Date: 20000817
Docket No: C.A.C. 157168

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. L.R.L., 2000 NSCA 94

Glube, C.J.N.S.; Roscoe and Cromwell, JJ.A.

BETWEEN:

L. R. L.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Christopher Manning for the appellant Dana W. Giovannetti, Q.C. for the respondent
Appeal Heard:	May 23, 2000
Judgment Delivered:	August 17, 2000
THE COURT:	Appeal allowed with respect to count eight and a new trial ordered on that count. All other grounds of appeal are dismissed, per reasons for judgment of Glube, C.J.N.S.; Roscoe and Cromwell, JJ.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,
>
> (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 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complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Editorial Note

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

GLUBE, C.J.N.S.:

I INTRODUCTION

[1] J. R. L. L., the appellant, was tried by Justice Donald M. Hall, without a jury, in a five day trial commencing on March 22, 1999, on an amended indictment involving seven male complainants and containing ten counts which alleged:

> Count 1
> THAT between the 12th day of July, 1995 and the 1st day of June, 1997, at or near *, in the County of Annapolis, Province of Nova Scotia, did commit a sexual assault on N.R.B., contrary to Section 271(1)(a) of the **Criminal Code**
>
> Count 2
> AND FURTHERMORE between the 12th July, 1995 and the 3rd of July, 1997, at or near *, in the County of Annapolis, Province of Nova Scotia, being in a position of trust or authority towards N.R.B., a young person, did for a sexual purpose touch directly the body of N.R.B., a young person, with a part of his body to wit: his hand and his mouth, contrary to Section 153(a) of the **Criminal Code**
>
> Count 3
> AND FURTHERMORE between the 12th July, 1995 and the 3rd July, 1997, at or near *, in the County of Annapolis, Province of Nova Scotia, being in a position of trust or authority towards N.R.B., a young person, did for a sexual purpose, invite N.R.B., a young person, to touch directly with a part of his body to wit: his penis, the body of L. R. L., contrary to Section 153(b) of the **Criminal Code**
>
> Count 4
> AND FURTHERMORE on or about the 16th November, 1996, at or near *, in the County of Annapolis, Province of Nova Scotia, did for a sexual purpose touch C.D.M., a person under the age of fourteen years directly with a part of his body, to wit: his hand, contrary to Section 151 of the **Criminal Code**

Count 5
AND FURTHERMORE between the 2nd day of April, 1989 and the 1st day of April, 1991, at or near *, in the County of Kings, Province of Nova Scotia, did commit a sexual assault on M.D.A., contrary to Section 271(1)(a) of the **Criminal Code**

Count 6
AND FURTHERMORE between the 1st day of July, 1995, and the 31st day of October, 1995 at or near *, in the County of Annapolis, Province of Nova Scotia, did commit a sexual assault on K.E.P., contrary to Section 271(1)(a) of the **Criminal Code**

Count 7
AND FURTHERMORE between the 26th day of April, 1989, and the 26th day of April, 1993 at or near *, in the County of Kings, Province of Nova Scotia, did commit a sexual assault on T.E.W., contrary to Section 271(1)(a) of the **Criminal Code**

Count 8
AND FURTHERMORE between the 25th day of January, 1986 and the 30th day of June, 1990, at or near *, in the County of Kings, Province of Nova Scotia, did commit a sexual assault on J.M.A., contrary to Section 246.1(1)(a) of the **Criminal Code**

Count 9
AND FURTHERMORE between the 1st day of August, 1992 and the 31st day of August, 1992, at or near *, in the County of Kings, Province of Nova Scotia, did commit a sexual assault on R.D.B., contrary to Section 271(1)(a) of the **Criminal Code**

Count 10
AND FURTHERMORE between the 1st day of January, 1987, and the 31st day of December, 1987, at or near *, in the County of Kings, Province of Nova Scotia, did commit a sexual assault on R.D.B., contrary to Section 246.1(1) of the **Criminal Code**.

[2] These are charges of sexual assault (s. 271(1)(a) and former s. 246.1(1)); being in a position of trust or authority and touching a young person for a sexual purpose (s. 153(a)) or inviting a young person to touch him (s. 153(b)); and touching a young person under fourteen for a sexual purpose (s. 151).

[3] On April 6, 1999, Hall, J. delivered his decision. He dismissed count six as the Crown offered no evidence. He found L. not guilty of counts one and seven (both s. 271 charges) and guilty of the remaining counts. The guilty findings involved five complainants.

[4] On June 30, 1999, L. was sentenced to a total of thirty-six months: nine months with respect to each of counts two and three; three months for count four; twelve months for count five; six months for count eight; and three months each for counts nine and ten. The terms were to be served consecutively, except with regard to counts two and three which were to be served concurrently.

II GROUNDS OF APPEAL

[5] By notice of appeal dated July 5, 1999, L., listing six grounds of appeal, appealed his convictions and sentence. On March 23, 2000, he withdrew his appeal from sentence and with the consent of the respondent, amended his grounds with respect to the convictions to the following:

1. THAT the Learned Trial Judge erred in law by failing to give any consideration to the evidence of the defence.

2. THAT the Learned Trial Judge erred in law by failing to critically examine the complainant's [sic] evidence and assess their credibility.

3. THAT the Learned Trial Judge erred in law by failing to apply the correct test for credibility in this trial.

4. THAT the Learned Trial Judge erred in law in convicting the Appellant on the basis that he was in a position of trust in relation to the complainant N.R.B. (Count 2 and Count 3).

5. THAT the Learned Trial Judge erred in law in applying section 273.1(2)(c) to count 8 (J.M.A.) of the Indictment.

6. THAT the Learned Trial Judge erred in law in convicting the Appellant on the basis that he was in a position of trust in relation to the complainant M.D.A. (Count 5).

7. THAT the Learned Trial Judge erred in law in his application of similar fact evidence.

[6] At the appeal hearing L. withdrew ground six.

III STANDARD OF REVIEW

[7] The appeal is pursuant to s. 675 of the **Criminal Code** which reads:

> (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
>
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
>
> (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> ...

[8] This Court may quash a conviction where the verdict is unreasonable, there has been an error of law, or there has been a miscarriage of justice pursuant to s. 686 which reads:

> (1) On the hearing of an appeal against a conviction ... the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is

> unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> . . .
>
> (b) may dismiss the appeal where
>
> . . .
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or
>
> . . .
>
> (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> (a) direct a judgment or verdict of acquittal to be entered; or
>
> (b) order a new trial

[9] The standard for determining an unreasonable verdict was set out in **R. v. Yebes**, [1987] 2 S.C.R. 168 (S.C.C.). The Supreme Court held that a verdict is reasonable if the verdict is one which a properly instructed jury acting judicially could reasonably have rendered.

[10] In **R. v. Biniaris** (2000), 143 C.C.C. (3d) 1, the Supreme Court of Canada reaffirmed the applicability of the **Yebes** test. Justice Arbour set out the test for determining whether a verdict is reasonable as follows:

> [para 42] It follows from the above that the test in **Yebes** continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence

> upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention....

[11] The grounds of appeal will be analyzed under the following headings: credibility, relationship of trust, wrong law applied, and similar fact evidence. The first three grounds concern the trial judge's assessment of credibility and if accepted, could result in an unreasonable verdict. L. submits that the evidence in ground four did not support a finding that he was in a position of trust with respect to counts two and three. Again, if these submissions are accepted, the verdicts on these counts could be found to be unreasonable. The fifth ground of appeal is that the trial judge erred in law in applying s. 273.1(2)(c) to count eight of the indictment, as that section was not in force at the time of the offence. Finally, L. submits that the trial judge erred in his application of similar fact evidence. Each of these will be dealt with in turn.

IV FACTUAL BACKGROUND

(1) General

[12] L., born * 1965, grew up as a francophone in the province of Quebec. He testified that while growing up, his father never helped him in anything he was doing. This led to his desire to help young people in any way he could.

[13] L. joined the *in 1983 and was transferred to Nova Scotia in 1986, serving at * as * . Except for a six month period between April and October 1988 when L. was on

course at *, *, during the material times of these charges (January 1986 to July 1997) he lived in various locations in and around * including *, * and *.

[14] One of the offences involving one young male (C.D.M.) only covers one day. The other offences for which he was found guilty involve the remaining four males and cover periods of a month up to three and one-half years.

[15] L. was between twenty-one and thirty-two years of age during the time frame of the charges. In many respects, L.'s testimony was consistent with the testimony of the complainants except concerning any sexual activity which he totally denied with two of the complainants and as for the other three, he explained by saying the contact was initiated by the complainants. He said he was not happy with that and tried to stop that activity by talking to the individuals.

[16] The complainants and L. gave consistent testimony which related a general pattern of their activities and of his relationship with each of them. L. generally treated them well, taking them out for food, swimming and camping. Further, he allowed four of the complainants to drive his vehicle on back roads or at a gravel pit before they were old enough to have a license. He provided and allowed them to drink alcoholic beverages, mainly beer, long before they could legally drink. Whenever any of the complainants stayed overnight with him, for the most part they slept with L. in the same bed. He gave four of the complainants gifts, some quite expensive, including bicycles to two of them. He took several on out-of-province trips which he generally paid for. He

talked about playing with the boys and wrestling with them. With several, he took photographs of them with their pants down in what was described as a joking atmosphere. He also became very friendly with the families of four of the boys.

[17] In dealing with why the several relationships ended, with the exception of J.M.A., he gave a reason as to why he suggested each boy made up their evidence.

[18] I propose to briefly review the evidence relating to each of the complainants with more details, as necessary, when dealing with the specific grounds of appeal.

(2) Counts 1, 2, and 3

[19] L. was found not guilty of count one, an allegation by N.R.B. of sexual assault (s. 271). Counts two and three relate to sexual touching of N.R.B. (ss. 153(a) and (b) respectively) occurring between July 1995 and July 1997.

[20] N.R.B., born *, 1981, was thirteen or fourteen years old and L. was thirty when they first met in *. N.R.B. did not get along with his mother, he was having difficulties in school and his parents were unable to exercise much control over him. He spent a great deal of time with L. (the two disagree on how much time) and there were some overnight visits. L. bought him gifts, including a bicycle, took him to restaurants, flying, on a camping trip, let him drive without a license and let him drink beer. N.R.B. testified that L. treated him well and he looked up to L.. He acknowledged that he felt L. had no authority over him.

[21] N.R.B. claims that on numerous occasions, L. touched his “privates”, “jerked him off” or gave him “blow jobs”. He neither said yes nor no to this type of touching. At various points in his testimony, N.R.B.. said L. touched him between fifty and three hundred and fifty times and that he touched L. ten to forty times. He further said L. asked him to have anal sex on three or four occasions, but he refused. When asked he said he did not think much about L. touching his penis, “It seemed to be right.”

[22] L. denied any masturbation, oral sex or asking for anal sex with N.R.B. L. testified that N.R.B. touched him on several occasions in 1995. On the first occasion, they were sleeping next to each other and he woke to feel N.R.B.’s hand down his pants on his penis. He pretended to wake up. N.R.B. stopped and when L. asked about it, N.R.B. said he was curious and it would not happen again. A week later it happened again, only this time L. touched N.R.B. back in the same manner. After a few minutes, they both stopped and nothing was said. The third time, L. said he was ready for it and when he felt N.R.B. touch his hip, he asked what N.R.B. was doing. The response was just fooling around. L. thinks this happened because there were rumours in the community at the time that he was a “fag”.

[23] L. also testified that on one occasion in 1996, while he was massaging N.R.B.’s back (he regularly had a sore back), N.R.B. asked to have sex but L. refused.

[24] L. testified that N.R.B. made up his testimony as a result of a big argument the two had in November 1996 when N.R.B. told C.L.F., the stepmother of another

complainant, C.D.M., that he was being sexually assaulted by L.. Although it was suggested to N.R.B. that he only reported the sexual assault to the police after he himself was charged with sexual assault, N.R.B. plead guilty to that charge.

(3) Count 4

[25] Count 4 (s. 151) is a charge of sexual touching of a person under age fourteen, namely, C.D.M. on November 16, 1996. C.D.M., born *, 1983, was twelve when he first met L.. At the time, the complainant had just left a foster home and returned to live with his stepmother in *. On several occasions C.D.M. and N.R.B. helped L. build his house. On November 16, 1996, after building a dog house, C.D.M. and L. spent the night at L.'s home. C.D.M. testified:

> A. Then I went downstairs and I got my sleeping bag, bags (sic) we were 'gonna' go to bed but my shoulders and back hurt where puttin' the dog house together and stuff and I wasn't used to doing it and stuff so I asked him if he'd give me just a back massage and shoulder massage. So he did and then he kept moving his hands downward and then he started feeling my butt and then he rolled me over and....
> Q. Excuse me. He started feeling your?
> A. Buttock. (sic).
> Q. Was it your butt?
> A. Yeah.
> Q. All right, go ahead.
> A. And then he rolled me over and he started feeling my chest and moved his, way down and.
> Q. Way down where?
> A. My privatal (sic) area.
> Q. And could you elaborate on that? What do you mean by your private area?
> A. My penis.

[26] Although C.D.M. testified he asked L. to stop, he did not until C.D.M. ejaculated. C.D.M. stated he was too embarrassed to tell the police or state he ejaculated when testifying at the preliminary.

[27] C.D.M.'s stepmother, C.L.F., testified that when he returned home the next day he appeared nervous and his mood had changed.

[28] L. testified that no such incident occurred. He denied giving C.D.M. a massage. He did state that on a couple of occasions when they were wrestling, C.D.M. attempted to touch the accused sexually. He stated that on one occasion he allowed this to happen to see what C.D.M. was doing and for no other reason. Although he admits the touching, he denies it was for a sexual purpose.

[29] L. stopped seeing C.D.M. when C.L.F. accused L. of touching C.D.M. He said he denied it as he did not want to embarrass C.D.M.

(4) Count 5

[30] Count five is a charge of sexual assault (s. 271(1)(a)) between April 2, 1989 and April 1, 1991 against M.D.A. M.D.A., born on *1976, first met L. when he was twelve through his brother's (J.M.A.) involvement in Scouts. L. became a friend of the family and M.D.A. went on camping and sailing trips with him. L. was involved in coaching M.D.A.'s junior high school * team. At age thirteen, L. allowed him to drive and offered him beer or liquor when he visited L..

[31] The complainant testified that L. suggested they should go skinny dipping; that L. would pull off M.D.A.'s towel when M.D.A. was trying to change; or L. would "grab your crotch". M.D.A. testified that he would be drinking, he would fall asleep and awaken to

find L. performing oral sex on him. He said this occurred 25 to 30 times when he was thirteen and fourteen years old. He would wake up and roll over or try to push L. away and pretend he was sleeping because he did not know what to do. He felt it was degrading and did not tell anyone at the time.

[32] L. denied performing, or asking to perform, oral sex on M.D.A. He claims M.D.A. was fifteen or sixteen before he started to drink. He also denied suggesting that the two of them go skinny dipping. Although their relationship ended in 1991, L. claims it renewed in 1995. In 1991, it ended over an incident with the * team and because M.D.A. had a girlfriend.

(5) Count 7

[33] Count 7 is a charge of sexual assault (s. 271(1)(a)) between April 26, 1989 and April 26, 1993 against T.E.W. L. was acquitted of this charge. However, this evidence is included because one of the issues on this appeal deals with similar fact evidence and it is unclear from the trial judge's reasons whether he considered the evidence relating to this count when he addressed the similar fact evidence.

[34] The complainant was fifteen when he first met L.. As T.E.W. was not getting along well with his stepfather, he moved in with L. and they moved from an apartment in town to * . In order to obtain * for the two of them, it was necessary for L. to become T.E.W.'s guardian. They lived together for approximately three years. T.E.W. worked and paid L. sixty dollars a month towards household expenses. L. took him on a trip to

Florida and taught him how to drive.

[35] The complainant testified that L. gave him liquor. They would drink and watch pornographic movies together and three or four times a week L. would perform oral sex on him.

[36] On direct examination at trial, L. testified as follows with respect to these allegations:

> Q. During the time that he was living with you was there any kind of sexual relations between you?
> A. No, never.
> Q. Never?
> A. No.
> Q. So what do you say to the allegations that you sexually assaulted him, between April 26, '89 and April 26, 1993?
> A. No it never happen. I never slept with him or, I did sleep with him but not, not during that period of time.
> Q. You heard him say that while he was at your home you put on pornographic films?
> A. Yes I heard him say that.
> Q. Is that true?
> A. It's possible yeah. I believe ah, yeah I did have a pornographic movie and ah, he probably saw it so, but it doesn't stand out in my mind that, you know, but it, I'm sure it did happen.
> Q. You heard him describe that he found those films to be funny, or that film to be funny? Do you remember his reaction?
> A. No I don't remember his reaction.
> Q. When he moved out were you on good terms or bad terms?
> A. Very bad terms.

(6) Count 8

[37] Count 8 was a charge of sexual assault (s. 246.1(1)(a)) between January 25, 1986 and June 30, 1990 against J.M.A. J.M.A., born on * 1972, met L. when he was fourteen years old. L. was helping out as a boy scout leader. He was also the assistant coach of J.M.A.'s * team. J.M.A. stated that L. taught him how to camp and sail and

assisted him in achieving the Chief Scout Badge (one of the highest accomplishments for a boy scout). L. gave him gifts, took him on trips, allowed him to drive before he had a license, also to drink before he was of age, and they became good friends. He testified L. was looked up to by many as a role model.

[38] J.M.A. testified that on two or three occasions when he was fourteen or fifteen, L. masturbated him making him ejaculate into a margarine container. He did not resist. He also testified that in 1990 L. grabbed his private area. L. denies any sexual contact with J.M.A. Other evidence regarding this count will be referred to later in this judgment.

(7) Counts 9 and 10

[39] Counts nine and ten refer to sexual assaults of R.D.B.; count nine in the month of August 1992 (s. 271(1)(a)) and count ten in the year 1987 (s. 246.1(1)).

[40] R.D.B. was born * 1976 and became L.'s "little brother" through the Big Brothers Big Sisters Program when R.D.B. was eleven years old and L. was twenty-one. R.D.B.'s parents were divorced and his father had not been a part of his life since he was two years old. R.D.B. testified that he and L. got along well, that they had gone on camping and sailing trips and out for meals together and that L. gave him gifts, including a bicycle, just before taking him on a trip to Quebec in 1987. While in Quebec, L. took a photograph of R.D.B. with his pants down. L. saw R.D.B. about every other day, they wrestled and swam and he slept over one night on the weekends, sleeping in the same

bed. L. remained R.D.B.'s big brother until he went on course in 1988.

[41] R.D.B. testified that at least twice in 1987, L. took down his pants and measured his penis with a tape measure. Further, that one time while he was sleeping in L.'s bed in 1992, L. grabbed his penis saying, "I want to jerk you off so bad." R.D.B. told him to let go and after a few seconds he grabbed L.'s hand who then let go. R.D.B. went and slept on the couch.

[42] L. denied that R.D.B.'s penis was ever measured in his presence or that he reached over and grabbed him. L. testified that he and another person took R.D.B. on a trip to Quebec. During this trip L. and R.D.B. played some jokes, including pulling down the pants of the other person and putting a screwdriver in R.D.B.'s pants to make it look like he had a big penis. On cross-examination he indicated that this was a joke and he did not feel it was inappropriate behaviour.

[43] L. says R.D.B. made up his testimony because he was angry at L. for not calling when he was back on a visit during 1988. Also, he says R.D.B. was annoying him and he got busy coaching *.

V ANALYSIS

(1) Grounds 1, 2, 3

1. THAT the Learned Trial Judge erred in law by failing to give any consideration to the evidence of the defence.

2. THAT the Learned Trial Judge erred in law by failing to critically examine the complainant's evidence and assess their credibility.

3. THAT the Learned Trial Judge erred in law by failing to apply the correct test for credibility in this trial.

(a) Credibility of Witnesses

[44] L.'s first three grounds of appeal deal with the trial judge's assessment of the credibility of the witnesses.

[45] **R. v. W.(R.)**, [1992] 2 S.C.R. 122 is the leading case on appellate review of findings of credibility made by a trial judge. The Ontario Court of Appeal overturned the accused's conviction on sexual assault charges involving children. In issue was the assessment of credibility by the trier of fact. On appeal to the Supreme Court of Canada, Justice McLachlin (as she then was), speaking for the Court at pp. 131-32 stated:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: **White v. The King**, [1947] S.C.R. 268, at p. 272; **R. v. M (S.H.)**, [1989] 2 S.C.R. 446, at pp 465-66. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

[46] This Court has followed this decision in several cases, most recently in **R. v.**

S.(D.C.), [2000] N.S.J. No. 144. Due deference is to be given to the trial judge's findings.

[47] L. makes three arguments with regard to credibility. He submits that the trial judge erred in law by: (1) failing to give proper consideration to the evidence of the witnesses for the defence; (2) failing to critically examine the complainant's evidence; and (3) failing to apply the correct test as to credibility.

[48] The respondent characterized these alleged errors as: (1) a failure to judicially consider the evidence; (2) a failure to provide adequate reasons; and (3) a reversal of the burden of proof. The respondent's characterization of the errors is adopted in this decision.

(i) Failure to Judicially Consider the Evidence

[49] L. submits that: the trial judge accepted the evidence of the complainants without considering his testimony; the trial judge did not address inconsistencies in the complainants' testimony; and the learned trial judge asked himself the wrong question by stating, "Are all the complainants lying and only the accused telling the truth?" This latter argument is properly dealt with under ground seven.

[50] As to the inconsistencies of the complainants' testimony and the lack of consideration of defence evidence, these were addressed by Justice Hall where he stated at pp. 16-17 of his decision:

> I have concluded that I ought to accept the testimony of the complainants on the pertinent matters where it is in conflict with that of the accused. I noted the conflicts or contradictions of the witnesses in some of their testimony, with previous testimony and previous statements to the police. I also have taken note of what may appear to be exaggeration, particularly exaggerated numbers as to the incidents where sexual contact occurred. I am satisfied, however, that this may merely have been the perception of the recipient and that on the pertinent matters the evidence of the complainants was accurate. I found that all of them testified in a straight forward manner on a subject that was probably very difficult and embarrassing for them to testify about. I saw nothing in the evidence to indicate that they held any particular grudge against the accused so as to induce them to concoct the allegations against him. [Emphasis added.]

[51] It is also argued that the trial judge did not consider L.'s evidence. Yet, at pp. 17-18 of his decision, the trial judge states:

> Accordingly, I have concluded that I ought to accept the testimony of the complainants as being reliable and accurate. I reject the evidence of the accused where he denies sexual contact with the complainants. That is the case with respect to each of the nine counts left in the indictment. I am not left with any reasonable doubt in this respect by his testimony and on an overall consideration of the evidence I am satisfied beyond a reasonable doubt that the events occurred as the complainants testified. [Emphasis added.]

[52] In **R. v. Burns**, [1994] 1 S.C.R. 656, Justice McLachlin (as she then was) stated at p. 663:

> In proceeding under s. 686(1)(a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. W. (R.)**, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial. [Emphasis added.]

[53] After reviewing the trial judge's reasons, I would find that in his decision Justice Hall turned his attention to all the evidence presented, including any inconsistencies and the evidence of L.. In my opinion, a review of the evidence in this case would not lead to a finding, "... that the trial judge's conclusion was unreasonable nor that it could not be

supported by the evidence." Rather I would find, "... there was sufficient evidence to reasonably support (a) conviction[s]" in the present case. (**Burns**, para. 15.) Therefore, I would find no error by the trial judge.

(ii) Failure to Provide Adequate Reasons

[54] During his oral submissions on the appeal, L. made reference to the absence of reasons by the trial judge and questioned why the trial judge "was so eager to reject the evidence of the Appellant in favour of the complainants".

[55] The Supreme Court dealt with this issue in **Burns** where Justice McLachlin noted at p. 664:

> The Court of Appeal's main concern was not that there was insufficient evidence to support the verdicts of guilty, nor that those verdicts were unreasonable, but that the trial judge's reasons failed to indicate that he had considered certain frailties in the complainant's evidence. Given the brevity of the trial judge's reasons, they could not be sure that he had properly considered all relevant matters.
>
> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see **R v. Smith**, [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and **Macdonald v. The Queen**, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case. [Emphasis added.]

[56] There is no positive duty on trial judges to include in their reasons a complete

appreciation of each aspect of relevant evidence (para. 20). In the recent decision of **R. v. L.(C.A.),** [1999] N.S.J. No. 431, [2000] S.C.C.A No. 90 (leave to appeal dismissed), the key issue was credibility. The trial judge acknowledged the inconsistencies of both parties, recognized his duty to acquit if the evidence as a whole left a reasonable doubt as to guilt, and rejected the evidence of the appellant where it conflicted. On appeal, the appellant noted the discrepancies and the variations in the complainants' testimony on direct and cross-examination and in the two statements to the police. This court held that although the trial judge did not specifically refer to these differences, they were there to be weighed in assessing credibility (para 7).

[57] After citing para. 14 from **Burns** (above), Freeman, J.A. went on to state in para. 9:

> [9] Our function as a court of appeal is therefore not to reweigh the evidence to determine if we agree with the conclusions of the trial judge. The appellant must show that the evidence of the complainant, after rejection of the evidence of the appellant which was rejected, is not reasonably capable of supporting the verdict. This is a deferential standard, and the deference to be shown a trial judge in matters of credibility is still greater. See **Keating et al. v. Bragg et al.** (1997), 160 N.S.R. (2d) 363 (C.A.). A properly instructed jury, acting judicially, could reasonably have believed the Crown evidence and found the appellant guilty.

[58] At the conclusion of the five-day trial, Justice Hall did not give his decision immediately. He expressed concern that he needed time to properly review all the evidence and the law. He reserved his decision for close to two weeks. In his decision he states that he did consider all the evidence upon review of the record and keeping in mind the unique position of a trier of fact, there is no reason to believe otherwise. I

would find no misapprehension of evidence or any palpable error by the trial judge with respect to any failure to provide adequate reasons. Accordingly, I would find the verdict reasonable and safe.

(iii) Burden of Proof

[59] Finally, L. submits the trial judge did not apply the "Cory formula" for evaluating credibility **(R. v. W. (D)**, [1991] 1 (S.C.R.) 742 (S.C.C.)). Essentially he advanced the argument that the trial judge reversed the onus, shifting it to him.

[60] In **R. v. W.(D.)**, Justice Cory stated at p. 757:

> Ideally, appropriate instruction on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously, you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[61] The court heard the testimony of the complainants. The complainants were not always clear on dates and times and, as the trial judge pointed out, there were some inconsistencies in their testimony as well. At p.16 of Justice Hall's decision he noted:

> With respect to the issue of credibility, as Mr. Manning [for the accused] pointed out, it is not simply a question of whether I believe the witnesses for one side and disbelieve the witnesses for the other. Here, Mr. L. has testified. <u>If I believe his testimony I must acquit. If I don't believe his testimony but am left with a reasonable doubt by it, I must acquit. If I don't believe his testimony and am not left with a reasonable doubt by it, but if on a consideration of all the evidence I am left with a reasonable doubt as to his guilt on any one or more of the counts, I must find him not guilty on that count or counts.</u> [Emphasis

added.]

[62] Also, at p. 18 he stated:

> I am not left with any reasonable doubt in this respect by his testimony and on an overall consideration of the evidence I am satisfied beyond a reasonable doubt that the events occurred as the complainants testified.

[63] A review of the decision in its entirety does not indicate that Hall, J. reversed the onus. On the contrary, it shows that he properly applied the Cory formula and that he was mindful of the fact that it was the Crown's burden to prove L.'s guilt beyond a reasonable doubt.

[64] For all of these reasons, I would dismiss the first three grounds of the appeal.

(2) Ground 4 - Trust Relationship

> THAT the Learned Trial Judge erred in law in convicting the Appellant on the basis that he was in a position of trust in relation to the complainant N.R.B. (Count 2 and Count 3).

[65] Ground four pertains to counts two and three. In those counts L. was charged with touching the complainant N.R.B. for a sexual purpose and inviting the complainant to touch him, contrary to ss. 153(1)(a) and (b), respectively. Section 153 reads:

> 153. (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
>
> > (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or

> (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
>
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

[66] L. submits that the trial judge erred in finding on the evidence before him that L. was in a trust relationship with N.R.B.

[67] The Supreme Court of Canada first dealt with s. 153 and the concepts of "position of trust" and "position of authority" in **R v. Audet**, [1996] 2 S.C.R. 171. This case involved sexual touching between a teacher and a student. In the majority decision, Justice LaForest determined at p. 188 "... that the Crown does not have to establish that the accused actually abused his or her position towards or relationship with the young person in order to obtain the young person's consent to the alleged sexual activities." (para. 23). The purpose of s. 153 is to ensure that persons in positions of trust do not engage in sexual activities with young persons, even though there is apparent consent. To obtain a conviction, the Crown must prove beyond a reasonable doubt: (1) that the complainant is a young person within the meaning of s. 153(2); (2) that the accused engaged in one of the activities referred to in s. 153(1); and (3) that when the acts in question were committed, the accused was in a position of trust towards the young person. Justice LaForest canvassed the case law to determine the scope and meaning of the concept, position of trust. He stated at para. 37:

> Even in light of these definitions, the concept of a "position of trust" is difficult, perhaps even more than that of a "position of authority", to define in the abstract in the absence of a factual context. For this reason, it would be inappropriate for this Court to try to precisely delineate its limits in a factual vacuum, especially since very few judicial decisions have so far commented on this relatively recent provision of the **Criminal Code**....

[68] Accordingly, he continued at para. 38:

> It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the alleged offence….

[69] In terms of what the trial judge should consider when making this factual determination, Justice LaForest, again at para. 38, held as follows:

> … It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship, and above all the status of the accused in relation to the young person will of course be relevant in many cases.

[70] Subsequent case law has followed the Court's reasoning in **Audet**. In **R. v. J.B.M.** (2000), 145 Man. R. (2d) 91 (C.A.), involving the alleged abuse of a youth by an intern at a substance rehabilitation centre, the intern was found to be in a position of trust. There was some argument as to when the trust relationship ended (e.g., when the victim left the facility). The Manitoba Court of Appeal noted at para 16:

> The trial judge correctly stated that <u>all of the circumstances of the relationship must be examined to determine the existence of an element of trust, including the status of the appellant, the age difference between the two parties, the evolution of the relationship, and the circumstances under which the alleged offence was committed.</u> [Emphasis added.]

[71] In **R v. T.R.**, [1996] O.J. No. 4945 (Gen. Div.), sexual assaults were perpetrated by a friend of the family. Evidence was presented that indicated the family of the victim and family of the accused spent time together and during some of these times the sexual assaults took place. In terms of finding the accused in a position of trust, the court stated at para 17:

> On the basis of the foregoing, I am persuaded that the law requires that I view the particular circumstances of the case to determine whether the relationship between the parties is one that gives rise to a position of trust. Having said that an impartial observer, considering the matter with sensitivity and common sense, could come to no other conclusion but that the friendship and mutual reliance between the parties and the special warmth of relationship between T.R. and G.B. placed T.R. in a position of trust to G.B. It follows that the result of analysis of the relationship required by law will in this case yield the same answer.

[72] In **R. v. Weston**, [1997] A.J. No. 263 (Q.B.), the accused was a coach for an athletic team on which the alleged victim, a young girl, had once played. She was no longer a student at the school. The issue of the trust relationship was canvassed quite thoroughly with specific reference to the dates of the alleged incidents. The judge concluded Weston was not in a position of trust or authority over the young girl. At para. 30, he summarized the law on the issue:

> So what **Audet** has told us, it's told us how to determine what a position of authority is. It hasn't been very clear on what a position of trust is, but it has certainly given us some very clear guidelines in arriving at what these are by looking at certain factors.

[73] Justice Hall heard testimony from N.R.B where he said that he first met L. when he was thirteen or fourteen at his friend M.D.A.'s home in *. Initially, the complainant did not associate with L., however, after subsequent meetings, N.R.B. and M.D.A. began spending time with him. N.R.B. testified that L. gave him a new bike one

Christmas and that they went on trips to Halifax and there they would eat out. L. also took N.R.B. flying and on a camping trip. N.R.B. testified that L. allowed him to drive his car even though he did not have a driver's license. He also testified to spending a lot of time, including occasional nights, at L.'s residence.

[74] N.R.B. characterized the relationship as follows:

> Q. Okay, I see. At this particular time as you were, your association with him grew during this period of time, how did you see him? How did you look upon Mr. L.?
> A. Ah.
> Q. Your eyes during that period of time?
> A. I seen [sic] him as quite a few. I seen [sic] him as a big brother, a father. He was, he would do anything that he could for me.
> Q. Ah-hum.
> A. To keep me happy. That's like, I would say he, like a parent. He was a guardian.

[75] During cross-examination, N.R.B. admitted that at the preliminary hearing that he had said he thought of L. like a brother or a lover. Also, N.R.B. acknowledged L. had no involvement with his schooling and had no control over his activities or discipline.

[76] In terms of the specific charges, N.R.B. stated that on a number of occasions L. touched him. He testified that he awoke one night at a party and L. was touching his privates. Other touching involved masturbation and fellatio. In his direct examination N.R.B. testified:

> Q. You guess fourteen (14), fifteen (15). What, if anything, can you tell us about ah any of this occurring, that you've just described, in *? This, the types of things you just described? What can you tell us about that?
>
> A. Well it was just, it happened ah probably every day. Ah blow job or hand job, same thing, you know. Some day, there would be nothin' some days, you know, he wouldn't offer, it would just, I can say it would just happen. Ah, or it'd be, you know, do you want to go to Tim Hortons or, you know, let me touch your penis or, or ah let me give you a blow job and we'll go drivin' or let me give you a blow job and we'll go to Tim Hortons. Like it

could be anything.

[77] N.R.B. testified that he did not say no to these advances and that often alcohol was involved. As stated previously, N.R.B. said L. touched him between fifty and three hundred and fifty times, and he touched L. ten to forty times. N.R.B. was unable to recall exact dates but was able to describe the incidents.

[78] During L.'s cross examination, he stated:

> Q. Now would you say that you would have been a person that [N.R.B.] could look up to?
> A. I was his friend and I was trying to help him out the best I could.
> Q. Would he (sic) be a person you (sic) could look up to? A role model?
> A. A role model? Well, I guess in a way I could have.
> Q. Someone to set an example for him?
> A. Yeah, somehow I could be.
> Q. And try to encourage him to go to school?
> A. I did do that.
> Q. Didn't want him to smoke?
> A. Didn't want him to smoke.
> Q. Talk to him... .
> A. I only bought him one pack of cigarettes.
> Q. Talk to him about the liquor drinking?
> A. Yeah.
> Q. Talk to him about his late hours?
> A. I wasn't, I wasn't making any rules for him.
> Q. Person he could trust?
> A. Yeah he could trust me.

[79] In his decision, Justice Hall stated at p. 21:

> Now, I have concluded in this instance that the accused was in a position of trust with respect to [N.R.B.]. The accused was fifteen or sixteen years older than [N.R.B.] when the sexual activity took place. He had cultivated a close friendship with [N.R.B.] and acted the part of the "big brother". [N.R.B.] relied on the accused and had confidence in him. The accused owed a duty of care toward [N.R.B.] which he blatantly breached. [Emphasis added.]

[80] I would find that the trial judge applied correct legal principles and his findings of

fact with respect to the position of trust vis a vis N.R.B. are amply supported by evidence as outlined above. Accordingly, I would dismiss this ground of appeal.

(3) Ground 5 - Wrong Law Applied

> THAT the Learned Trial Judge erred in law in applying section 273.1(2)(c) to count 8 [J.M.A.] of the Indictment.

[81] Pursuant to s. 246.1, L. was convicted of sexually assaulting J.M.A. Section 246.1(1)(a) (now s.271(1)(a)) stated as follows:

> 246.1 (1) Everyone who commits a sexual assault is guilty of
>
> > (a) an indictable offence and is liable to imprisonment for ten years; or

[82] At the time, s. 244 (now s. 265) set out the definition of assault:

> 244 (1) A person commits an assault when
>
> > (a) without the consent of another person, he applies forces intentionally to that other person, directly or indirectly;
> >
> > . . .
> >
> > (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
> >
> > (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
> >
> > . . .
> >
> > (d) the exercise of authority.
> >
> > (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[83] Both parties agree that at the time of the offence, between January 25, 1986 and June 30, 1990, J.M.A. was between fourteen and eighteen years of age and therefore, in law, absence of consent is an element of the offence which the Crown must prove beyond a reasonable doubt.

[84] L. submitted that Hall, J. misdirected himself with respect to the applicable law at the time of the alleged offence (between 1986 to 1990), in applying s. 273.1(2)(c) (i.e., the “position of trust” concept), when convicting L. on this count and in doing so he erred.

[85] The Crown conceded that the trial judge erred when he used s.273.1(2)(c) to find L. guilty with regard the count involving J.M.A., but argued that the error did not occasion a substantial wrong or miscarriage of justice and accordingly s. 686(1)(b)(iii) should be used to dismiss this ground of the appeal. The curative provision reads as follows:

> 686 (1)
>
> ....
>
> (b) may dismiss the appeal where
>
> . . .
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or
>
> . . .

[86] As it was conceded that the trial judge misdirected himself with respect to the

law, the issue before this court with regard to this ground of appeal is that which is set out in **R. v. Bevan**, [1993] 2 S.C.R. 599, wherein it was stated at pp. 616-17 that:

> The question to be asked in determining whether there has been no substantial wrong or miscarriage of justice as a result of a trial judge's error is whether "the verdict would necessarily have been the same if such error had not occurred": see **Colpitts v. The Queen**, [1965] S.C.R. 739, per Cartwright J. (as he then was), at p. 744; **Wildman v. The Queen**, [1984] 2 S.C.R. 311, at pp. 328-29. This test has also been expressed in terms of whether there is any possibility that if the error had not been committed, a judge or properly instructed jury would have acquitted the accused: see **Colpitts**, per Spence J., at p. 756; R. v. S.(P.L.), [1991] 1 S.C.R. 909, per Sopinka J., at p. 919; **R. v. Broyles**, [1991] 3 S.C.R. 595, at p. 620; **R. v. B.(F.F.)**, [1993] 1 S.C.R. 697, per Iacobucci J. at pp. 736-37. I do not interpret these two approaches as being intended to convey different meanings. Under either approach, the task of an appellate court is to determine whether there is any reasonable possibility that the verdict would have been different had the error at issue not been made.

[87] It is the Crown that bears the burden of demonstrating that the error did not result in a miscarriage of justice.

[88] The evidence for this count involved two separate types of incidents. The first was that L., on several occasions, masturbated J.M.A. until he ejaculated into a margarine container. J.M.A.'s evidence was as follows:

> Q. All right. Can you describe how he assisted you in doing that?
> A. Ah he ah grabbed my penis and he ejaculated, ah made me ejaculate into this Becel container.
> Q. All right.
> A. He then said ah, cover it up and we'll put it into the, into the fridge or the freezer and ah we'll save it for later. Said girls would kind of go for that kind of thing and I was like naive at the time, not educated into sex so I just went along with ....
> Q. Well I guess to be able to ah masturbate you your penis would have to be exposed. Do you know how that came about?
> A. Ah.
> Q. Your penis got exposed so he'd even be able to touch it?
> A. Ah I can't remember exactly the event, actual events, whether he pulled down my drawers physically or I pulled down my drawers and then he grabbed me but he did have a firm hold on my penis and did masturbate and make me ejaculate.
> Q. Do you recall if he'd asked you whether he could do this to you?
> A. No, it was just something that was just done.
> Q. Did you ask him to do it?
> A. No sir I did not.

[89] And further, he testified:

> Q. And so who, who carried out the masturbation?
> A. Ah, it would have been Mr. L..
> Q. Do you recall on that occasion at *whether he ever asked you whether he could do that?
> A. I can't. To the best of my knowledge I can't, can't remember.
> Q. Can you recall whether you had asked him to do it?
> A. No sir.
> Q. And you can't recall or you didn't ask?
> A. No I didn't ask.

[90] The second incident referred to by the trial judge in his review of the evidence is as follows:

> J.M.A. testified about another occasion the last night that he stayed with the accused. He had been drinking and wasn't feeling well and while lying beside the accused the accused reached over and took hold of his penis and tried to make it erect by rubbing his genitals. J.M.A. said he rolled over and that was the end of it.

[91] Although he did not say anything to L., J.M.A. testified that was the last night he stayed there and did not go back after that.

[92] L. denied both types of incidents, namely, masturbating J.M.A. and grabbing his penis. He also testified that he and J.M.A. met from time to time after that date.

[93] The trial judge's decision with regard to these incidents is as follows:

> … The accused was a family friend and he cultivated the friendship of [J.M.A.] through various activities such as a Scout leader, * coach and so forth which caused [J.M.A.] to develop a sense of trust in him. He had confidence in and relied on the accused who was six years his senior at a stage in life when six years is a huge difference. I am satisfied that he abused this position of trust to induce [J.M.A.] to participate in the sexual acts complained of. Accordingly, I find the accused guilty of the charge under section 246.1 at it was at the time. [Emphasis added].

[94] The trial judge clearly used the language in s. 273.1(2)(c) when giving his reasons for convicting L. of this offence. For the purposes of this count, the section reads:

> 273.1 (1) Subject to subsection (2) and subsection 265 (3), "consent" means, for the purposes of sections 271, 272, and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purposes of sections 271, 272, and 273, where
>
> . . .
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> . . .
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[95] L. submits that Hall, J. erred in using the concept of “position of trust” with respect to the relationship between he and J.M.A. as that concept was not applicable at the time of the offence. Section 273.1(2)(c) of the **Criminal Code** did not come into force until 1992, two years after the last date noted in count eight. Also, by purporting to use s. 273.1(2)(c) to vitiate consent, Hall, J. had to have found (although not stated in his decision) that the complainant had consented to engaging in sexual activity.

[96] The Crown in its factum submitted that, “For the masturbation incidents, acceptance of the victim’s evidence that these acts occurred could not by itself lead to the verdict. The trial Judge was also required to consider whether the apparent consent was vitiated.” However, the Crown argued that because Justice Hall accepted J.M.A.’s testimony and he found as a matter of fact that the grabbing incident occurred,

therefore, the *actus reus* of sexual assault was proved beyond a reasonable doubt. Also, because L. denied it happened, consent as regards the *mens rea* (i.e., mistake of fact) was not in issue. Thus the Crown submits that the error did not amount to a substantial wrong or miscarriage of justice; therefore, this court should use s. 686(1)(b)(iii) of the **Criminal Code** and dismiss the appeal.

[97] The trial judge accepted J.M.A.'s evidence. However, in his reasons for convicting on this count, he did not distinguish between the two types of incidents or indicate which formed the basis of the conviction. He made no explicit finding with respect to the issue of non-consent and the complainant did not testify that he did not consent. As the Crown notes, there was apparently consent to the masturbation incidents. The trial judge's reasons for conviction on this count are premised on consent vitiated by abuse of a position of trust. In these circumstances a finding with respect to consent is one which should be made by the trial judge, not by the Court of Appeal. The appropriate inquiry is not whether this particular judge would have convicted but whether there is any possibility a trial judge would have a reasonable doubt had the correct legal standard been applied. (**R. v. S.(P.L.)**, [1991] 1 S.C.R. 909; **R. v. Rockey**, [1996] 3 S.C.R. 829, and **R. v. Faulkner** (1997), 120 C.C.C. (3d) 377 (Ont. C.A.)).

[98] The trial judge stated:

> I am satisfied that he abused this position of trust to induce [J.M.A.] to participate in the sexual acts complained of.

[99] Thus, while the trial judge had no doubt there was sexual touching, his use of the word “induced” suggests there is a possibility that had he directed himself to the proper issue, he might have entertained a reasonable doubt on the absence of consent.

[100] I would find there is a reasonable possibility the verdict would have been different had the error of using the wrong law not been made.

[101] In the alternative, the Crown argued that “exercise of authority” pursuant to s. 265(3)(d), (in force at the time of the offence), was the same as “position of trust” found in s. 273.1(2)(c). I would disagree. Although similar, they are not interchangeable. In his decision, Hall, J. found:

> It is clear that the concepts of authority, power and dependence included in those provisions do not apply to any of these charges.

[102] See **R. v. R.H.J.** (1993), 86 C.C.C. (3d) 354 (B.C.C.A.), where the court notes at p. 358 that:

> It seems to me that Crown counsel is asking that we apply that subsection [265(3)(d)] as if it read:
>
> > For the purposes of this section, no consent is obtained where the complainant and the accused are in a relationship in which the accused may have had a capacity to exercise authority over the complainant in relation to sexual activity. [Emphasis added.]

(See also: **Audet, supra; R. v. Saint-Laurent** (1993), 90 C.C.C. (3d) 291 at p. 304; **R. v. Z.C.**, [1998] O.J. No. 1087 (G.D.)).

[103] I am unable to agree with the Crown’s position that a finding of position of trust

between the complainant and L. is tantamount to finding an exercise of authority.

[104] In light of the error in law made by the trial judge on count eight, I would order a new trial on count eight (**Bevan**).

(4) Ground 6 - withdrawn by L. at the appeal hearing.

(5) Ground 7 - Similar Fact Evidence

> THAT the Learned Trial Judge erred in law in his application of similar fact evidence.

[105] With respect to similar fact evidence, as no appeal is made as to its admissibility, the test for the admissibility of such evidence is not discussed. L. accepts that the similar fact evidence could be used with respect to the issue of credibility and refers to McLachlin, J.'s (as she then was) decision in **R. v. B(C.R.)**, [1990] 1 S.C.R. 717, where she stated at pp. 738-39:

> It is well established that similar fact evidence may be useful in providing corroboration in cases where identity or *mens rea* is not in issue....
>
> As noted earlier, the probative value of similar fact evidence must be assessed in the context of other evidence in the case. In cases such as the present, which pit the word of the child alleged to have been sexually assaulted against the word of the accused, similar fact evidence may be useful on the central issue of credibility.

[106] While L. accepts that the trial judge could use the evidence with respect to the issue of credibility, he submits that Hall, J. erred in his application of the evidence on this issue. Specifically, he argues Hall, J. erred in using the similar fact evidence to "actually prove credibility of the complainants" and not "to assist him in determining

credibility". Further, in his written submissions, he stated:

> In this case it appears that the similar fact evidence is the whole basis for determining questions of credibility, or in other words the sheer number of complainants is the basis for the guilt.

[107] A review of the trial judge's decision does not support the submission that the sheer number of complainants was the basis on which the trial judge found L. guilty. It simply cannot be said that the similar fact evidence was, as L. submits, "the whole basis for determining questions of credibility." On the contrary, the decision shows that Hall, J. considered all the evidence of the complainants and L.. He considered their demeanor, any inconsistencies in their testimony, and any corroborating evidence proffered.

[108] There is no set pattern for a judge to follow in writing a decision. Thus, because the trial judge analyzed the law of similar fact evidence before he dealt with reasonable doubt does not mean he erred in its use. After concluding that the probative value of the evidence outweighed the prejudicial effect on L., he stated:

> ... I find that this evidence is particularly pertinent with respect to the issue of credibility. Here we have six young men or youths testifying as to what happened between them and the accused when they were very young. Each says that the accused subjected them to sexual conduct. The accused denies that such occurred. In my opinion, I should be entitled to take all of this evidence into account in determining issues of credibility.
>
> It seems to me, as well, and I am satisfied that it is relevant from the point of view of establishing a *modus operandi* or a patten of conduct on the part of the accused, which may assist in determining the nature of the relationship between the complainants and the accused. The evidence of the complainants tended to show that the accused developed a close relationship with each of them which led to an opportunity for the alleged sexual acts to take place.

[109] He then set out the process for determining reasonable doubt along the lines suggested by Cory, J. in **D.(W.), supra**. He concluded that he accepted the complainants' testimony despite conflicts and contradictions within some of their testimony as it related to previous statements and previous testimony, and despite exaggeration by some. He found they all testified in a straightforward manner and that the evidence did not disclose any grudges against L. which induced them to concoct allegations against him.

[110] After referring to L.'s evidence, he went on to ask the 'similar fact' questions:

> … I have to ask myself, is it reasonable for me to accept the accused's denials in the face of the overwhelming evidence of the complainants to the contrary? Are they all lying and only the accused telling the truth?...

[111] He then repeated what he found earlier. He found the complainants to be straightforward and credible witnesses and was satisfied that they had not concocted their stories out of malice or vindictiveness toward the accused.

[112] Finally, he concluded this part by saying at p. 17:

> Accordingly, I have concluded that I ought to accept the testimony of the complainants as being reliable and accurate. I reject the evidence of the accused where he denies sexual contact with the complainants. That is the case with respect to each of the nine counts left in the indictment. I am not left with any reasonable doubt in this respect by his testimony and on an overall consideration of the evidence I am satisfied beyond a reasonable doubt that the events occurred as the complainants testified.

[113] While the trial judge's sentence, "Are they all lying and only the accused telling the truth?" is, on it own, an inappropriate way of considering the similar fact evidence, I

am satisfied from my reading of his reasons as a whole that this was merely an unfortunate turn of phrase and not an error of law. I would find that he used the similar fact evidence in an appropriate fashion. He did not use it, as L. submits, to actually determine the guilt of the accused but rather to consider the probability or improbability of the coincidences in the complainants' testimony.

[114] The trial judge acquitted L. on counts one and seven and I would set aside the conviction on count eight and order a new trial. In his reasons, the trial judge does not differentiate among the evidence relating to the various counts. The question is: What is the effect, if any, of the trial judge's use of the similar evidence? I must assume that he relied on the evidence from all counts, including counts one, seven and eight.

[115] The Supreme Court addressed this issue in **R. v. Arp**, [1998] 3 S.C.R. 339. The Court discussed the general rule that evidence supporting a count that the accused was acquitted of cannot be used as similar fact evidence in a subsequent trial (**Grdic v. The Queen** case at para. 77 of **Arp**) but came to a different conclusion where the evidence is to be used in the same multi-count trial. Justice Cory for the Court stated at para. 79:

> … I cannot accept the proposition that the principle set out in **Grdic, supra**, applies to verdicts rendered by the same trier of fact in respect of charges tried together in a single proceeding. There is nothing unfair or logically irreconcilable about a jury having reasonable doubt whether the accused committed an act while also finding that it is likely that he committed it. There may very well be good reasons to exclude similar fact evidence underlying a prior acquittal in a subsequent proceeding. However, the principle has no application where the alleged similar acts are the subject of a multi-count indictment. There a careful instruction from the trial judge will be required. It will be necessary to explain to the jury that evidence adduced on one count upon which the jury would acquit may be used in assessing the liability on another count or counts.

[116] Accordingly, the acquittals on counts one and seven and the setting aside of the conviction on count eight do not affect the judge's use of similar fact evidence as regards the other counts.

[117] I would dismiss this ground of appeal.

VI DISPOSITION

[118] For the above reasons, I would allow the appeal with respect to count eight and order a new trial on that count, and dismiss all other grounds of appeal.

[119] As a consequence of the appeal being allowed for count eight and the original sentence being consecutive, the thirty-six month sentence received by L. is reduced by the six months he was sentenced for on this count.

Glube, C.J.N.S.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.