C.A.C. No. 02973

NOVA SCOTIA COURT OF APPEAL

Jones, Chipman and Pugsley, JJ.A.

Cite as: R. v. M.H.M., 1994 NSCA 146

BETWEEN:

M. H. M. M. Joseph Rizzetto	)	for the Appellant
Appellant	)	
- and -	)	
HER MAJESTY THE QUEEN	)	Kenneth W.F. Fiske, Q.C.
Respondent	)	for the Respondent
	)	Appeal Heard: June 16, 1994
	)	Judgment Delivered: August 3, 1994

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 Chipman, J.A.; Pugsley, J.A. concurring and Jones, J.A., dissenting.

JONES, J.A.: **(dissenting)**

The appellant was tried on an indictment before Mr. Justice Simon MacDonald and a jury in December, 1993. There were seven counts in the indictment alleging acts of indecent assault and gross indecency and sexual assault on a female person at various locations on Cape Breton Island between April 1, 1982 and the 28th day of April, 1988. The seventh count provided:

> Between the 28th day of August 1982 and the 28th day of April 1988 at or near Sydney in the County of Cape Breton, did commit acts of gross indecency with a female person having the initials of C.S. to wit: by having sexual intercourse with her contrary to Section 157 of the **Criminal Code** of Canada.

The complainant C. S. was 23 at the time of trial. She is the daughter of C. M. and has a younger brother J.. C. M. met the appellant M. M. in August, 1982 when she acquired a home at in Sydney. The appellant moved into the home with C. S. and her two children in March of 1983. The complainant testified that the sexual encounters commenced in 1982 when she was 12 and continued until she left home in 1988.

The appellant denied having sexual relations with the complainant. Her evidence was also contradicted by her mother. The mother married the appellant in 1988. At that time the complainant was 18 years of age. Although the events described in the counts occurred over the same

time period the jury found the appellant not guilty on the first six counts but guilty on the seventh count.

There was evidence which the jury could have considered as corroborative of one incident relating to the seventh count. The complainant testified as follows:

> A. There was an incident that occurred in their bedroom and I remember that there wasn't any one home and that I was in the bedroom and he was on top.
>
> Q. When you say more, you are referring to...
>
> A. Mr. M. was on top and I remember he was having intercourse with me and I was looking over his shoulder and I remember seeing the back of my brother's head coming out of his bedroom and the way the rooms were arranged is you had eh...at the end of the hall there was my mother's room and then there was my brother's and my room, my brother's on the right and mine on the left and I remember just seeing the back of his head coming out of the bedroom and going down the hallway and I didn't see his face but I jut remember looking over Mr. M.'s shoulder and seeing the back of his head going down the hallway. He never once looked in my direction and I remember being scared to death thinking of my God, what did he see. But I dismissed it after that.

In relation to that incident J. S. testified as follows:

> Q. With respect to when you lived at [...] in Sydney, did you ever see anything take place in that house that stood out in your mind, or a memory that stayed with you over the years?
>
> A. Yeah, I eh, I eh, normally when I come home I would go up the stairs and I will sort of go through in, wander in mom's room and then into my room,

just to see who was there. I got to about...I was in mom's room and I saw M. naked face down on the bed and from how he was moving, I thought he was masturbating, so I am starting to leave the room and I look down at the foot of the bed and I see a couple of pairs of feet there and eh, so, they didn't look..I expected it to be mom of course, but they were small and they were smooth and they were mom's feet, so I look up at the head of the bed and I see long black hair on the pillow, and eh, so now I believe that's C..

Q. Why did you believe that that was C.?

A. Her hair, her feet.

Q. Do you remember anything about the size of that person?

A. Her feet were small, it seemed they were smooth.

Q. What about the size of the person...the body size?

A. Basically smaller than M., around eh.

Q. You say you noticed the long black hair on the pillow, as a result of seeing that what conclusion did you come to?

A. I concluded that it wasn't my mother because her hair is kind of frizzy and curly, it doesn't...it isn't straight.

Q. And back then when you would have seen this was that the way your mother's hair would have been?

A. No her hair was frizzy back then.

Q. What about, as you recall, what about C.'s hair back then.

A. It was straight and it was black.

Q. And what about the length of it?

A. Shoulder length or longer.

Q. Did eh, how certain are you that it was M. or Mr. M. that you saw?

A. I am positive it was M.

Q. And you say you are positive and that is based on what J.?

A. Seeing M., it's ...I could clearly, see there was no covers or clothing on at all, so I could see M. completely from behind.

Q. And the eh, other person in the bed.

A. All I saw was hair and feet.

Q. Did you see that person's face? So you came to your conclusion as to who that person was based on what?

A. Based on the hair, the feet, plus I was expecting, I was looking for C. when I came upstairs and I eh, I waited outside the house afterwards, I wanted to see who came out, I wanted to be sure, I wanted to see mom come out of that house, and I would think well...

Q. Did your mom come out of that house?

A. No.

Q. Who did come out of that house?

A. C. came out.

In cross-examination J. stated:

Q. Alright, and you already said why you think it was C., you didn't want that to be C., you went down looking, if you were certain it was C., I mean if

you were certain it was C., you may think it was C., but if you were certain you wouldn't go downstairs looking for C. is that correct, if you were certain?

A. I was certain.

Q. The hair that your sister had, and this is another very important point, I think later as the days go on, but I want to ask you what year and time did this, what you say you saw, take place?

A. I can't nail down the year, the exact time, all I can say, I can eh...I know the condition of the room, they had the new green bed sheets, the coffee tables for that, the front yard was done up in the stone wall, they had done some landscaping and it was not winter. There was no snow on the ground, but that's, as far as the time that is as close as I can get.

Q. That doesn't really tell us very much does it J..

A. No.

Q. You moved into [...], would you agree with me in '82, do you know the year that you moved in?

A. I don't know the exact year.

Q. You moved in there sometime is that correct?

A. Yes.

Q. And you lived there for about eight years, would you agree?

A. Yeah about eight.

Q. About that period of time. And when you moved from [...] out to [...], did you go to [...]?

A. I was there but I was boarding in [...] for a while, because there was no high school there.

Q. You were going to school in [...]?

A. Yes.

Q. Okay, but do you remember, what grade were you in when you went to [...]?

A. Yeah.

Q. What grade...that was grade...

A. Grade 11.

Q. Grade 11, okay so from the period of time, from Grade 3 I guess, what was the first year that you went to school in Sydney?

A. The first year in Sydney was Grade 4, the first year in [...] was Grade 5.

Q. Okay so you went to [...]in Grade 5 and did you grade every year up until Grade 11.

A. Yeah.

Q. Okay, so from Grade 5 to Grade 11, you would have lived in [...]?

A. Yes.

Q. Right, and now does that help you a little bit in situating, can you tell me from those grades about when you would have seen what you seen?

A. When, guess, and I can only guess when it was.

Q. Give me your best estimate?

A. My best estimate would have been between Grades 5 and 6.

Q. Between your grade 5 and 6.

A. Yes.

Q. So that would be the ...correct me if I am wrong, between the 2nd and 3rd year that you were at [...].

> A. No that would be between the first and second I guess.
>
> Q. Okay. And eh, your sister would have then been in Grade eh...two years ahead of you eh?
>
> A. Roughly yeah.
>
> Q. So it wasn't like eh...it wasn't when she was in Grade 12 or anything like that, it wouldn't have been that late, I mean that's not too long ago?
>
> A. It could have been, but my best guess is, as I say, is between my Grades 5 and 6, would put her between Grade 7 and 9, somewhere in that...
>
> Q. There's a big difference between those years, but that is your best guess?
>
> A. Yeah.

Many of the incidents described by the complainant if true, were non-consensual as she stated she was assaulted. The Crown did not pursue the issue of consent in relation to the incident described by J.. At the end of her examination she was asked by the Crown attorney:

> 2. And did you ever want Mr. M. to do any of these things to you that you've described here in Court today?
>
> A. No.

During their deliberations the jury returned to the courtroom and heard the evidence of J. S. a second time. The jury then entered a conviction on the seventh count.

The appellant appealed from his conviction and sentence. He has abandoned the appeal against sentence. The following grounds of

appeal were raised in the notice of appeal:

> 1. That the learned trial Judge failed to direct or improperly directed the jury as to the definitions and law relevant to section 157 of the **Criminal Code.**
>
> 2. That section 157 of the **Criminal Code** was not in full force and effect during the time period alleged in the indictment.
>
> 3. That the jury failed to consider the evidence, the summations or the trial Judge's charge.
>
> 4. That the verdict is not one which could reasonably have been rendered.
>
> 5. That the verdict is unreasonable, perverse, and not supported by the evidence.
>
> 6. That the sentence imposed at trial was excessive.
>
> 7. Such further and other grounds as may appear.

Counsel for the appellant argued grounds two and five. Section 157 of the **Code** which made gross indecency an offence was repealed by c. 24 of the Statutes of Canada 1987. The repealing section came into force by proclamation on January 1, 1988. The complainant stated that sexual relations continued until September, 1988. The appellant contends that the jury must have found that the evidence of J. S. corroborated the complainant's testimony and therefore entered a conviction on the seventh count. It was further submitted that J.'s evidence is not clear when the specific act to which he referred occurred and therefore could have been after the period when the section was repealed.

The fact that the charge included a period beyond the repeal of

the section would not be fatal, provided the evidence established beyond a reasonable doubt that the offence occurred before that date. The issue was not raised on the trial and the jury were not instructed on this point. The Crown did not move to amend the information.

I agree with the appellant's submission that the jury were obviously not prepared to rely on the complaint's evidence standing alone. This is confirmed by the request to hear J.'s evidence a second time. That evidence was not of sufficient probative value to establish that the act which he witnessed was committed before the repeal of the section. The non-direction on this issue amounted to a misdirection and with respect was fatal. As the verdict cannot be supported by the evidence it must be set aside and an acquittal entered. It is not appropriate to order a new trial as the Crown simply failed to prove its case.

The Crown did not move on the trial to amend the indictment. It should not be given a second opportunity to do so. The appellant made his defence on the basis of the indictment presented. To order a new trial in this case would, in my view, place the appellant in double jeopardy for the same offence. Section 609(1) of the **Criminal Code** provides:

> 609. (1) Where an issue on a plea of **autrefois acquit** or **autrefois convict** to a count is tried and it appears
>
> (a) that the matter on which the accused was given in charge of the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and

> (b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of **autrefois acquit** or **autrefois convict** is pleaded,
>
> the judge shall give judgment discharging the accused in respect of that count.

This was not only an issue of non-direction but also an issue as to whether the Crown had proved its case.

The Crown argued that this Court should amend the indictment to refer to s. 153 of the **Code**, the offence of sexual exploitation. With respect that charge was not included in the indictment and therefore the appellant was never called upon to answer to that charge.

In view of the first ground of appeal I think it is necessary to comment on the charge to the jury. Three of the counts in the indictment alleged that the appellant committed acts of gross indecency by having sexual intercourse with a female person. No other particulars were contained in the charges. An act of sexual intercourse **per se** with a person over 14 is not an offence if that person consents. The act is not incest by definition and s. 145 which made it an offence to have sexual intercourse with a stepdaughter was repealed in 1987. It is open to question therefore whether count seven alleged any offence.

The original section only referred to homosexual acts between

males. For a history of the section see Crankshaw's **Criminal Code**, 7th ed. 1959-71 at pp. 59,60. In **Regina v. P.** 3 C.R. (1968), 3 C.R.N.S. 302 Dickson, J.A. in delivering the judgment of the majority in the Alberta Court of Appeal stated at p. 317:

> It is correct that former s. 206 affected only a male person who committed an act of gross indecency with another male person, but, with respect, I think Mr. Sedgwick and Mr. Megarry were misled in supposing that Parliament ever intended by the new s. 149 to intrude into the area of the intimacies which take place in private between consenting spouses or lovers.
>
> That women as well as men should be answerable for acts of gross indecency may well have seemed reasonable to Parliament in view of modern recognition of equality between sexes. Depending on time, place and circumstances it is no doubt possible for a man to commit an act of gross indecency with a female - **Regina v. LeFrancois**, 47 C.R. 54, [1965] 4 C.C.C. 255, is an example - and for a female to commit an act of gross indecency with a male - e.g. an adult woman with an innocent male child. Parliament may well have thought it proper to broaden the section to cover such and other cases, but it would require words much plainer than appear in s. 149 to persuade me that Parliament suddenly decided to enter the portals of the home and to require courts to sit in judgment upon what passes in private between consenting adult spouses or persons living together, whether married or not, or, for that matter, upon any heterosexual sex act (save, of course, that described in s. 147) done in private between consenting adults. (emphasis added)

That decision was cited by the Ontario Court of Appeal in **Regina v. St. Pierre** 17 C.C.C. (2d) 489. Dubin, J.A. in delivering the judgment of the

Ontario Court of Appeal stated at p. 495:

> If the act of the accused constituted an act of gross indecency, the consent of the complainant therefore would not be a defence. However, in determining whether what was done was an act of gross indecency, the consent of the complainant along with all the other circumstances,including her age, is a relevant consideration. The jury may well have concluded by the manner in which this issue was left to them by the learned trial Judge that the consent of the complainant was irrelevant, and indeed that there was no defence for the accused since he had admitted the act.
>
> It was therefore a misdirection for the learned trial Judge to have responded to the question in that way, and it was incumbent upon him to instruct the jury that, in considering whether the conduct of the accused was grossly indecent, they must consider whether the complainant consented and, if so, whether under all the circumstances the Crown had established the charge of gross indecency.

Both of those cases involved acts which had been previously regarded as grossly indecent.

In **R. v. C.** 39 Nfld. & P.E.I. R.8 the accused, a woman, was charged with gross indecency by engaging in homosexual acts with a 17 year old girl. The Newfoundland Court of Appeal held that having regard to all of the circumstances of the case the evidence led by the Crown did not establish gross indecency. See also **R. v. LeBeau**, 62 C.R. (3d) 157.

In **The Queen v. Galbraith**, a decision of the Ontario Court of Appeal dated April 21, 1994, and reported in The Lawyers Weekly Reports, Vol. 1, Number 4, June 3, 1994, Finlayson, J.A. in discussing the meaning of

"dependency" in s. 153(1)(a) of the **Code** stated:

> With great respect to the trial judge, I do not think that a dictionary definition is sufficient to interpret the will of Parliament in this particular case. I start with the proposition that having sexual relations with a young person between the ages of 14 and 18 is not a criminal offence. Parliament has seen fit to give more sexual freedom to young persons than the **Code** permitted previously. Before the enactment of the present s. 153, it was an indictable offence for a male person over the age of 14 to have sexual intercourse with a female person who was not his wife and who was between the ages of 14 and 16 if the female person was of previously chaste character: see **Criminal Code**, R.S.C. 1970, c. C-34, ss. 146, 147. The only defence available to an accused was to show that the female person was "more to blame" for the offence. The concept of chastity which had such importance under the former s. 146 is not relevant under the present s. 153. Instead, Parliament has focused on prohibiting sexual relations between young persons and persons with whom they share a special type of relationship marked by trust, authority or dependency. The age of the appellant is not a relevant consideration under s. 153. **Prima facie**, a 27 year old man is entitled to have sexual relations with a 14 year old girl unless one of three conditions prevails. They are: a position of trust, a position of authority, or a relationship of dependency.
>
> In my opinion, it is self-evident that the disentitling condition must exist independently of the sexual relationship. Furthermore, the fact that a young girl moves in with a man more than 10 years her senior cannot by itself constitute the prohibited relationship; otherwise the **Code** would have addressed the problem in those terms. Something else must be present before the young person is afforded protection from sexual activity. In this case, the alleged dependency is solely economic, and I have to question if that alone is what is

> proscribed by the **Code**. There has been no allegation of any **quid pro quo** between the economic support and the sexual relationship.

It is not necessary to consider whether sexual intercourse with a female under 14 would constitute an act of gross indecency as on the evidence it appears that the complainant was over 14 when the act referred to by J. took place. These issues were not addressed during the trial.

In the Crown's submission any improper sexual conduct may be grossly indecent. With respect I agree with Dickson, J.A. in **Regina v. P**, supra. By merely extending the section to include women, Parliament did not intend to extend the prohibition to include all actions. The section primarily related to homosexual acts. Surely a charge of gross indecency by sexually assaulting A could not be sustained if it is established that A was a female over 14 and consented and notwithstanding that consent is not a defence to the primary charge. The same argument applies to a charge of gross indecency by having sexual intercourse. In my view without further particulars the seventh count did not disclose a criminal offence. An expansive interpretation of this section would not be consistent with the intent of Parliament in repealing the section.

In dealing in his charge with s. 157 of the **Code** the trial judge stated:

> Section 157 of the **Criminal Code of Canada** deals with the subject gross indecency and that section reads as follows:

> Every one who commits an act of
> gross indecency with another person
> is guilty of an indictable offence.

The law as contained in Section 157 of the **Criminal Code**, is designed to eliminate from our society the practice of an act or acts of one person with another found to be grossly indecent. The section prohibiting an act of gross indecency obviously contemplates that at least two persons be involved in a practice which the law prohibits. In this case, as in all cases of a serious nature, the Crown must prove that the crime was committed. Further the Crown must prove beyond a reasonable doubt that the accused committed the crime alleged in the indictment. Accordingly in this case, the Crown must prove beyond a reasonable doubt that two or more persons, namely the accused, by his actions to C. S., performed acts of gross indecency. It is sufficient if the Crown has proven beyond a reasonable doubt that the accused knowingly and intentionally and voluntarily placed himself in such a position that each of you as judges of the facts, conclude that a grossly indecent act was being conducted by him upon Miss S.. If the Crown has failed to prove the accused acted intentionally, knowingly and voluntarily, then the accused must be acquitted. The acts of gross indecency must be by the accused with another person and here it is alleged to be C. S..

Gross means in section 157, out of all measure, shameful, flagrant. Therefore an act of gross indecency is the performing of something flagrant, shameful, offensive to common propriety, a very marked departure from the decent conduct expected of the average Canadian in the circumstances as they here existed.

In considering whether the conduct of the accused was grossly indecent you must consider the consent of the complainant, along with all the other circumstances, including her age.

There is a section I am going to mention, section

> 158 says that section 157 which is the section I referred covering gross indecency does not apply to any act in private (a) between husband and wife, (b) or to any two persons each of whom was 21 years of age or more both of whom consent to the commission of the act. I've not dwelled on that, because I am sure you can easily find in this case that Miss S. and Mr. M. are not husband and wife and that Miss S. was not over 21 years of age, and naturally both counsel have not raised this as an issue, but the law requires that I mention that to you.
>
> So before the Crown can be said they've proved their case of gross indecency, each of you, as jurors, must find only on the evidence you have heard, beyond a reasonable doubt, that the accused intended to voluntarily act in such a manner with C. S., to commit the act of gross indecency that has been alleged. If, after you have considered the whole of the evidence, you reach the conclusion the Crown has proven that the accused intended and did act voluntarily in his actions in the treatment of C. S., in actions which each of you as jurors find to have been grossly indecent, you may return a verdict of guilty. If, on the other hand, you've considered all of the evidence and you've concluded the Crown has not proven that the acts alleged were grossly indecent or that the accused did not freely and voluntarily intend to participate in an act or acts of gross indecency with C. S., ir if you are left in any reasonable doubt about it, then you must return a verdict of not guilty.

The trial judge did not discuss the acts relied upon by the Crown to establish the acts of gross indecency or the significance of consent in relation to those acts. After dealing with the offence of sexual assault he stated:

> I tell you in this case there does not appear to be an issue of consent. First of all, if you accept C. S.'s

> evidence, I believe you can find that she did not consent because she said she was struggling and I will refer to that later, and the defence argument is that the offence never happened at all.

With respect consent was certainly pertinent to a consideration as to whether the act witnessed by J. was an act of gross indecency. It was open to the jury to find that the act if committed was consensual. The effect of referring to s. 158 in the context was to effectively take away the issue of consent. The charge did not meet the standards set forth by the Ontario Court of Appeal in **Regina v. St. Pierre, supra**.

I would allow the appeal, set aside the conviction and enter an acquittal on the seventh count in the indictment.

J.A.

CHIPMAN, J.A.:

The facts are set out by Jones, J.A. in his reasons.

I agree with Jones, J.A., that the fact that the charge included a period beyond the repeal, s. 157 of the **Criminal Code** effective January 1, 1988 would not be fatal if it could be established that the jury reached its guilty verdict on the basis of events taking place before its repeal. That cannot be done. I also agree with him that there was non-direction by the trial judge on this issue. It was essential for the jury to be told that they must be satisfied beyond a reasonable doubt of the appellant's guilt on the basis of his actions prior to January 1, 1988.

By virtue of s. 686 of the **Code**, where this Court allows an appeal on the ground of a wrong decision on a question of law, it may either direct a judgment of acquittal or order a new trial. The exercise of the discretion thus conferred was discussed by Bird, J.A., in **R. v. More et al.** (1959), 124 C.C.C. 140 (B.C.C.A.) at pp. 149-150:

> "I think it further appears from these judgments that broadly speaking where a conviction is quashed because of some mistake in the conduct of the trial the Court will direct a new trial where there was legal evidence upon which the jury might have convicted on a proper trial. But where the Court concludes there is no reasonable evidence of an essential element in the crime charged it will direct a judgment of acquittal to be entered for it is repugnant to our conception of justice that the accused prisoner be again placed in jeopardy after the Crown has failed to prove his guilt in order to give the Crown another opportunity to convict him."

[emphasis added]

Examples of unfairness which would result from a new trial were given by Wood, J.A. in **R. v. Tom** (1992), 79 C.C.C. (3d) 84 (B.C.C.A.) at 95:

> "This Court has a discretion to order an acquittal under s. 686(2)(a) of the **Criminal Code**, even though there is evidence upon which a properly instructed jury, acting judicially, could reasonably convict if a new trial were held. That discretion has been exercised in the past where part or all of a fit sentence has been served before a successful appeal from conviction: **R. v. Dillabough** (1975), 28 C.C.C. (2d) 483 (Ont. C.A.), or when it would be unfair, in all of the circumstances, to put a successful appellant through the ordeal of another trial: **R. v. Dunlop** (1979), 47 C.C.C. (2d) 93, 99 D.L.R. (3d) 301, [1979] 2 S.C.R. 881."

I do not agree however that such non-direction here is so fatal that an acquittal must be entered. A properly directed jury could very easily have come to the conclusion that the act of intercourse, alleged to have occurred in the complainant's mother's bedroom, took place before January 1, 1988 and amounted in the circumstances to gross indecency. The evidence strongly suggests that it took place between September of 1982 and June of 1984. That, however, was for the jury and in my view the matter should be sent back for a new trial so that the jury can be properly instructed on this vital issue.

As well, there was evidence of other events at [...] which the jury could have taken as establishing that sexual intercourse between the appellant and the complainant took place there before January 1, 1988. The

verdict could, with correct directions, be supported by the evidence.

The indictment should be amended to confirm with the time duration of the offence at issue.

I agree with Jones, J.A., that in view of the first ground of appeal it is necessary to comment on the charge to the jury.

In my opinion, the trial judge did, in general, correctly charge the jury on the ingredients of offence of gross indecency.

Originally, as Jones, J.A. has pointed out, the offence of gross indecency only related to homosexual acts between males. In 1954 the section was amended by making reference to an act of gross indecency "with another person". The section continued in this form until its repeal effective January 1, 1988. At the same time the offences of sexual interference (s. 151) invitation to sexual touching (s. 152) and sexual exploitation (s. 153) were established. These are specific prohibitions and are to be contrasted with the very general offence of gross indecency - which leaves it to the trier of fact to determine whether the conduct of an accused was in the circumstances so repugnant to the ordinary standards of morality and decency as to constitute the offence.

I do not believe that an act must be homosexual or in any way analogous thereto to constitute gross indecency. The test is as I have stated it. As the trial judge said:

> "Gross means in s. 157 out of all measure, shameful, flagrant. Therefore an act of gross indecency is the performing of something flagrant,

> shameful and offensive to common propriety, a very marked departure from the decent conduct expected of the average Canadian in the circumstances . . .".

Under such a test, the trier of fact is given very wide latitude and a verdict of guilty could only be set aside where it is so unreasonable that the conduct in issue could not, in law, be said to amount to gross indecency.

Thus, in my view, it was open to the jury to conclude that if the accused had intercourse with the complainant it was, in the circumstances, grossly indecent. In coming to its conclusion the jury would have in mind her age and whether or not she consented. There is evidence of a general nature from her that she did not consent. The jury would also have in mind the evidence that the appellant was in **loco parentis** to the complainant and all of the other circumstances relating to the family.

In my view it would not be unreasonable for a trier of fact to conclude that the actions of a man having intercourse with his stepdaughter under the age of 18 was grossly indecent and that such a verdict would not be set aside as unreasonable. As Dubin J.A. said in **Regina v. St. Pierre, supra,**

> "In determining whether it was an act of gross indecency the consent of the complainant and all the other circumstances including her age are relevant considerations."

While in general consensual intercourse is not grossly indecent, the time, place and circumstances may make it so. See Dickson, J.A., in **Regina v. P.** (1968), 3 C.R. 302 at 317; Dubin, J.A., in **Regina v. St. Pierre** 17

C.C.C. (2d) 487 at 495. The terminology used by these judges satisfies me that the term "gross indecency" as used in the **Code** should not be subject to a narrow construction arising merely from the early history of the legislation.

I would therefore set aside the conviction and order a new trial on the charge of gross indecency in the seventh count, amended to allege such gross indecency with C.S. by having sexual intercourse with her at Sydney between August 28, 1982 and December 31, 1987, contrary to s. 157 of the **Criminal Code**.

Chipman, J.A.

Concurred in:

Pugsley, J.A.