C.A.C. No. 113981

NOVA SCOTIA COURT OF APPEAL

Hallett, Roscoe and Flinn, JJ.A.

Cite as: R. v. O. B., 1995 NSCA 220

BETWEEN:		
O. B.	Appellant	Stanley W. MacDonald for the Appellant
- and -		
HER MAJESTY THE QUEEN	Respondent	Denise C. Smith for the Respondent
		Appeal Heard: September 18, 1995
		Judgment Delivered: November 27, 1995

Editorial Notice

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

THE COURT: The appeal is allowed, the conviction is set aside and a new trial is ordered as per reasons for judgment of Roscoe, J.A.; Hallett and Flinn, JJ.A., concurring.

ROSCOE, J.A.:

The appellant was tried before a Supreme Court judge and a jury on five

counts of sexual offences against his daughter between 1969 and 1983 beginning at a time when she was ten years old. He was found guilty of three of the offences and sentenced to four years imprisonment. Verdicts of not guilty were entered on the other two charges.

BACKGROUND

At the time of the trial the appellant was 66 years old and his daughter, D.H., was 35 years old. In 1992 D.H.'s twin daughters, then sixteen years old, made allegations of sexual abuse against the appellant, their grandfather. Charges were laid, and on April 19, 1993 the appellant was acquitted after a trial by judge alone. On June 3, 1993, the charges relating to this appeal were laid.

SUMMARY OF THE EVIDENCE

Evidence of the complainant:

D.H. testified that from 1969 to 1975 she was sexually abused by her father on numerous occasions. She said that the first incident, that she recalls, happened when she was ten years old. It was a Saturday morning, he was in his bed, she went in to ask for some money to go to the store and he pulled her into the bed and had sexual intercourse with her. D.H. testified that all other occurrences happened in the basement area of the home. Her direct testimony regarding these events is as follows:

> **A.** I would go downstairs, usually, to get potatoes, [f]or Mom, and Dad would be back in the work area, and after I got the potatoes and was ready, was turning around to come back out, towards the rec room area, Dad would usually come up behind me and put his arms around me. And I believe I recall him kissing me on the face sometimes. And he would just take my pants down and he would fondle me down there. If I wasn't wet, he would wet himself, his penis, with his fingers, and he would have sex with me.
>
> **Q.** And how would you be positioned?
>
> **A.** I would have my back to him, and usually I was leaning over or leaning on the ironing board.

She testified that these events occurred two or three times a week over

a period of six years until she left the home at age sixteen. Each incident in the basement lasted about two or three minutes. Approximately five years later she moved back into her parents' home with her three children and the sexual activity with her father recommenced. She testified as follows concerning this period of time:

> **Q.** How did you feel about what was happening with your father then?
>
> **A**. I hated every second of it, but I thought that if I let him have sex with me, he would leave my daughters alone.
>
> **Q**. Did you consent?
>
> **A**. I didn't say yes, but I didn't say no either. I just did my best to avoid him when I could, but if I couldn't, then I didn't stop him.

D.H. also testified that she moved from her parents' home again when she was twenty-four years old. She indicated that when she would visit, her father would often touch her breasts or place her hand on his penis. She said that there was no sexual touching after 1986. D.H. also testified that when she was around twelve or thirteen years old she and her brother R. B. "explored a little bit of sex together." He was about sixteen at the time and the acts were consensual.

The complainant testified that she has had a life of trouble and turmoil, marked by feelings of worthlessness, an addiction to cocaine, and periods of time when her children were taken into care by child welfare agencies.

Evidence of R. B.:

R. B. testified that the appellant admitted to him that he had "fooled around with" D.H. and that the appellant had phoned his daughter to say he was sorry. It was evident from the cross-examination of R. B. that he was uncertain about when this phone call took place and what was actually said.

Evidence of O. B.:

The appellant in his testimony emphatically denied all the allegations

against him. He also denied having made any admission of guilt to his son, R..

ISSUES

The appellant raises the following grounds of appeal:

1. That the learned trial Judge erred in allowing the Crown to adduce evidence of prior consistent statements made by the Complainant;

2. That the learned trial Judge erred in his charge to the jury by failing to instruct the jury on the use to be made of the Complainant's prior consistent statements;

3. That the learned trial Judge erred in his charge to the jury by failing to instruct the jury in a proper fashion about the issues of credibility of the witnesses and the use of their prior inconsistent statements;

4. That the learned trial Judge erred in his charge to the jury by failing to review the evidence and relate that evidence to the theory of the Appellant's defence;

5. That the learned trial Judge erred by excluding the evidence of past sexual abuse of the Complainant by other named parties;

6. That the learned trial Judge erred in his charge to the jury by directing them on the issue of mistaken belief in consent.

First Issue: **Admissibility of prior consistent statements**

The Crown sought a pre-trial ruling allowing the introduction into evidence of statements made by the complainant to her two daughters, two of her friends, her psychologist and her social worker. The proposed evidence was to the effect that D.H. had, prior to the complaint to the police of the assaults by her father, told other persons about the abuse. The Crown sought to lead the evidence as part of the narrative exception to the rule against prior consistent statements. The trial judge ruled against the evidence of the disclosure to the two friends. Although granted permission of the trial judge to introduce the other statements, only evidence of the disclosure to her daughters in 1986 and that of disclosure to her mother was introduced. The Crown had not asked for a ruling on the evidence regarding the statement to her mother.

The appellant submits that the trial judge erred by allowing the Crown to introduce the evidence of the statements to the daughters and that it was an error of law to have allowed the testimony of the statement to the complainant's mother without receiving an advance ruling.

In his decision allowing the evidence of the statements to the daughters, the trial judge reviewed the case of **R. v. F.(J.E.)** (1993), 85 C.C.C.(3d) 457 (Ont.C.A.) which both counsel agreed was the leading authority on the point. He then concluded as follows:

> I shall deal first with the statements to the twin daughters. This appears to be the first time that the complainant discussed the matter, which, if true, indicates that for some reason she was reluctant to discuss her father's alleged abuse until this rather cathartic occasion, that is, when advised of the abuse of her daughters by her then-husband and their stepfather. As I understand from the background, at this time they also disclosed to their mother that their grandfather, the accused, sexually abused them.
>
> I have yet to hear the evidence, as I have stated, from the complainant, particularly about her thought processes and her emotional state, and it is somewhat difficult to determine the exact role such an event played. Nevertheless, although it raises somewhat collateral matters, it is my opinion that it is a significant part of the background of the eventual disclosure to the authorities and the case in general, and its admission is justified as providing necessary background to the narrative.

The evidence that was led as a result of this ruling is as follows:

> **MISS SMITH:** You've mentioned just briefly that you blocked it out or blocked this out, these memories out, for a period of time. I just want to be clear, when you say blocked it out, what you mean.
>
> **A.** I mean I knew that it had happened, but I didn't want to think about it or if I heard a sound, the sound Dad always made, like, if someone went (witness makes hissing sound), if they burnt themselves or something, it would instantly...I would be right back there. So I did my best not to think about it at all.
>
> **Q.** For what period of time did you do your best

not to think about it at all?

A. The whole time it was happening, and I started admitting that it happened, at least to myself, when S. was arrested again with my daughters.

Q. All right. That's your second husband being arrested for abusing your daughters?

A. Yes.

Q. What happened to him, to S.?

A. He was charged and he pled guilty and was sentenced to two years.

Q. And what was the significance of what happened between S. and your daughters to you and your own memories?

A. When S. was arrested, I was doing my best to show the girls that I was there to be...to stand behind them and support them and that I believe them. And when we came home, after they were checked out that day, the first day he was arrested, I said to them, "It's O.K., I understand what you're going through," and they said, "No, you don't, Mom," and I said, "Yes, I do, your grandfather did it to me."

Q. Is that the first person that you ever told about this?

A. Um-hm.

The evidence led regarding the statement of the complainant to her mother for which no advance ruling was made is as follows:

Q. Did you ever discuss this with your mother?

A. I tried to once. When I first started getting counselling for my drug abuse ... This wasn't going away in my head. I had blocked the abuse ... I had blocked it out for so long but it wasn't going away. So when I started getting counselling, I realized there was going to come a point in time when I would have to speak to my mother about it. And I went home one day to prepare her for this. I said to her, I said, "Mom, something really traumatic happened to me in my childhood. I don't have a memory before I was 10 years old. I don't know things that happened, like other kids do." And my mother said to me, "That may be, but I wouldn't know anything about it."

The appellant submits that according to **R. v. F.(J.E.), supra**, these prior consistent statements can only be admitted if recent fabrication is alleged by the defence or if the statements are part of the **res gestae** or narrative. The appellant denies that his defence was that of recent fabrication. The trial judge relied on the narrative exception which is explained by Finlayson, J.A. in **R. v. F.(J.E.), supra**, at page 472:

> . . . It must be a part of the narrative in the sense that it advances the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice. Specifically, it appears to me to be part of the narrative of a complainant's testimony when she recounts the assaults, how they came to be terminated, and how the matter came to the attention of the police.

And further at page 474:

> The second aspect of the rationale for the rule against admitting previous consistent statements is that such evidence has little, if any, probative value. However, narrative is justified as providing background to the story - to provide chronological cohesion and eliminate gaps which would divert the mind of the listener from the central issue. It may be supportive of the central allegation in the sense of creating a logical framework for its presentation - but it cannot be used, and the jury must be warned of this, as confirmation of the truthfulness of the sworn allegation.

And at page 476:

> . . . To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his or her experience as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities. In all cases where evidence is admitted under the rubric of prior consistent statements, the trial judge is obliged to instruct the jury as to the limited value of the evidence.

In **R v. F.(J.E.)**, **supra**, the Ontario Court of Appeal determined that some of the prior statements that had been made by the complainant were admissible as part of the narrative, but part of the testimony should not have been allowed because it was

double hearsay and another part should not have been allowed because it was not part of the narrative.

R. v. F.(J.E.), supra, was approved by the British Columbia Court of Appeal in **R. v. Ay** (1994), 93 C.C.C. (3d) 456, a case where the adult complainant testified regarding sexual assaults against her during her childhood. Evidence of the fact that she told a family counsellor and her mother five years after the last incident was admitted by the trial judge. As well, she testified that several years later she disclosed to a therapist who encouraged her to report the incidents to the police, which she did, shortly thereafter. After referring to **R. v. F.(J.E.), supra**, and the 1983 amendments to the **Criminal Code** by which the rules relating to recent complaint were abrogated, Wood J.A. for the majority, said at page 470:

> If the full purpose underlying Parliament's abrogation of this particular rule relating to evidence of recent complaint is to be achieved, then evidence of when a complaint was first made, why it was not made at the first available opportunity if that was the case, and what it was that precipitated the complaint eventually made, must be receivable as part of the narrative, in order to ensure that the jury have all the evidence of the complainant's conduct necessary to enable them to draw the right inference with respect to her credibility. In this respect, the decisions in ***George*** and ***F.(J.E.)*** are consistent with the legislative purpose of the 1983 amendment.

And further, on page 471:

> However, when leading evidence of the fact that a pre-trial complaint was made, the Crown is obviously entitled to relate it to the allegations before the court. The fact that the complainant did complain of the accused's actions which have already been described is, therefore, admissible as long as the evidence of such prior complaint is described in general terms only and does not contain details of what was actually said so as to invite the jury to draw an inference of truthfulness in respect of the complainant's evidence at trial by reason of its apparent consistency with what was previously said.
>
> To summarize, the fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters relevant and admissible to

> establish the conduct of the complainant in a criminal case, from which conduct the trier of fact is entitled to draw inferences relative to the credibility of that complainant's evidence. However, the content of any prior statement cannot be used to demonstrate its consistency with, and therefore, the probable truthfulness of, the complainant's evidence at trial, and thus, such content is inadmissible unless relevant for some other purpose such as providing necessary context for other probative evidence.
>
> Turning to the evidence to which objection was taken in this case, it was clearly open to the Crown to lead evidence from the complainant that she eventually disclosed the appellant's assaults upon her, first to a family counsellor, then to her mother, then to her therapist, and finally to Constable Logan, and that her failure to go to the authorities earlier resulted from her fear the appellant would carry out the threats he had made to her at various times throughout the alleged assaults. In my view, it was also open to the Crown to lead evidence from those to whom she spoke, confirming the simple fact that such "complaints" were in fact made.

The Saskatchewan Court of Appeal has also approved of the use of the narrative exception for the admission of previous consistent statements. In **R. v. Foster** (1995), 128 Sask.R. 292, a case in which a teacher was convicted of sexual offences against former students several years earlier, the court adopted the reasoning of Finlayson, J.A. expressed in **R. v. F.(J.E.), supra**. The evidence found to be part of the narrative was, as in this case, only that of the complainants, not that of those who heard the complaints. Sherstobitoff, J.A., for the court, after reference to **R. v. F.(J.E.), supra**, said at page 299:

> The evidence in question in this case falls squarely within the narrative exception to the rule against previous consistent statements. The evidence was relevant and necessary to enable the court to understand the chronology of events, the relationship of the appellant to the complainants, the experience of the complainants and how it influenced their course of action, the reasons for delay in bringing the matter to the knowledge of the appropriate authorities, and how it came to the knowledge of those authorities. It was relevant to an understanding of the conduct of the complainants and to the assessment of their credibility.
>
> Although the Courts of Appeal of Ontario, British Columbia and

Saskatchewan have adopted the narrative exception to the admission of prior complaints in sexual assault cases, the Manitoba Court of Appeal has taken a different approach, at least as it concerns the evidence of child witnesses. In **R. v. B. (D.C.)** (1994), 91 C.C.C. (3d) 357 evidence from a school counsellor who heard the first disclosure from the children of sexual abuse by their father and step-father was held to be admissible, but not as part of the narrative. Each of the three judges held that traditional rules of evidence respecting previous consistent statements should not be applied to the testimony of child witnesses. Philp, J.A. disagreed with the approach taken in **R. v. F.(J.E.)** and preferred to create a new exception to the rule against the admission of previous consistent statements, in cases involving reports of sexual abuse of children. Twaddle, J.A. indicated that the rule against the admission of prior consistent statements should not apply to children. Kroft, J.A. held that the statements to the counsellor were admissible because of their relevance and spontaneity.

I agree with the approach taken in **R.v. F.(J.E.), supra, R. v. Ay, supra,** and **R .v. Foster, supra**. In this case the evidence of the disclosure to the daughters is, in my view, clearly part of the narrative. It simply provides an explanation for why the complainant finally divulged to someone that which she said she had kept secret for so long. In a case where the complainant testifies to having "blocked out" from her memory the events she now complains of, it is helpful for the jury to hear evidence of the circumstances which led to the recollection of the events. It assists the jury in piecing the evidence together, that is, providing "chronological cohesion" and allows the jury to assess the complainant's credibility with respect to her explanation for the delay in bringing the matter to the attention of the police. It is simply evidence of the beginning of the process that brought the accused to trial, although admittedly, in this case, there is a further significant delay from the date of the disclosure to the daughters, to the date of the complaint to the police. There is nothing in the evidence of details

of the alleged assaults, or even the specific content of the statements to the daughters, merely an assertion that the accused had abused her. I am unable to distinguish the statement made to the daughters from those made by the complainants in **R. v. Foster, supra, R. v. Ay, supra**, and **R. v. F.(J.E.), supra**, which were found to be admissible on appeal. I am of the opinion that the trial judge did not err in admitting this evidence.

If the evidence of D.H. that she confronted her mother as part of her therapy is a previous consistent statement, it is also admissible, despite the fact that no **voir dire** was held in respect of that evidence. There is no mention of the sexual assaults, in this evidence. The defence took no objection to it at the time, but now submits that it was in some way unfair in that it "had the effect of negating any evidence that the mother may have been able to offer to the jury with respect to various aspects of the Appellant's defence". Obviously nothing said by the complainant in her evidence prevented the mother from testifying on behalf of the appellant if she had material evidence to offer. There was no error in allowing this evidence.

The Crown contends that if the statements were not admissible as part of the narrative exception to the rule against previous consistent statements, that they would be admissible as a response to an allegation of recent fabrication. I agree with counsel for the appellant that there is no justification for this exception in this case. The defence was based on inconsistencies in the complainant's evidence and a general attack on her credibility. As indicated in **R. v. F.(J.E.), supra**, at page 470:

> . . . if the Crown is relying upon recent fabrication as the basis for the admissibility of prior consistent statements, it must wait until the defence has clearly opened this door by making an opening statement, or through cross-examination of the complainant or other Crown witnesses, or as in **R. v. Owens** ... by the allegation of fabrication becoming implicit from the defence's conduct of the case. If this door is opened during cross-examination, questions directed to refuting the allegation can be asked in re-examination or, if necessary, by calling or recalling witnesses. ... When the justification for the evidence is to rebut an allegation of recent fabrication, the Crown should announce to the court

> that that is the reason it is being led so that the trial judge is aware of this problem from the outset and defence counsel is firmly on notice.

I would reject the Crown's ***ex post facto*** attempt to justify the evidence on this basis. (See also **R. v. Hoffman** (1994), 32 C.R. (4th) 396 (Alta. C.A.)).

Second Issue: **Failure to instruct the jury on the use of the prior consistent statements**

The Crown concedes that the trial judge should have cautioned the jury as to the limited use that could be made of the evidence of the complainant's disclosure to her daughters and her mother. In his decision on the **voir dire** regarding the admissibility of the statements, the trial judge indicated that he would caution the jury. It was also agreed in a pre-charge discussion, in the absence of the jury, by counsel and the trial judge that such a caution was required, but for some reason it was not given. Although the Crown concedes that the non-direction was an error in law, it is suggested that no substantial wrong or miscarriage of justice occurred and that this Court should apply the curative provisions of s. 686(1)(b)(iii) of the **Criminal Code**.

I cannot agree that this non-direction is a harmless error or so insignificant that it can be said that the verdict would have been the same without the error. In **R. v. F.(J.E.), supra**, Finlayson, J.A. after agreeing that some of the prior consistent statements in that case were admissible, said at page 475:

> . . . With a proper limiting instruction to the jury, I think that this evidence was properly admissible as part of the unfolding of events from the alleged offences to the inception of this prosecution.
>
> However, there was no such limiting instruction in this case. The jury was never told that the complaints were not admissible for the truth of their contents, and that they were to consider only the fact that the complaints were made to assist them in their understanding of what occurred and why. It is to be noted that, in his initial ruling, the trial judge stated "[i]f there are any problems I can discuss that issue in my

> jury charge". In fact, he did not say anything by way of a limiting instruction with respect to either the evidence of prior consistent statements or the evidence of emotional upset on the part of the complainant. Despite the lack of objection of defence counsel, this remains a most serious matter of non-direction because the content of the statements could be perceived by the jury as corroboration of the complainant's story.

In **R. v. Ay, supra**, Wood J.A., on this point, said at page 472:

> Even in cases where the evidence is strictly confined to the fact that a prior complaint was made, without any reference as to its content, it is essential that the trial judge instruct the jury that such evidence is admitted only to assist their understanding of what happened and that it cannot be used by them as proof of the truth of its implicit content, or as a prior consistent statement corroborative of the complainant's testimony at trial: **R. v. George; R. v. Jones**.

In my opinion, as will be seen, there are other reasons why a new trial is required in any event, but even if there were not, this error is not one to which the curative provisions of the **Code** should be applied.

Third Issue: <u>Charge to the jury regarding prior inconsistent statements</u>

The appellant in his factum lists what is submitted are eleven major prior inconsistent statements in the evidence of the complainant from that which she gave at the preliminary hearing and a written statement to the police. In addition, three inconsistencies in the evidence of R. B. are itemized. It is argued that the trial judge's instruction to the jury regarding inconsistent statements was incomplete, incorrect and destructive of the defence. The portions of the charge that the appellant says are deficient are as follows:

1. From page 550 of the appeal book:

> One of your major functions as a jury is to decide on the truthfulness of the witnesses that you have heard. You have to decide on their credibility, their believability. You've got the very important obligation of weighing all of the evidence of all the witnesses that you've heard to determine their

credibility and their truthfulness. People, witnesses, as you know from your own experience, can see the same thing and report them in different ways. Discrepancies do not necessarily mean that the testimony of a witness should be discredited. Discrepancies in trivial matters, particularly over long periods of time, are unimportant. A lack of accuracy in any detail or in some minor detail is, in fact, as you know, to be expected at times. If you have two of your children go out and do something that they shouldn't do and then they come back in and tell you that they didn't do it and you hear exactly the same story from both of them, you began to get suspicious, if you've been practising parents, that perhaps they have created the details among themselves. People do this ... adult people do this as well, so that quite often if there is discrepancy then, you may at some times be more confident of the truth than if there is a duplication of evidence.

2. From page 552:

A witness might testify to certain facts that are true and then, perhaps, by reason of poor powers of observation, or poor memory, or even a desire not to tell the truth, that same witness might testify to things that are false. So, because you find a witness who has told an untruth or made a mistake in some particular, it doesn't necessarily mean that all of the evidence of that witness is discredited. Everything that I'm saying, I'm sure, is relatively obvious to you from your own experience in attempting to determine the truthfulness of people during your lifetime.

3. From page 558:

Now, I want to deal with the rules relating to prior inconsistent statements by witnesses. You have had raised during this case the question of whether or not statements given by a witness previously was contradicted by statements that he or she gave in the courtroom. The fact that a witness on a prior occasion has made a statement that's inconsistent or contradictory to his or her evidence at trial, goes, of course, to the credibility of that witness. The testimony of the witness may be discredited in whole or in part by showing that he or she previously made a statement which is inconsistent with her or his present testimony. It's obvious to all that only one version of an event can reflect reality or truth and only one version can be correct. Therefore, two contradictory versions can't both be correct even though both might appear credible or believable. The witness may have been mistaken as to the prior statement or may be mistaken as to his or her present testimony in the same event. In that regard, a witness can have been

honestly mistaken or deliberately lying. If the event occurred concerns the material matter as opposed to minor or insignificant matters, that may be more telling as against the witness's credibility, particularly, if you find as a fact that the witness had deliberately lied under oath.

4. And finally from pages 561 to 563:

Now, let me speak for a moment about the evidence in this matter. You've heard [D.H.] and R. B. give evidence, and during the course of their cross-examination, defence counsel read to them evidence that they had given before under oath and, also, read to Ms. [H.] a previous unsworn statement that she gave to the police. Counsel did this in an attempt to show that the evidence given by the witness on the stand was inconsistent with what she had previously said. You must first consider whether there is in fact any inconsistency, and if you find an inconsistency, whether in your opinion it's a minor one or a significant one, and what weight you wish to attach to it.

As I understand the evidence, Ms.[H.] said that there had been no incidents of sexual touching when she was questioned. She explained that her evidence at the trial was her present memory. She advised us that she had spent many years avoiding thinking of this subject of trying to block it out and, as the matter was being explored in her counselling process and in the litigation process, that she recalled things that she hadn't previously remembered. You will recall that she used that as an explanation for the fact that she didn't give certain statements during her earlier testimony but that she ... that she subsequently gave on the stand. I'm noting this and a few other examples only to show you what the inconsistent statement means. I do not intend to review all of the allegations and inconsistent statements. You will have to take them from your memory - your collective memory - and assess them in the manner that I've indicated. You also heard challenges to R. B. regarding his testimony that his father had told him of the father's sexual abuse by [sic] [D.H.]. He stated that this occurred the same day that his father had been at the police station. His previous testimony given at the trial of the accused, related to you the charges involving his granddaughters, was brought to his attention. He agreed that the earlier ... that he had earlier testified that his father had made the statements to him on another occasion and that he had been confused and ... that is, he had confused two occasions. He stated that his present memory had been refreshed by reading the earlier testimony and that the time specified in the earlier testimony was correct. That's my understanding of his statement and explanation. So, as I say, these are just two of the suggestions of prior

> inconsistent statements. You're going to have to review all and decide what effect, if any, they will have on your assessment of credibility.
>
> [D.H.] had also given the police an unsworn statement during their investigation of the earlier charges relating to her father and her daughters. She was challenged that she had not there disclosed some of the matters that she gave in evidence at this trial. She explained that she was essentially dealing with her daughter's allegations of abuse at the time of the statement, not her own. As well, she explained, as I had mentioned earlier, that now that she is confronting the matters between her father and herself, she is realizing more about that relationship.
>
> It's your recollection, I repeat, relating to these statements as to everything else in evidence that counts. If your recollection is different than mine, it's your duty to make your decision based on your own recollections of the evidence.

The appellant cites several cases where it was determined that a jury charge either inadequately or wrongly dealt with inconsistent statements including: **Binet v. The Queen** (1954), 17 C.R. 361 (S.C.C.) where Cartwright, J. approved of the following passage from **R. v. Stack and Pytell** (1947), 88 C.C.C. 320 at page 363:

> Where the testimony of a principal Crown witness is in direct conflict with a prior sworn statement made by him the trial Judge must caution the jury in the strongest terms with respect to the danger of accepting his evidence, and the failure to do so will necessitate a new trial, notwithstanding that the trial Judge properly instructed the jury with respect to the evidence of such witness in the event that they concluded that he was an accomplice.

The appellant also relies on **R. v. Reddick** (1989), 91 N.S.R. (2d) 361 (N.S.C.A.); **R. v. Dutrisac** (1971), 4 C.C.C. (2d) 13, (Ont.C.A.); **R. v. J. (F.E.)** (1990), 53 C.C.C. (3d) 64 (Ont.C.A.); **R. v. G. (M.)** (1994), 93 C.C.C. (3d) 347 (Ont. C.A.); and **R. v. Williams et al** (1992), 77 C.C.C. (3d) 477 (Ont.C.A.). The specific complaints of the appellant in respect of this issue can be summarized as follows:

1. The first two segments of the charge quoted above are inappropriate for the circumstances of this case.

2. The trial judge did not provide sufficient and appropriate instructions to the

jury with respect to the **use** that they should have made of previous inconsistent statements, that is, to assess the witnesses' credibility.

3. The trial judge did not instruct the jury to specifically assess any explanation a witness provided for an inconsistent statement.

4. The trial judge incorrectly advised the jury that the complainant provided as explanations for inconsistencies that she was exploring the abuse in her counselling process, and that at the time she gave a police statement she was more concerned about the abuse to her daughters.

The Crown's response to these submissions is that, first of all, not all of the instances listed by the appellant are actual inconsistencies. Sometimes the difference in her evidence between, for example, the preliminary and the trial was that more detail was given or that more was remembered at the later date. I agree with Crown counsel that the issue of whether it is possible that the complainant's memory improved between 1992 and 1995 is different from the issue of whether the two statements are inconsistent with each other. For example, when she gave her police statement in 1992, she described the first incident in her father's bed and then indicated "there are no clear ones after that" during the period before she first left home. At the trial she testified that she remembered each and every incident of sexual intercourse. However, there are several other clear inconsistencies; even the complainant agreed that there were.

In my opinion, there is a basis for the appellant's submission that the example, given in the charge, of the two children with the same version of an event was inappropriate for the circumstances of this case. This was not a case where two witnesses gave the exact evidence, it was one where the main Crown witness gave several inconsistent accounts of the same events. The two children example may have given the jury the impression that inconsistencies add to a witness's credibility.

However, given that the balance of the charge regarding inconsistent statements is suitable, I would not agree that the inappropriate example was a critical error.

I agree with the Crown that the second specific objection, that is that the trial judge did not instruct properly on the use that should be made of the inconsistencies, cannot be sustained. As shown in the third segment of the charge quoted above, the jury was told that they can use inconsistent statements to test the credibility of a witness. As well, the segment above was followed by an additional instruction as follows:

> . . . So, I want to make it clear to you that you must first find that the witness in fact made a prior inconsistent statement. In determining that matter, you consider all of the circumstances under which that statement was made. Even if you find as a fact, or if the witness has admitted making the prior inconsistent statement, you must take into account any explanation given by the witness for the inconsistency before you decide that the inconsistency adversely affects that witness's credibility. Assuming then that you do find as a fact that a witness made a prior inconsistent statement and that it should be considered in assessing that witness's credibility, I want to make it also clear that such a statement cannot be used by you to prove the truth of the facts to which it relates, unless, in your opinion, that witness has, when testifying in the courtroom during the trial, accepted the truth of the prior statement. Basically, what I'm saying, if John Doe said "I drove a green car" in a past statement, then comes on the stand and says "I drove a red car", and then is confronted with the evidence of the green car in the previous statement, and John Doe says "Oh, I really made a mistake, I've forgotten, it was in fact a green car"; then you can use the fact that it was a green car as part of the evidence. But if John Doe says "No, I was mistaken then, it was a blue car", you cannot use the fact of his earlier statement of it being a green car. You cannot use the fact ... you cannot find as a fact it was a green car. A little convoluted perhaps, but, nevertheless, that is the instruction. In other words, only the parts of the statements which were accepted by the witness as being true can be used by you as proof of the facts stated. You can only use the inconsistent parts to assess the credibility of the witness. You're the sole judges as to the factual issues and where there's been an inconsistency in a prior statement and the effect as well, you are the judges as well as to the effect that inconsistency might have on the witness's credibility.

All in all, I am satisfied that the jury was given sufficient instructions on the use that could be made of inconsistent statements.

The third part of the appellant's argument on the third issue is that the trial judge did not instruct the jury that they should assess any explanation given by a witness to see if they accepted the explanation, and if they rejected the explanation they could reject the witness's testimony. The trial judge's only instruction regarding the assessment of any explanations given is included in the last quoted segment of the charge and is as follows:

> . . . Even if you find as a fact, or if the witness has admitted making the prior inconsistent statement, you must take into account any explanation given by the witness for the inconsistency before you decide that the inconsistency adversely affects that witness's credibility.

I am of the view that this instruction was sufficient on the point of assessing the explanations given by the complainant. Defence counsel in his address to the jury stressed the inconsistencies and questioned the explanations given in a very forceful manner. A few examples are as follows:

> What is even more significant, I would submit, is her explanation of why it's not in the statement of May 2nd, '92, because she says that she only remembered the specific ... these incidents of fondling after May 2nd 1992. That's her evidence, that's her explanation. And she says that even though she had gone through counselling, even though she says that she told her daughters about this and although she had gone and spoken with someone at the Department of Community Services in 1991. Yet she gives a statement to the police in 1992. Again, she is suppose to be digging in to try and find the details with respect to this, but no, what does she do? She remembers things later and she remembers things after May 2nd, 1992, very important facts.
>
> The other thing I'd ask you to consider is that it's a very convenient answer, obviously. If it doesn't appear in the statement, "well I thought of it afterwards." It's a convenient answer, but it's not one that gives her any credibility whatsoever. ... She would ask us to believe that that could happen. That these very incidents that are the underpinnings of the crown's case could be remembered after she gave her statement. What she is asking us to do

> is believe that her memory is improving as time passes. And not only improving on small items but improving to the point of clearly remembering major sexual acts that she says that took place but which she did not describe in 1992. She even goes so far as to say that she remembers an incident right on the stand, right on the witness stand. ... She agreed with me that this was the first time right on the stand that she ever remembered this kleenex in her father's bedroom. That, I would submit, is absolutely unreasonable, absolutely ludicrous.
>
> . . . Can we believe this anymore than we can believe that someone comes up with miraculous improvement in their memory. I would submit that our common sense tells us that we just cannot believe that.

The fourth part of this issue is the appellant's contention that the trial judge improperly characterized the complainant's explanations for the inconsistent statements in the following passages from the charge:

> . . . She explained that her evidence at the trial was her present memory. **She advised us that** she had spent many years avoiding thinking of this subject of trying to block it out and, **as the matter was being explored in her counselling process and in the litigation process**, that she recalled things that she hadn't previously remembered. You will recall that she used that as an explanation for the fact that she didn't give certain statements during her earlier testimony but that she ... that she subsequently gave on the stand. . . .
>
> [D. H.] had also given the police an unsworn statement during their investigation of the earlier charges relating to her father and her daughters. She was challenged that she had not there disclosed some of the matters that she gave in evidence at this trial. **She explained that she was essentially dealing with her daughter's allegations of abuse at the time of the statement, not her own. As well, she explained, as I had mentioned earlier, that now that she is confronting the matters between her father and herself, she is realizing more about that relationship.**

(emphasis added)

The appellant submits that these summaries of the evidence are inaccurate. The complainant testified that her counselling was completed before she gave a statement to the police in May 1992, and well before the preliminary in 1994.

As well, the complainant did not say that she was dealing with her daughters' abuse at that time. The appellant is correct when he says that the complainant's explanation, given several times in the cross-examination, was that she simply remembered more at the trial in 1995 than she did in 1992 or 1994.

To answer this argument, the Crown does not deny that misstatements were made but relies on the trial judge's instruction to the jury that they were the sole judges of the facts. Reference is made to the following passage from **R. v. Fosty** (1989), 46 C.C.C. (3d) 449 (Man. C.A.), affirmed on other grounds sub. nom. **R. v. Gruenke** (1991), 67 C.C.C. (3d) 289 (S.C.C.), at page 468:

> In considering complaints that evidence has been misstated or mischaracterized in a judge's charge, we must not forget that the jury members have listened to the evidence themselves. They know that they are the triers of fact. They know that they must decide the factual issues on the basis of the evidence and not on the basis of the judge's summary of it. A summary is not intended as a complete recapitulation, but as a reference back to the actual testimony which the jury members heard and can evaluate for themselves. The words of Channell J., delivering the judgment of the English Court of Criminal Appeal in ***R.* v. *Cohen and Bateman*** (1909), 2 Cr. App. R. 197 are apt. He said (at pp.208-9):
>
> > When one is considering the effect of a summing-up, one must give credit to a jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact.

In **R. v. Fosty, supra**, Twaddle, J.A. referred to the misstatements of evidence in the jury charge as "relatively minor" matters which were relevant to the issue of planning and deliberation on a charge of first degree murder. The appeal court concluded by finding that:

> In the context of the entire case against Fosty and the absence of any explanation from him as to his role in the killing, the misstatements and the mischaracterization (if that is what it was) were insignificant. Without them, the jury would necessarily have returned the same verdict of guilty

> on the charge of first degree murder. It is consequently my opinion that no miscarriage of justice has occurred as a result of the relatively minor errors in the judge's charge.

Here the misstatements are, in my opinion, very significant given the emphasis of the defence on the inconsistencies in the complainant's evidence. The explanations she gave for the improvement in her memory were critical to the jury's assessment of her credibility. It cannot be said that the verdict would have necessarily been the same without the misstatements.

The third ground of appeal should be allowed and a new trial ordered.

Fourth Issue: **The theory of the defence**

The appellant submits that the trial judge did not adequately review the evidence in his charge to the jury, and specifically that the review of the inconsistencies in the evidence of the complainant and her brother was cursory. The appellant submits that the inconsistencies should have been highlighted by the trial judge, not only in his general review but specifically in relation to each count on the indictment. The contention on this point is very similar to that made on the third ground of appeal. The appellant relies on **R. v. Pace** (1992), 108 N.S.R.(2d) 227 (C.A.) and the cases referred to therein for this submission. Hallett, J.A. described the jury charge under appeal in **Pace, supra**, as follows, at page 231:

> It is clear from a review of the trial judge's instruction that he did not review the evidence and did not review with the jury the theory of the Crown, the theory of the defence or relate the evidence to the issues.

Here, as indicated in the lengthy passages quoted above from the instruction, the trial judge did review the evidence, and pointed out the inconsistencies. It is not necessary that the trial judge do it more than once or that the charge be repetitious. I am satisfied that, with the exceptions already dealt with above, the evidence is sufficiently reviewed and related to the issues before the jury.

The appellant also objects to the manner in which the trial judge presented the theory of the defence to the jury. That portion of the charge is as follows:

> The theory of the defendant, as I understood the explanation of it, was that the defence submits that the Crown has a heavy burden to discharge to prove that these five counts occurred beyond a reasonable doubt and the defence further submits the Crown has not provided such convincing evidence to you. The defence argues that the evidence of [D. H.] is unreliable because it is inconsistent in parts. They point out the lack of opportunity created by acts occurring in the basement in an area separated from the recreation room by a slat door. They also point out that the acts of intercourse were alleged to have occurred over a period of many years and that there is no evidence that the complainant said "no" or resisted even when she was a woman in her twenties. The defence submits that for her to return home with her children to live with her parents and to subject herself to sexual assaults is not credible. They also questioned the credibility of her evidence that she felt obliged to approach her father during her second marriage when the alleged acts of sexual touching occurred. The defence highlights several areas where they submit to you that the evidence of [D.H.] and R. B. at this trial was inconsistent with earlier statements or testimony. The defence submits that if you accept such inconsistencies they, along with the other weaknesses in her evidence or their evidence, should raise a reasonable doubt as to each and all of the charges. If you have such a doubt, they submit, it is therefore your duty to acquit. The defence correctly told you that it did not have the burden to prove the motive for false allegations. It advanced to you that the complainant's motive was that she had a ... had many problems in her life and, in her mind, she needed to ascribe a reason for such troubled life. Defence theorizes that she has falsely ascribed this reason to childhood sexual abuse by her father. The defendant asks that you accept his evidence ... that you accept the evidence of the accused from the stand; that is, that that evidence was credible when he stated that he committed no sexual act with his daughter.

The appellant says that this summary of the defence is deficient in that the effect of the inconsistencies in the complainant's evidence is disregarded. I cannot agree with that assessment of this section of the charge.

It should be noted here that defence counsel refused the trial judge's request to provide a written copy of the defence theory. The reason the invitation was

declined was to protest the practice of counsel providing copies of the theories to the judge, because, it is submitted, it has "a significant adverse effect on the right of an accused to have the Judge fairly explain the position of the Defence to the jury." It is obvious that trial judges routinely ask counsel for them to provide the theories so that the trial judge does not misstate the position of the Crown or the defence. It is equally clear that if one side presents a theory that has no foundation in the evidence, or is inflammatory, or too lengthy, the trial judge is obliged to make corrections before reading it to the jury. In addition, the trial judge should ensure that the theories are of approximately the same length so there is no perceived imbalance.

In this case, I am of the view that the trial judge met the direction in **R. v. Pace, supra**:

> An accused is entitled to have his defence fully and fairly put to the jury. That cannot be accomplished unless the evidence that touches on the defence is referred to.

Other than the parts referred to in relation to the third ground of appeal, a review of the whole charge to the jury reveals that the trial judge discussed the issues of law and fact clearly, fairly and adequately.

Fifth Issue: **Exclusion of evidence of past sexual abuse by others**

The appellant made a pre-trial application to introduce evidence of the complainant's prior sexual history pursuant to s. 276.1 of the **Criminal Code**. The evidence related to sexual activity involving her brother, her uncle and two neighbours. The complainant had given a police statement a few weeks prior to the trial alleging these other sexual abuses against her when she was a child. Defence counsel sought to introduce the evidence to show, among other things, a pattern of false allegations. The trial judge ruled against the application in respect to evidence in relation to the uncle and the neighbours, but ruled that the defence could cross-examine the brother

and the complainant about sexual activity between them on the basis that it was relevant to a question of the brother's motive in testifying against his father. The trial judge also found that s. 276 applied to non-consensual sexual activity. The appellant is not contesting this pre-trial ruling. However, after the complainant's direct examination, defence counsel made a further application pursuant to s. 276 based on two additional points. The evidence that precipitated the second application was as follows:

From page 176:

> **Q.** Growing up, when you were between 10 and 16, those years before your first marriage, what did you think about what was happening in your life? What were your thoughts about it?
>
> **A.** Until I was, again, 12 to 14 - I'd say I was about 13, I knew what was happening was wrong, but we didn't talk about sex in our house, so I didn't know how wrong it was. I didn't actually even know I was having sex until one time, in school, all the girls were standing in the bathroom and they were saying, "Oh, I'm going to be a virgin when I get married," and I said, "So am I, right?" Everybody else was going to be, so I was going to be. And for some reason, some girl said what a virgin was, and at that point I realized I couldn't be a virgin; I hadn't been one for years.

And from page 179:

> **Q.** All right. Between 1986 and when you first spoke to Constable Myers, in 1992, what sorts of things were happening in your life in that period?
>
> **A.** I was living common-law with a man. He was ... We lived together a little over a year and he was killed. In that time period we never went to visit my father much, and they didn't come to my house, so ... There wasn't much going on in the relationship with my parents then. We talked but not often. After that, I went directly pretty well to work, and there wasn't a lot of communication then either. I worked and the girls babysat at home, so ... I don't know how to put it, but it was just distant, I guess.
>
> **Q.** You've told us about drug abuse.
>
> **A.** Yes.

> **Q.** When?
>
> **A.** That would be in '89 I became addicted to cocaine.
>
> **Q.** You've referred to having taken some counselling for that. That was when?
>
> **A.** That would have started, I believe, in 1990. I ... It was pretty rugged, and I don't have a lot of memories then. I was addicted to cocaine and I spent most of my time doing cocaine.
>
> **Q.** What effect did drug addiction have on your life in that period, between the end of your marriage to Mr.[H.] and when you came forward to Constable Myers?
>
> **A.** By that time, my children had gone into care at ... with Childrens' Aid, and I was no longer working or ... I lived daily for drugs, at that point.

At the conclusion of the direct testimony, in the absence of the jury, defence counsel renewed his s. 276 application. It was submitted to the trial judge that the jury would be left with the impression that her father was solely responsible for (a) the fact that she lost her virginity at an early age, and (b) her troubled life, if they did not hear that she had been abused by three other men. In other words, they may find that the evidence of her realization that she was no longer a virgin, during the discussion with the other girls; and the fact that she had had a difficult life, to be corroborative of her testimony that her father sexually assaulted her. The trial judge refused to alter the earlier decision in this respect and said:

> **THE COURT:** First of all, I listened carefully to the testimony of the complainant in all respects. I would note that at no stage did she directly make reference to any of the other sexual episodes that were excluded in the rape shield application, the application under 276 of the **Code**, and those which Mr. MacDonald wishes to pursue at this time.
>
> Secondly, it is clear that Miss [H.] had other factors in her life that she discussed that would affect her life situation at this time, including her two failed marriages, including her...the sexual assault of her children by her second husband, and other matters that she discussed. So I don't think the impression is as absolute as defence counsel submits that it is.

> The ... We have heard the application, thoroughly argued by counsel at the time of the 276 application, argued fully by counsel, and made a careful resolution at that time that some of her prior sexual activity could be explored, that in relation to her brother. On that basis... But that the other could not be. On that basis, the Crown has presented its evidence as explored in the one occasion, that in relation to the brother, and has explored it in the manner in which I requested in my ruling on the subject. At this time, I think to change that opinion is unfair, not only to the presentation of the evidence, but I think it is also unfair in view of the earlier ruling that I made, which I think, under these circumstances, should still apply. And I, therefore, rule that those matters of prior sexual activity should not be explored by defence counsel. In a sense, to do so would be to re-open the application, and I feel there is nothing wrong in doing that at any stage of the trial, but I think that ... My conclusion is that it is inappropriate to do it at this stage, now, after the evidence that I have heard.

The appellant argues that the trial judge erred in not allowing the cross-examination in relation to the statement that the complainant gave to the police where she alleged that when she was about thirteen or fourteen years old her uncle "sexually fondled her", that she had sexual intercourse with a neighbour and some unspecified sexual activity with another neighbour. It is submitted that the complainant's evidence in relation to the loss of her virginity and the turmoil in her life was very emotional and must have had a significant impact on the jury. It is also pointed out that Crown counsel, in her summation, emphasized this evidence. Counsel for the appellant argues that this reinforced the impression that the father's abuse was the cause.

The appellant offers no case law to support his argument on this ground of appeal; the submission is simply that the evidence he sought to introduce was relevant and probative and its probative value outweighed its prejudicial effect.

The respondent denies that there is probative value to the proposed evidence, that the complainant only lost her virginity once and that was when she was ten years old in her father's bed. It is also submitted by the Crown that it was necessary to lead the evidence of all the troubles such as drug addiction and failed

relationships as part of the narrative to explain why the complainant kept going back to her parents' home, and why it took so long to report it to the police. The respondent also asserts that it would have been unfair to allow cross-examination on the other abuse since it was not explored in direct examination. The latter argument is met, of course, by indicating that if the application had been allowed by the trial judge it would have been appropriate to allow the direct examination to be re-opened, or to allow re-examination on those points.

The first issue that has to be addressed is whether s. 276 applies to non-consensual sexual activity. If it does not, the next question is whether there was any other reason to prevent the proposed cross-examination.

The relevant **Criminal Code** provisions are as follows:

> 276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsections 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
>
> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or;
>
> (b) is less worthy of belief.
>
> (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
>
> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; and
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right or privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.
>
> . . .
>
> 277. In proceedings in respect of an offence under section ... 271 ..., evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

In my opinion s. 276 is not applicable to non-consensual sexual activity. I agree with the decision in **R. v. Vanderest** (1994), 91 C.C.C. (3d) 5 (B.C.S.C.) on this question where Lysyk, J. said at p. 7:

> The terminology of s. 276(1) closely tracks a passage in the reasons of McLachlin J., delivering the reasons of the majority, in **R v. Seaboyer** (1991), 66 C.C.C. (3d) 321 at p. 409, 83 D.L.R. (4th) 193, [1991] 2 S.C.R. 577, where she summarizes the applicable principles and formulates the first of those principles in the following terms:

> 1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:
>
> (a) more likely to have consented to the sexual conduct at issue in the trial;
>
> (b) less worthy of belief as a witness.
>
> It is the case that McLachlin J. refers expressly to evidence of consensual sexual conduct whereas s.276(l) does not employ the word "consensual". The difference may be explained, however, on the basis of economy of expression in the statutory language inasmuch as the reference to the complainant having "engaged in" certain activity clearly excludes non-consensual activity. If, for example, a bank teller complies with a demand from an armed bandit to hand over cash, one would not, in ordinary use of the English language, say that the teller has engaged in bank robbery.
>
> Accordingly, on a natural reading of s. 276(1) of the **Code** as well as on authority, I conclude that the primary position taken by defence counsel is correct, that is to say, s. 276(1) and related provisions are not triggered by evidence of non-consensual sexual activity.

The conclusion reached in **Vanderest** was approved in **R. v. Eyre**, Q.L. [1995] B.C.J. No. 1377, (B.C.S.C.) leave to appeal refused by British Columbia Court of Appeal, [1995] B.C.J. No.1936, and in **R. v. Sakakeesic**, Q.L. [1994] O.J. 2021 (O.C.J.). Another case relevant to this question is **R. v. Brothers**, Q.L. [1995] A.J. No. 523 (Alta.C.A.) where the issue was whether it was proper for the Crown to have led evidence from the complainant that she was a virgin prior to the alleged sexual assault. Although the Court of Appeal found that s. 276 did not preclude the Crown from leading that evidence, the appeal was allowed because the trial judge ought to have warned the jury of its restricted probative value. The reasoning of Russell, J.A. is helpful in determining the issue here because of her analysis of the rationale for the so-called rape shield provisions as follows:

> The section is intended to eradicate negative stereotyping

> associated with the myth that a person who has been sexually active is less virtuous, and more likely to consent to other sexual activity, or be less credible. Though the amendments circumscribe the prohibition, the general intent of the section is unchanged. Evidence of previous sexual activity is irrelevant to either credibility or consent. Section 276 is not engaged by the issue in the instant appeal.
>
> DOES SECTION 277 PROHIBIT EVIDENCE OF VIRGINITY?
>
> Section 277 excludes evidence of sexual reputation for the purpose of attacking or bolstering the credibility of a complainant. It is an absolute prohibition with no exceptions. In **Seaboyer**, McLachlin J. explained the purpose of the section at p. 392:
>
> > Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s. 277 can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to a fair trial.
>
> However, here, evidence of the complainant's virginity is evidence of physical fact only and not of reputation. It is not evidence of the way this complainant is generally viewed in the community. The section is specifically directed to the exclusion of evidence of reputation, and is not the basis for exclusion of any evidence of a sexual condition which may be prejudicial to the accused. Therefore, the evidence is not excluded under section 277.

The next issue is whether the common law rules of evidence restrict the ability of the defence to cross-examine the complainant respecting previous sexual assaults or other non-consensual sexual activity. The test is whether the evidence is relevant and whether its prejudicial effect substantially outweighs its probative value. (See **Seaboyer, supra**, p. 391). Here the purpose of the cross-examination would have

been to point out to the jury that there were other possible explanations for the facts that the complainant lost her virginity at an early age and she had a troubled life. The evidence is therefore relevant to a fact in issue, that is whether the appellant sexually assaulted the complainant. It is, in my opinion, necessary to ensure the appellant's right to a fair trial that the cross-examination be allowed for that narrow purpose. In this sense, its probative value outweighs its prejudicial effect. This is consistent with the following statement by McLachlin J. in **R. v. Seaboyer**, [1991] 2 S.C.R. 577, at pp. 620-21:

> . . . Accepting that the rejection of relevant evidence may sometimes be justified for policy reasons, the fact remains that [former] s. 276 may operate to exclude evidence where the very policy which imbues the section - finding the truth and arriving at the correct verdict - suggests the evidence should be received. Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations. What is required is a law which protects the fundamental right to a fair trial while avoiding the illegitimate inferences from other sexual conduct that the complainant is more likely to have consented to the act or less likely to be telling the truth.

In this case, the evidence of the complainant's previous non-consensual sexual activity could not be used to show that the complainant is generally less worthy of belief, and an instruction to that effect would be required. The evidence is not admissible to show a pattern of false allegations; that would require proof that they were false. The trial judge has already ruled on this question and that ruling has not been appealed.

To summarize, the trial judge erred by not allowing the defence to cross-examine the complainant as to whether she had been sexually assaulted by others when she was a child.

Sixth Issue: **The charge on mistaken belief in consent**

The trial judge instructed the jury as follows:

> I want to touch briefly on one aspect of consent that you should be aware of and that is that a person doesn't commit a criminal offence under our law if she or he mistakenly but honestly believes that their conduct was not unlawful or criminal; that is, in the sense that they honestly believe that the complainant was consenting to having sexual activity with them even though the complainant was not. In that circumstance, the accused is entitled to be acquitted. You must consider all of the evidence in considering whether the accused honestly believed that the complainant consented. In reviewing this evidence you ought to consider whether the accused had reasonable grounds for such a belief. There has been no submission to you that there could have been a dispute or a misunderstanding of facts. I suggest that on the basis of listening to the evidence that there is no such dispute. But nevertheless, it's important for you to understand that principle of law that not only must there be found to be no consent but it must also be found that the accused did not honestly believe there to be consent.

Both the Crown and defence counsel suggested to the trial judge after the charge that he should not have included this part of the charge since the defence was one of complete denial and not that the complainant consented to those actions that comprised the offences that were alleged to have been committed after she was an adult. On the appeal, the respondent submits that while it was not necessary to charge on mistaken belief in consent it was not an error to have done so.

In my view this charge should not have been given. (See **R. v. Reddick** (1989), 91 N.S.R. (2d) 361 (C.A.)). While in the circumstances of this case, this error would by itself not likely be one requiring the ordering of a new trial, given the cumulative effect of the other errors found, this is not a case where the curative provisions of s. 686 of the **Criminal Code** should be applied.

CONCLUSION

I would allow the appeal, set aside the conviction and order a new trial.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Flinn, J.A.