a Ms. G. made on September 13th, 1997, was admitted into evidence on the *voir dire* subject to a ruling as to its admissibility as similar fact evidence. The statement related to an event that took place eight or nine years prior to the sexual intercourse with K.A.I. that led to the charge against L.. Ms. G.'s statement read, in part, as follows:

(a) I went to bed after midnight because I was not feeling good. I was in my own bed. M. came up to check on me, he laid down and fell asleep. There were still people in the house. I was awaken by a male lying beside me who was taking his penis and touching my butt with it, trying to find an entry. I got up out of bed and it was G. L.. He had his pants down. I kicked him out of the bed and he fell on the floor. My husband, M., woke up and I told M. what had happened. By this time, G. L. was gone out of the bedroom. I knew it was G. L. because when I woke up the hallway light was on and it shone in my bedroom. I have known G. L. all my life. G. did not penetrate my body with his penis. I was not wearing any clothes to bed. The reason I went to bed early was because I got sick to my stomach from the shot of tequila. My husband, M., confronted G. L. about the incident and G. replied he can't remember.

[15] A written statement by a Ms. M. dated June 17th, 1997, was also admitted by agreement. This statement related to two encounters that Ms. M. had with L.. Relevant parts of the question and answer statement are as follows:

(a) Q. I am assisting the Royal Canadian Mounted Police, Guysborough Detachment, Nova Scotia, in an investigation. G. A. L. is alleged to have committed a sexual assault on the 7th of June, 1997.

(b) Do you know G. A. L. and if so can you explain to me how you know him or the nature of your relationship/past relationship?

(c) A. I know him he's from the same community that I am from, B., and there's no relationship and there never has been. There's only 200 people there in the summer time, it's a very small community. He was a friend of some of the people I knew. It was like early fall of 88, I think September or October and a group of us went to a dance. After the dance everyone ended up going to my house, and that was in R. of all places. I went to my own room and went to sleep. I'm not sure of everyone who was there, but here were six or so of us including E. M., B. W., I think S. G. and R. C. and G. L., I don't know why he was there and L. W., I think because G. would not have been with us, he wasn't really our friend he was more friends with L., S. and R.. We had all been drinking. I don't remember to what degree, but I don't believe anyone was passed out or anything. After the dance normally we would have a BBQ and have a few more drinks. B. and E. were sleeping in one room upstairs and the other guys were on the sofa and floor. So, it was coming daylight, and I woke up, I remember it was becoming daylight because I could see in the room and someone was in my bed, he was in my bed, and he had his clothes off, it was G. L.. I woke up because he was touching me, he was trying to have intercourse with me from the back. He had his penis pushing up against my backside but he was not trying to fondle me or anything like that. He was trying to move me with his hands so he could achieve his goal. When I realized what was going on, because it took me a moment to come to grips or absorb what was happening so then I tried to get out of bed and he tried to stop me by holding me back and pushing me down, but I was

able to get away and out of bed. I was under the covers and he had got under there as well. When I got up I was screaming and upset and I made a big scene and woke people up in the house, E. and B. and I think S. and R. woke up. Then I kicked him out he got his pants on, and he got his clothes and I made him leave, like I kicked him out and he left walking. It was early, it must have been around 5 or 6 in the morning. I guess that was it for that.

(d) Q. Did he say anything to you during the incident?

(e) A. No, not that I can remember not even when I freaked out, he always appeared as though there was something missing, he was liquored but not enough to not know what he was doing. I'm sure he'll say he was drunk but that's no excuse. .....

[16] The second time Ms. M. had contact with L. happened either in the same year or early in the year following. In her statement she said that she was staying with E. M. who was a friend of hers. She was asleep on the sofa in the living room. In her statement she states:

(a) A. ... I woke up and there was someone on top of me on my back, I was on my stomach. He was pushing me by the back of my neck into the pillow (demonstrated pushing face forward with hand). He had his pants undone and he was trying to raise my night dress. I was able to knock him off on the floor because I remember him laying on my machine. It was G. L.. I was very angry and nasty to him and he got up and went out and got in his truck and left.

(b) Q. When he is on top of your back, you say he had his pants down, how do you know this?

(c) A. Because I could feel his penis touching me and when I knocked him off, I could see his pants were undone and I could see his "parts".

(d) Q. Did anyone hear or come into the room?

(e) A. Yes, E. and I think B. came in too. B. was up for sure and they wanted to know what was going on. He (G. L.) was just going out the door and they saw him drive away. He had a one ton farm truck with wooden racks on the back, it was very distinctive. I hadn't had anything to drink because I wasn't feeling well. I don't know if he (L.) had been because he

> wasn't there when we went to bed. I hadn't seen him that day or evening until I woke up and he was on top of me.

[17] Both Ms. G. and Ms. M. testified at the trial.

[18] Judge Embree permitted the admission of the two statements and the evidence of Ms. G. and Ms. M. as similar fact evidence on the ground that the evidence was relevant to at least two issues at trial, that is the credibility of the complainant and to rebut a defence of innocent association. Judge Embree had been advised by defence counsel that likely the court would be ultimately expected to consider issues of consent and honest but mistaken belief in consent. On the critical issue of distinctiveness of the similar fact evidence to the incident that gives rise to the charge of sexual assault, the trial judge stated:

> (a) ... There is more than a sufficient degree of distinctiveness, common to the alleged actions of the accused as described by Ms. M. and Ms. G. and his actions as described in the testimony of K.A.I. ....

[19] In affirming Judge Embree's trial ruling on the *voir dire*, Justice Hall stated:

> (a) ... I refer in particular to the fact that the appellant indicated that one of his main lines of defence was honest but mistaken belief that the complainant was consenting to the sexual activity. Similar fact evidence was admissible to show what his state of mind was and that from his previous experience he would have known that in such circumstances it was unlikely that the subject of the sexual overtures would likely be consenting. The similar fact evidence in question was properly admissible to rebut the defence of honest but mistaken belief in consent. The fact that it incidentally may have shown that the appellant had a propensity to commit such acts is immaterial so long as the prejudice to the defendant is not outweighed by the probative value of the evidence. As found by the learned trial judge in this case it was not.

[20] Counsel for L. asserts on this appeal that the similar fact evidence was to bolster the credibility of the complainant and that such "oath-helping" is impermissible. Further, the appellant says the events to which the witnesses testified occurred a number of years prior to 1997 and because of the passage of time the incidents should not have been considered. He submits that the evidence was not called for the purpose of establishing identity; identity was not an issue at the trial. The appellant also argues that the similar fact evidence did not possess the necessary quality of uniqueness or

distinctiveness and that the probative value of the evidence was such that it did not outweigh its prejudicial effect.

[21] The critical issue with respect to the admissibility of similar fact evidence is to determine whether its probative value outweighs its prejudicial effect. With respect to its probative value, the Supreme Court of Canada in **R. v. C.(M.H.)**, [1991] 1 S.C.R. 763 stated at p. 771:

> (a) This Court addressed the principles governing the admissibility of evidence of similar acts in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717. Evidence as to disposition, which shows only that the accused is the type of person likely to have committed the offence in question, is generally inadmissible. Such evidence is likely to have a severe prejudicial effect by inducing the jury to think of the accused as a "bad" person. At the same time it possesses little relevance to the real issue, namely, whether the accused committed the particular offence with which he stands charged. There will be occasions, however, where the similar act evidence will go to more than disposition, and will be considered to have real probative value. That probative value usually arises from the fact that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence. Only where the probative force clearly outweighs the prejudice, or the danger that the jury may convict for non-logical reasons, should such evidence be received.

[22] I agree with the submission of the Crown on this appeal that what is relevant is the method adopted by L. in his attempts to have sex with the three women in question and that his method bears unique and distinctive qualities. In each incident the woman was asleep. In each incident L., in varying degrees of undress, attempted to have sexual intercourse by penetration from behind and in silence. In each incident there was no indication of any prior sexual overtures between the woman and L.. In my opinion, by any objective standard, the method L. adopted in attempting to have sexual intercourse with each woman (he succeeded with K.A.I.) is clearly unique and, therefore, highly probative and relevant to issues that were before Judge Embree. The fact that the incidents with Ms. G. and M. took place some eight years before the sexual intercourse with K.A.I. and the fact that he did not succeed in having sexual intercourse with those persons does not detract from the highly probative value of the uniquely similar conduct of L..

[23] Justice Hall did not err in law in affirming the ruling of Judge Embree that the similar fact evidence was admissible.

THE ISSUE OF THE COMPLAINANT'S ALLEGED PRIOR SEXUAL ACTIVITY WITH L.:

[24] L. applied, pursuant to s. 276 of the **Criminal Code** to have admitted evidence of a prior alleged incident of sexual intercourse between L. and K.A.I. which took place in the back seat of a car about a year prior to the sexual intercourse that occurred on June 7th, 1997. Under cross-examination on the *voir dire* respecting the admissibility of this evidence, L. acknowledged that he was not saying that the thought was in his mind on June 7th, 1997 that K.A.I. was consenting because of the previous sexual intercourse which he alleges took place between them in the car.

[25] Counsel for L. submitted to Judge Embree that the evidence of the previous incident of sexual intercourse should be admitted as it would "show a quickness of pattern" in the sexual activity as well as the fact that she had had sex with L. before and that it would be impossible for her to mistake L. for her boyfriend R. W.. Essentially, he was asserting that the evidence of this prior incident would show that it was more likely that she had consented to sexual intercourse on June 7th, 1997.

[26] Section 276 of the **Criminal Code** states:

(a) **276. (1)** In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(b) (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(c) (b) is less worthy of belief.

(d) **(2)** In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge,

provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(e) (a) is of specific instances of sexual activity;

(f) (b) is relevant to an issue at trial; and

(g) (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(h) **(3)** In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(i) (a) the interests of justice, including the right of the accused to make a full answer and defence;

(j) (b) society's interest in encouraging the reporting of sexual assault offences;

(k) (c) whether there is a reasonable prospect that the evidence that the evidence will assist in arriving at a just determination in the case;

(l) (d) the need to remove from the fact-finding process any discriminatory belief or bias;

(m) (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(n) (f) the potential prejudice to the complainant's personal dignity and right of privacy;

(o) (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(p) (h) any other factor that the judge, provincial court judge or justice considers relevant.

(q)

[27] At the conclusion of the *voir dire*, Judge Embree ruled:

(a) .....it appears that there is an issue at trial concerning whom the complainant believed was in bed with her on the 7th of June, 1997, when the alleged sexual assault here occurred. On the surface, I would say that an indication that there had been a previous encounter of a sexual nature involving sexual intercourse between the complainant and the accused could be a relevant consideration to the

issue of identification of the person that she was in bed with on the 7th of June.

(b) The particular evidence sought to be adduced, as garnered from what was put before me in the affidavit and in the *viva voce* testimony of Mr .Skinner and Mr. L. at the hearing, is evidence in my view of very, very dubious relevance to that issue. It is only in the very most general of senses connected to that. But the specifics of the evidence are so indefinite as to be even questionable in my view as to whether the relevance aspect is met. Mr. Skinner really doesn't have anything much to offer on that subject aside from the general testimony of finding Mr. L. and the complainant in this vehicle. He can't testify as to the existence or non-existence or presence or absence of sexual intercourse except in a very inferential fashion.

[28] Judge Embree, after making reference to L.'s evidence and other matters, and in particular that the evidence seemed to be of very little relevance stated:

(a) But even if I were to say that just by the very nature of the issue that there's some evidence that might be relevant, this application in my view definitely falls short on the third category, that is significant probative value [s. 276.(2)(c)].

[29] Justice Hall dealt with this issue on appeal as follows:

(a) The only basis claimed [before Judge Embree] by the appellant for admission of evidence of the previous sexual history of the complainant was that it showed that she was more likely to have consented to the sexual acts. Under s. 276(1)(a) of the **Code** that is not a permitted basis for admitting such evidence. Here there was no issue of identity or motive as the appellant acknowledged that it was he who was in bed with the complainant at the time in question and that he, in fact, did have sexual intercourse with her. The issue was purely a question of consent or no consent. Admittedly such evidence may have been relevant to the honest but mistaken belief defence, but that defence was not raised until later in the trial. In his testimony on the *voir dire* to determine the admissible of the evidence, the appellant acknowledged that the first incident was not in his mind at the time the incident that was the subject of the charge occurred and that it did not play any role in his behavior.

[30] Counsel for L. submitted to this Court that K.A.I. had a motive to fabricate her evidence. She acknowledged in cross-examination that in June of 1997 she had just resumed co-habitation with her boyfriend after a year of separation.

[31] Counsel for L. submits that K.A.I. did not want to lose her home or her common law husband and fabricated her evidence when she testified that she thought it was R. W. and had consented to having sexual intercourse because of that mistake.

[32] The Crown's submission on this issue was that the earlier alleged incident of sexual intercourse in the car, based on L.'s own testimony, was not on his mind on June 7th when he was in bed with K.A.I.

[33] In reading Justice Hall's decision it would be logical to conclude that he was addressing the issue raised by L.'s counsel at trial that the evidence of previous sexual intercourse between L. and K.A.I. ought to be admitted to show K.A.I., having had sexual intercourse with both R. W. and L., must have been able to distinguish between the two on the morning of June 7th, 1997. There was no evidence led to show that there is anything distinctively different between L.'s approach and that of R. W. that would support such a suggestion. In fact, the evidence shows that R. W. often initiated sexual intercourse from behind K.A.I.. The distinctiveness of the similar fact evidence which warranted its admission has been described in paragraph 22 of this judgment. Judge Hall did not err in ruling that admission of the alleged prior sexual intercourse between L. and K.A.I. was simply for the purpose of showing that it was more likely that K.A.I. had consented on the evening in question and that this was an impermissible purpose.

[34] With respect to the issue of honest but mistaken belief in consent, Justice Hall concluded that the evidence may have been relevant on that issue but that the defence was not raised until later in the trial, that is, subsequent to the *voir dire* and Judge Embree's ruling. At the start of the trial when the *voir dire* was held, the defence was that K.A.I. had initiated and had clearly consented to sexual intercourse with L.. Defence counsel did not at any subsequent time in the trial ask the trial judge to reconsider his ruling on the grounds that the evidence of the alleged prior sexual intercourse between L. and K.A.I. supported the defence of honest but mistaken belief in consent. It is of significance that on the *voir dire* L. testified that the prior sexual intercourse was not on his mind on the evening of June 7th, 1997. I agree

with the submissions of the Crown that in view of L.'s evidence that the evidence of prior sexual intercourse between L. and K.A.I. not having been on his mind on June 7th, 1997, was of no probative value to support the defence of honest but mistaken belief and consent.

[35] The motive to fabricate issue was not directly dealt with by the trial judge in his decision. However, I would infer that counsel for L. did raise the issue in his submission at trial as he cross-examined K.A.I. on the issue and elicited from her that had she gone to bed with L. she would have lost her boyfriend. I put no stock in the submissions to this Court on this issue in face of the strong findings by the trial judge respecting the credibility of K.A.I. and the lack of credibility of L.. After properly instructing himself on the burden of proof, reviewing K.A.I.'s evidence, and making reference to the conflicting testimony as to the circumstances under which sexual intercourse occurred, Judge Embree stated that it was his conclusion that K.A.I. was an honest and forthright witness whose evidence is credible and reliable. The trial judge went on to state that he accepted the testimony of Ms. M. and Ms. G. as to what had taken place between them and L.. With respect to the testimony of L. he stated:

(a) ... <u>His evidence is totally unworthy of belief</u>. It is filled with falsehoods surrounding his sexual conduct, excuse me, contact with K.A.I., as was his statement to the police. I am satisfied that the sexual contact on June 7, 1997 between K.A.I. and the accused occurred as K.A.I. described.

(emphasis added)

[36] On the issue of consent to sexual intercourse and the defence of honest but mistaken belief in consent Judge Embree stated.

(a) ... There clearly was no consent by K.A.I. to this sexual contact with the defendant. When the accused's sexual touching of K.A.I. started she was asleep and thus incapable of consenting. When K.A.I. became aware of being touched and was conscious for the sexual intercourse that followed, she did not know the perpetrator was the defendant. She would not have and did not consent to engage in this sexual activity with the defendant. Even when under the belief that the person was her boyfriend, she expressed in words her lack of agreement to engage in sexual activity by saying "hon don't, go to sleep, leave me alone".

> (b) The evidence does not support, and I totally reject the defence submission of honest belief in consent. The whole basis put forward by the defendant in his testimony as to why he believed that, is untrue, as I have already commented on. Based on what really did happen, the testimony of K.A.I. clearly shows, and I conclude, that there is a complete absence of reasonable grounds for that belief. K.A.I. did nothing before or during the sexual activity to indicate her consent to same with the defendant. The defendant took no reasonable steps to ascertain that K.A.I. was consenting. In my view, he held no such belief. The defendant did not have, did not seek, and did not care about K.A.I.'s consent. He got into bed with K.A.I. while she slept, intended to sexually assault her, and did sexually assault her. That assault continued after K.A.I. woke up.
>
> (emphasis added)

[37] In view of the strong findings by the trial judge as to the lack of credibility of L., I have no concern whatsoever that the verdict might have been different had the evidence of the alleged prior sexual intercourse between L. and K.A.I. been admitted. K.A.I. testified that L.'s evidence that he had sexual intercourse with her in the back seat of a car was untrue. Based on the findings of the trial judge on the vital issue of credibility there is no reason to believe that there had been prior sexual intercourse between K.A.I. and L.. Furthermore, the evidence to support the submission of counsel for L. that K.A.I. may have had a motive to fabricate her evidence was already before the Court as a result of counsel's cross-examination of K.A.I. Therefore, the evidence of the alleged prior sexual activity was not relevant to this issue.

[38] Justice Hall did not err in affirming Judge Embree's decision to exclude the evidence of the alleged incident of prior sexual activity between L. and K.A.I. The evidence had no significant probative value.

THE CONSENT ISSUE:

[39] I have previously set out what the trial judge had to say in his decision in concluding that the Crown had proven the absence of K.A.I.'s consent to the sexual intercourse with L. on June 7th, 1997. In short, the trial judge found: (i) that K.A.I. was not consenting to sexual intercourse with L. but with R. W.; and (ii) that the trial judge "totally rejected" L.'s defence of honest belief in consent.

[40] Justice Hall dealt with the issue of consent as follows:

(a) The question of whether the complainant consented is basically a question of fact. Although as stated in **Yebes v. R.** (1987), 36 C.C.C. (3d) 417, an appeal court must on an appeal re-examine and to some extent re-weigh and consider the effect of the evidence at trial, it must not merely substitute its view for that of the finder of fact at trial. Findings of fact of a trial judge will not be disturbed unless the appeal court is satisfied that serious error was made by the trial judge in his/her assessment of the evidence or important evidence was overlooked, leading the appeal court to conclude that the verdict is unreasonable or cannot be supported by the evidence. Here, the learned trial judge rejected the evidence of the appellant and accepted the evidence of the complainant and found that she, in fact, did not know that the man in bed with her was the accused. In order for there to be true consent, in a legal sense, the person must know the substance of what is being consented to and, in circumstances such as this, to whom the consent is being given. In my respectful opinion, there was ample evidence to support the findings of the trial judge.

(b) As to the defence of honest but mistaken belief, in my opinion, there was no "air of reality" to this defence. In his evidence the appellant stated that the complainant invited him into the bedroom and that she was consenting throughout and responding in such a manner as if she knew it was him who was in bed with her. Thus the issue was clearly one of consent or no consent. If the evidence of the appellant had been believed the court would have to have found the appellant not guilty. Unfortunately for the appellant the court rejected his evidence. It is trite to say that a person in the position of the appellant in these circumstances cannot have it both ways.

[41] Counsel for L. submits on this appeal that Judge Embree erred in finding that the consent component of the offence was proven beyond a reasonable doubt. By implication, counsel asserts that Justice Hall erred in affirming the trial judge's conclusion. Counsel's submission seems to boil down to this: "The error of identity by K.A.I. was her error." Counsel for L. submits that L. did not hold himself out to be R. W. on the evening in question.

[42] Counsel for the Crown submits that the issues raised by L.'s counsel involve either findings of fact or inferences drawn from the facts by the trial judge and are, therefore, not issues of law that fall within the parameters of an

appeal to this Court pursuant to s. 839(1) of the **Code**. Counsel for the Crown also submits that the trial judge, without reservation, accepted the evidence of the complainant and found that L.'s testimony was "totally unworthy of belief". Counsel submits that she was consenting to sexual relations with R. W. and not L. and that the absence of consent is subjective and must be answered by reference to the complainant's subjective state of mind.

THE LAW RE: CONSENT:

[43] In **R. v. Ewanchuk**, [1994] 1 S.C.R. 330 the Supreme Court of Canada described the components of the offence of sexual assault at § 23:

(a) A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

[44] With respect to the *actus reus* of the consent component of the offence, the Court stated that the absence of consent is subjective and determined by reference to the complainant's subjective internal state of mind towards the conduct in question at the time. Most relevant to the appeal we have under consideration are the statements made by the Supreme Court of Canada in **Ewanchuk** at § 29 and 30:

(a) 29. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

(b) 30. The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of

> the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.
>
> (emphasis added)

[45] With respect to the *mens rea* component of the offence, the Court in **Ewanchuk** stated:

(a) 41. Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement. See *R. v. Daviault*, [1994] 3 S.C.R. 63.

(b) 42. However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See *Park*, *supra*, at para. 39.

(c) 43. The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):

(d)

> Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which

> may have caused an accused to entertain a belief in a fallacious set of facts.

[46] In **Ewanchuk**, the Court went on to point out the difference in the concept of consent as it relates to the state of mind of the complainant with respect to the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. With respect to the *actus reus* consent means that the complainant, in her mind, wanted the sexual intercourse to take place with the accused. With respect to the *mens rea*, and specifically for the purpose of the defence of honest but mistaken belief in consent, consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. The Court went on to point out that there are limitations on the defence of honest but mistaken belief in consent and that these limitations are set out in s. 273(2) of the **Criminal Code** which provides as follows:

> (a) **273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (b) (*a*) the accused's belief arose from the accused's
>
> (c) (i) self-induced intoxication, or
>
> (d) (ii) recklessness or wilful blindness; or
>
> (e) (*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

DISPOSITION OF THIS GROUND OF APPEAL:

The *Actus Reus*:

[47] The trial judge believed K.A.I., that subjectively she was not consenting to sexual intercourse with L.. She thought she was having sex with R. W.. In **Saint-Laurent v. Hétu**, [1994] R.J.Q. 69 (C.A.), Fish, J.A. at p. 82 set out what must be borne in mind by the trier of fact when evaluating the actions of a complainant who claims to have been under fear, fraud or duress at the time she participated in the sexual activity with the accused. He stated:

> (a) "Consent" is . . . stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.
>
> (emphasis added)
>
> In **Ewanchuk** the Supreme Court of Canada implicitly approved of this statement (§ 37).

[48] K.A.I. was deceived. She assumed it was R. W. attempting, from behind to have sex with her. She stated "hon don't, go to sleep, leave me alone" L. made no response. K.A.I. did not subjectively consent to having sex with L.. The emphasis in **Ewanchuk** on the subjective nature of consent in relation to the *actus reus* of the offence is consistent with English, Irish and Australian authority holding that consent is not present if the alleged victim permitted the act under a misapprehension as to the other person's identity: see **R. v. Dee** (1884), 15 Cox C.C. 579 (Crown Cases Reserved); **R. v. Gallienne** (1963), 81 W.N. 94 (N.S.W.C.C.A.); **R. v. Linekar**, [1995] 3 All E.R. 69 (C.A., Crim. Div). The **Gallienne** case is very similar factually to this one and the Court upheld the conviction for rape starting at p. 100:

> (a) If there is evidence upon which the jury can come to the conclusion that the woman permitted the act of intercourse under a misapprehension as to the identity of the person with whom she was having intercourse, that is, under the belief that he was her husband, the jury could convict of rape.

[49] I am satisfied that the evidence supports a finding that the Crown had proven the *actus reus* of the offence.

The *Mens Rea o*f the Offence:

[50] The trial judge did not believe that L. had an honest but mistaken belief in consent. The evidence supports that finding.

[51] When L. initiated the sexual contact with K.A.I. she said "hon don't, go to sleep, leave me alone". Considering all the circumstances which I have already outlined in the factual summary, L.'s silence at that point speaks volumes as to his lack of moral innocence.

[52] The trial judge found that there was no reasonable basis for L. holding his alleged belief that K.A.I. was consenting. To the extent that this is a finding

of fact, there is no basis to interfere with it and Hall, J. was right not to do so. It follows as a matter of law that s. 273(2)(b) of the **Code** applies and L.'s alleged belief is not a defence.

[53] The submission that K.A.I. had a motive to fabricate is without merit. R. W. was asleep in the family room at the time sexual intercourse took place. He was awakened by K.A.I. after she realized what happened. It is hardly likely that she would waken him to tell him about this incident had she engaged in consensual sexual intercourse with L. and was, therefore, interested in deceiving R. W. so as not to jeopardize her relationship with him.

[54] Hall, J. was correct when he said that there was no air of reality to the defence of honest but mistaken belief in consent.

[55] The evidence supports a finding that the Crown had proven beyond a reasonable doubt the absence of consent. The conviction was amply supported by the evidence. Justice Hall did not err in affirming the conviction. I would grant leave to appeal but dismiss the appeal from conviction.

THE SENTENCE APPEAL:

[56] The Crown has applied for leave to appeal and appeals Justice Hall's decision to vary the sentence imposed by the trial judge. The Crown submits that Justice Hall, in varying the sentence from 14 months incarceration plus 18 months probation to a conditional sentence of 14 months to be served in the community plus 200 hours of community service failed to apply the proper standard of appellate review.

[57] To deal with this issue it is necessary to review the remarks of the sentencing judge and those of Justice Hall on the appeal of the sentence to the summary conviction appeal court.

[58] Judge Embree, in a thorough and carefully crafted decision, considered the purpose and principles of sentencing found primarily in s. 718, 718.1 and 718.2 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Judge Embree made specific reference to ss. 718.2(d) and (e) which are as follows:

(a) 718.2 A court that imposes a sentence shall also take into consideration the following principles:

(b) ...

(c) (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(d) (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[59] Judge Embree recognized that sexual assault in all its forms is a serious offence and that the sexual assault committed by L. involving sexual intercourse was one that warranted a sentence at the high end of the scale for sexual assaults that were proceeded with summarily. He made express reference to the positive pre-sentence report and the victim impact statements.

[60] He quoted from the decision in **R. v. G. (T.V.)** (1994), 31 C.R. (4th) 321 where Justice Bateman stated at p. 323:

(a) In *R. v. M.(G.)*, a decision of the Ontario Court of Appeal dated November 2nd, 1992, [reported at 77 C.C.C. (3d) 310], Justice Abella, writing for the court, explains the role of denunciation in sentencing sexual offenders. She says [at page 131]:

(b) The public can logically be expected to infer from the nature of the sentence the extent to which a court views as serious, certain conduct by a given individual ... Sentences which appear on their face to be exceptionally lenient in the circumstances can be presumed to generate neither deterrence nor denunciation.

[61] Judge Embree stated:

(a) It is clear when sentencing for crimes of sexual assault, the Court has to place particular emphasis on deterrence, both specific and general. General deterrence in particular has to be stressed.

[62] Judge Embree concluded that a period of imprisonment must be imposed. He then went on to consider the submission made on L.'s behalf that a conditional sentence would be appropriate. Judge Embree reviewed the relevant provisions of the **Code** having noted that as the maximum period of imprisonment for the offence for sexual assault in summary proceedings was 18 months that he was called upon to consider a conditional sentence.

He then stated that the sentences imposed in different cases he was asked by counsel to consider with respect to the imposition of a conditional sentence, all had significant factual differences from the situation he was considering. He went on to state:

> (a) In my view, considering all of the circumstances I have to consider here, this is not a proper case to impose a conditional sentence. In my view, a conditional sentence here is not consistent with the fundamental purpose and principles of sentencing set out in Section 718 to 718.2 of the *Criminal Code*. ...

[63] In reaching this conclusion Judge Embree was obviously influenced by the passage from **R. v. G.(T.V.)**, which he quoted.

[64] Judge Embree then considered the personal circumstances of L. and then imposed the sentence of 14 months imprisonment in a correctional centre to be followed by 18 months probation with conditions.

Justice Hall's Decision:

[65] L. appealed the sentence imposed by Judge Embree to the summary conviction appeal court on the ground that Judge Embree erred in failing to impose either a conditional sentence that could be served in the community or failing that an intermittent sentence.

[66] Justice Hall properly rejected out of hand the submission that an intermittent sentence was fit. He stated that such a sentence would be for a maximum 90 days and that it would be grossly inadequate. I agree. He then stated:

> (a) The option for a sentencing court to order that a custodial sentence be served in the community rather than in a prison is provided for in s. 742.1 et seq. of the **Criminal Code**. These provisions were adopted by Parliament and came into force in 1995. They constitute a clear signal from Parliament that the courts of this country ought to rely less on imprisonment as a sentencing tool, having in mind that among the Western nations of the world, Canada is second only to the United States in the rate of incarceration.

[67] Justice Hall expressly recognized that a sentence imposed by a trial judge is entitled to a high degree of deference by a reviewing court and that the sentence should not be disturbed unless the trial judge applied wrong

principles or if the sentence was clearly excessive or inadequate. He then stated:

(a) With respect, in the present case it appears to me that the learned trial judge over emphasized the elements of denunciation and general deterrence. From his comments he seems to have taken the position that a conditional sentence would never be appropriate in cases of serious sexual assaults as it would not satisfy the need for denunciation and general deterrence. In doing so he seems to have ignored a number of recent decisions of the courts of this Province, for example, **R. v. Winters** (1999), 174 N.S.R. (2d) 83, **R. v. S.P.C.** [1999] N.S.J. No. 113, and **R. v. C.K.H.** [1998] N.S.J. No. 520. In **R. v. Winters** which was a case of an adult having sexual relations with a twelve year old, including oral sex and sexual intercourse, the Nova Scotia Court of Appeal confirmed that a conditional sentence of eighteen months was "not demonstrably unfit." In that case, Flinn, J.A., in rendering the unanimous judgment of the Court said in part at pages 89 - 90:

(b) The Crown's position is that nothing short of incarceration is appropriate for this serious offence of sexual assault of a child. In **R. v. L.F.W.** (1997), 155 Nfld. & P.E.I.R. 115; 481 A.P.R. 115; 119 C.C.C. (3d) 97 (Nfld. C.A.), the same position was advanced by the Crown. Marshall, J.A., writing for the majority, gave three reasons why such a position is untenable. He said at pp. 118 - 120:

(c) The argument that sex offences against children merit incarceration, except in the rarest and most exceptional of cases is a reiteration of the Crown's stance before the trial judge. ...

(d) In the first place, the argument assumes deterrence and denunciation cannot be achieved through a conditional sentence and reflects the traditional mind set that these objectives can be achieved only through incarceration in a jail. This is not tenable.

> As the trial judge aptly observed, the denunciatory and general deterrent effect of a conditional sentence ought not be underestimated. Not only may the offender's freedom be severely limited, but his or her continuing presence in the community, detained at home and bearing the stigma of conviction, is calculated to serve as a daily deterrence to any like minded person and have real denunciatory consequences. These effects may perhaps be considered all the more pronounced in a rural setting such as Bay de Verde.

[68] Justice Hall then stated:

(a) Although the conduct of the appellant on this occasion was unquestionably reprehensible, in my opinion, it is not of the same level as the conduct of the respondent in **Winters**.

[69] Justice Hall then made reference to the favourable pre-sentence report. The following are excerpts from the report quoted by Justice Hall:

(a) All sources contacted for the purpose of preparing this report offered support for Mr. L., many unsolicited calls were received in support of him. ... He was described as a kind, thoughtful and considerate individual and one you could always depend on to help if he was needed.

[70] Justice Hall also made reference to the statement in the report that L. has been responsible for the care of his elderly parents, both of whom were experiencing serious health problems and that L. looked after the family farm which included livestock.

[71] Justice Hall then stated that he rejected the Crown's submission that L. is a danger to the safety of the community. He went on to state:

(a) Frankly, I can see absolutely no support for this proposition in view of the comments of community members set forth in the pre-sentence report; that the appellant has no criminal record and no record of anti-social behaviour except for the incidents described in the trial; that he

has expressed remorse for his actions and now accepts responsibility for his actions and acknowledges that this type of conduct is wrong.

(b) In my view, the learned trial judge was in error in ignoring or overlooking very significant mitigating factors such as those referred to above.

(c) In my opinion, permitting the appellant to serve his sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the **Criminal Code**.

[72] Justice Hall then varied the sentence by ordering that the sentence be served in the community rather than in a correctional centre. He made the sentence subject to stringent conditions including confining L. to his farm premises with the exception of being able to absent himself in limited circumstances including absence for bona fide employment. He further ordered that L. perform 200 hours of community service.

The Crown's Submission on the Appeal:

[73] The Crown submits that: (i) there was no evidence to support Judge Hall's conclusion that the sentencing judge had erred in principle; (ii) the offence, by any objective standard, was serious in nature, notwithstanding the exercise of prosecutorial discretion to proceed summarily under Part XXVII of the **Code**; (iii) although there was no violence, L. took advantage of K.A.I.; (iv) the trial judge's view of the seriousness of this offence, within the context of the summary conviction proceeding, should not be challenged; (v) Judge Embree did not err in principle in ruling that sentence must be imposed primarily to reflect denunciation of the crime and deterrence to both the offender and others; and, (vi) a term of incarceration for this offence committed in these circumstances cannot be viewed as proof of an error in principle or of a sentence which is "clearly unreasonable".

Disposition of the Appeal from Sentence:

[74] In **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.), the standard of review was put this way by former Chief Justice Lamer, speaking for the full Court at p. 374:

(a) Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. ...

[75] This non-interventionist standard was recently affirmed by the Supreme Court in its judgment in **R. v. Proulx** (2000), 140 C.C.C. (3d) 449. At p. 500, Lamer, C.J.C., speaking for the Court, said:

(a) Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit.

And further, at p. 504:

(b) However, trial judges are closer to their community and know better what would be acceptable to their community. Absent evidence that the sentence imposed by the trial judge was demonstrably unfit, the Court of Appeal should not have interfered to substitute its own opinion for that of the sentencing judge. The trial judge did not commit a reversible error in principle and she appropriately considered all the relevant factors. Although the Court of Appeal's decision is entitled to some deference . . . in my opinion it erred in holding that the sentencing judge had given undue weight to the objective of denunciation. I see no ground for the Court of Appeal's intervention.

[76] In **R. v. Winters, supra**, this Court referred to the following statement of Justice Iacobucci in **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 at p. 209 - 210:

(a) An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit.

> That is to say, that it has found the sentence to be clearly unreasonable.

[77] One should not lose sight of the fact that in **R. v. Winters** this Court refused to vary the conditional sentence imposed by the trial judge.

[78] In recent decisions of the Supreme Court of Canada in which the Court was particularly focused on the new sentence regime which came into force in 1996 with the enactment of Part XXIII of the **Criminal Code**, the Court stated that as a result, the range of available penal sanctions had been significantly increased, including the availability of the conditional sentence. The Court nevertheless reiterated the message of **Shropshire** that appellate courts should be slow to interfere with sentences imposed by trial judges.

[79] The decisions of the Supreme Court to which I am referring are **R. v. Gladue**, [1999] 1 S.C.R. 688; **R. v. Proulx**, [2000] 1 S.C.R. 61and **R. v. S.(R.N.)** (2000), 140 C.C.C. (3d) 553 (S.C.C.).

[80] In **Gladue**, an aboriginal woman pleaded guilty to manslaughter for killing her common law husband. The trial judge imposed a sentence of 3 years incarceration. She appealed. The British Columbia Court of Appeal dismissed the appeal. The Supreme Court of Canada, despite concluding that the lower courts may have erred in limiting the application of s. 718(2)(e) of the **Code** or erred in failing to consider many relevant factors that might have warranted the imposition of a conditional sentence nevertheless recognized that this was a serious offence and did not interfere with the three years imprisonment imposed by the trial judge. Ms. Gladue had been granted day parole after she had served six months in a correctional centre and, about a year prior to the decision of the Supreme Court, had been granted full parole with conditions. The Court declined to vary the sentence concluding that the incarceration for six months and the subsequent controlled release were in the interest of both the offender and society.

[81] In **R. v. Proulx**, the trial judge imposed a sentence of 18 months incarceration on an accused who had pleaded guilty to dangerous driving causing death and dangerous driving causing bodily harm. He appealed. The Manitoba Court of Appeal substituted a conditional sentence. The Supreme Court of Canada allowed the appeal and restored the sentence of incarceration.

[82] Similarly, in **R. v. S.(R.N.)**, the trial judge had imposed a sentence of 9 months imprisonment on the offender. He appealed. The British Columbia Court of Appeal substituted a 9 month conditional sentence. The Supreme Court of Canada allowed the appeal and restored the sentence of the trial judge.

[83] In each of these cases the Supreme Court dealt exhaustively with the concept of conditional sentences including recognition that a conditional sentence can have an appropriate deterrent effect. In these cases, the Court either restored or confirmed the sentences of imprisonment imposed by the trial judge. These decisions are a strong re-affirmation of the principle that a decision of a trial judge is entitled to considerable deference and should not be varied unless a court of appeal is convinced that the sentence is clearly unreasonable (**R. v. Shropshire, supra**).

[84] I would allow the appeal. Justice Hall erred in principle in failing to give appropriate deference to the sentence imposed by the trial judge. This is an error of law within the meaning of s. 839(1) of the **Criminal Code**. A review of Judge Embree's remarks on sentencing satisfies me that he considered whether he ought to impose a conditional sentence. I do not interpret his remarks as indicating that he felt that he could not impose a conditional sentence. He decided that he would not do so as such a sentence would not adequately reflect the principles of denunciation and deterrence. This was a serious sexual assault. The principles of denunciation and deterrence are recognized objectives of sentencing (s. 718(a) & (b) **Code**). In my opinion, Justice Hall erred in finding that Judge Embree had over-emphasized deterrence. As stated in **Proulx, supra**, although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference of opinion will generally not constitute an error of law justifying intervention (see also **R. v. S.(R.N.), supra**). Had Judge Embree chosen to impose a conditional sentence with stringent conditions he would not necessarily have been wrong. In my opinion, Judge Embree considered all the relevant factors and did not err in principle in imposing the sentence he did nor is the sentence demonstrably unfit.

[85] As of the date of the hearing of this appeal, November 23rd, 2000, L. had served 10 months of the 14 month conditional sentence imposed by Justice Hall. He has performed 180 hours of community service out of the 200 to

be performed. Had L. been imprisoned in a correctional centre rather than serving his sentence in the community he would have been eligible for mandatory release after he had served two-thirds of the sentence, in other words, he would have been discharged prior to the hearing of this appeal.

CONCLUSION:

[86] I would dismiss the cross-appeal from conviction. I would grant leave and allow the Crown appeal from sentence. I would restore the sentence imposed by the trial judge. It is now February 8, 2001. L. is into the 14th month of service of the 14 month conditional sentence. In addition, he has performed at least 180 hours of the 200 hours of community service. Under the circumstances, I would order that the service of the sentence of 14 months incarceration imposed by Judge Embree be stayed (**R. v. Proulx, supra**). L. will be subject to the probation order for 18 months under the terms imposed by Judge Embree.

Hallett, J.A.

Concurred in:

Chipman, J.A.

CROMWELL, J.A.: (Concurring)

[87] I agree with Hallett, J.A., for the reasons he has given, that the conviction appeal should be dismissed.

[88] As to sentence, I would dismiss the Crown's application for leave to appeal. In my view, it is not necessary for the purposes of this appeal to decide whether this Court has jurisdiction with respect to the sentence appeal or, if it does, whether Hall, J. committed reversible error in varying the sentence imposed at trial.

[89] Had the order of Hall, J. not intervened and Mr. L. continued to serve the custodial sentence imposed at trial, he would have been eligible for remission equal to one-third of the 14 month sentence imposed and would not have been required to perform the community service ordered on appeal by Hall, J. The conditional sentence ordered by Hall, J. began on January 21, 2000 with the result that, when the appeal was heard by this Court on November 23, 2000, Mr. L. had served 10 of the 14 months of that sentence and had performed 180 hours of community service. If Hall, J. had upheld the sentence imposed at trial, Mr. L. in all probability would have been released from custody by the time the appeal to this Court was heard and he would not have been required to perform community service. It would, therefore, be unjust to recommit him to close custody even if we accepted the Crown's submissions that this Court has jurisdiction to consider the Crown sentence appeal and agreed that Hall, J. erred in varying the sentence imposed at trial. I would, therefore, dismiss the application for leave to appeal with respect to sentence.

[90] Although I would dismiss the application for leave to appeal, I note the practical effect of doing so is the same as the result arrived at by Hallett, J.A.

Cromwell, J.A.