S.C.C. No. 02718

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Hart and Hallett, JJ.A.

Cite as: R. .v Richard, 1993 NSCA 42

BETWEEN:

CLAIR RICHARD	)	J. Michael MacDonald
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	William D. Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	February 4, 1993
	)	
	)	
	)	Judgment Delivered:
		February 12, 1993
	)	

Editorial Notice

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

THE COURT: Appeals against conviction and sentence dismissed per reasons for judgment of Hart, J.A.; Clarke, C.J.N.S. and Hallett, J.A. concurring.

HART, J.A.

The appellant, a male priest, was charged with four counts of indecent assault against a male parishioner between 1977 and December 31, 1982, at or near Inverness, Sight Point, Broad Cove and Margaree, all in the County of Inverness and a further count of sexual assault at or near Margaree between January 1, 1983 and December 31, 1984 under the amended section of the **Criminal Code** which replaced indecent assault with sexual assault in January, 1983.

After a jury trial presided over by Mr. Justice Goodfellow, he was convicted of the first four counts and acquitted of the fifth. He was sentenced to four years on each count to run concurrently.

The issues in this appeal against conviction and sentence are:

1. Did the Learned Trial Judge err in law by failing to declare a mistrial in light of the erroneous information disclosed by the Crown to the Defence?
2. Did the Learned Trial Judge err in law by unduly emphasizing certain aspects of the complainant's testimony in his charge to the Jury?
3. Did the Learned Trial Judge err in law by misinterpreting the issue of consent in his charge to the Jury? and
4. Did the learned Trial Judge err in law by ordering a sentence that was excessive considering the charges for which the Appellant was convicted?

The victim of the assaults was a young boy who was born on September [...], 1966 and at all times before September 13, 1980 he was under 14 years of age. Consent was no defence in law to any assaults that occurred before that date.

The Crown, in making full disclosure to the defence, gave them a typed copy of a written statement given by the complainant to the police. This statement discussed how the

relationship between the appellant and the victim had developed at [...] and had continued after the priest had been transferred to [...] , and later to [...]. The boy was encouraged to wrestle with the priest who weighed about 240 pounds at first shirtless and later in their underwear. The wrestling progressed to masturbation for which the boy was paid generously by the appellant. The last sentence of the typed statement was "I would say the very 1st time I had any sexual contact with Fr. Clare was when I was 18 or 19 years old and that was down in Sydney. I'd say it was around 1984 or 85." This sentence was, of course, in direct conflict with the victim's testimony at trial and the earlier part of the statement to the effect that the indecent assaults had taken place at [...] while he was still under the age of 14 years.

Counsel for the defence cross-examined the complainant and attacked his credibility by putting the last sentence to him. The victim read the typewritten copy and said there must be a mistake. He had not said what was typed in the statement. At this point it was revealed that there was a typographical error in the statement; "lst" should have been typed "last" which was the word used in the original handwritten statement.

The defence then moved for a mistrial alleging that a great deal of reliance had been put on the information provided by the Crown when approaching their cross-examination of the principal witness of the Crown. If the final sentence in the typed copy of the complainant's statement had been correct they could have argued that none of the assaults had taken place before the boy was fourteen years and since the subsequent acts had been consensual no offences were committed. Not only had their defence been irreparably damaged but the credibility of the complainant had been bolstered and his evidence-in-chief strengthened by pointing out the mistake. The appellant argued that a fair trial had therefore become impossible under these circumstances.

The Crown argued that the defence should have been alerted to the error in the statement but, in any event, the court could overcome any possible damage by a proper

direction to the jury and that the trial should proceed.

Goodfellow, J. agreed with the Crown. He explained the error in the typing of the statement to the jury and told them that the statement which had been marked as an Exhibit would be withdrawn from the evidence. He advised them not to consider in any way that part of the statement dealing with "lst" or "last". In his caution to the jury he stated:

> " COURT: Mr. Foreman and ladies and gentlemen of the jury, you may recall my very opening remarks to you. I referred with some force that you would decide this matter exclusively on the evidence that you heard in the Court Room. It might have been an idea at that time to also indicate that there are occasions that arise sometimes in trials where there is some evidence that you may hear that you will be asked to put aside with equal force as I had said earlier about only hearing, only deciding on the evidence before you. It is only the evidence that you should consider. That is, everything you hear unless I give you some direction that there is a portion of evidence that you should not pay any attention to whatsoever and simply wipe it from your minds. That has arisen in relation to this Exhibit No. 2 which is the typed statement. It may be that I should have declined the admission of the statement at the outset. I'm going to have that statement withdrawn and sealed as we will not have that statement. You will have the cross examination by Defence Counsel and they will be entitled, should they choose, to refer to that cross examination on a number of areas to make what they wish of that, and that evidence will be evidence that you should pay attention to. So that you can appreciate it, I can tell you that the error that has been made is the error of the Crown and what the Crown did is provide Defence Counsel with a typed copy of a written statement. And the very last paragraph starts off, or words to the effect, 'I would say that the very first', which is '1st' because a typewriter makes a one the same as 'L' and what is missing is the letter A. So that it should have read 'last'. Now the only reason I'm telling you that is because I believe you will follow the direction I now give you to unequivocally put out of your mind in your consideration of weighing the evidence, any reference to that paragraph. Do not utilize that in any way, shape or form for a consideration of the credibility attached to that witness' evidence as to the fortification or confirmation plus or minus. It is something that you must remove completely out of your mind because it is the Crown's mistake. Defence Counsel only had the typed version and if they had the written version, they wouldn't have presented the statement in that aspect. So you are to wipe that out completely and totally and I will refer to it again in my final direction down the way when I give you some

> guidance on how you weigh evidence. But I repeat that when you weigh the evidence of this witness, you will not take any fortification, comfort or even consider his evidence on that last point dealing with the question of the first and the last. Thank you very much, ladies and gentlemen."

I am satisfied that the procedure followed by the trial judge was correct and that a direction for a mistrial was unnecessary under all of the circumstances.

I am further of the view that defence counsel should have been alerted to the error in the statement. They had had the benefit of a preliminary hearing where the complainant testified at length. They also had in fact a copy of the original written statement in their file although it had come from another source. It should have been obvious that the last sentence in the statement had to be in error.

The next ground alleges that the trial judge unduly emphasized certain aspects of the complainant's testimony in his charge to the jury. I see no merit in this allegation. The appellant did not testify but his statement given to the police officers was admitted in evidence. The trial judge reviewed this evidence as well as that of the complainant and I would reject this ground of appeal.

The third ground of appeal deals with the judge's charge in relation to "consent". It is alleged that there may have been some burden cast upon the accused to establish "consent" rather than upon the Crown to negative it.

I am satisfied from a reading of the judge's charge as a whole that the trial judge properly left with the Crown the burden of establishing beyond a reasonable doubt all of the essential elements of the offences including lack of consent.

The evidence relating to the first three counts was substantially to the effect that the indecent assaults took place before the appellant was transferred to [...] at a time when the boy was under the age of legal consent. The evidence with regard to the fourth count which

took place at [...] could have related to a time before or after the age of consent whereas the evidence relating to the fifth count applied to a time when the complainant was well over the age of fourteen years. In my opinion the jury's decision to convict on the fourth count but acquit on the fifth is a clear indication that the jurors understood the place of "consent" in the issues before them. I would reject this ground of appeal.

The sentence of four years on each count to run concurrently in my opinion is a fit and proper sentence in this case. A serious breach of trust was involved between a young boy and his spiritual advisor. The boy's life has been to some extent ruined and deterrence of this type of conduct is all important.

I would dismiss the appeal against the convictions and sentences.

J.A.

Concurred in:

Clarke, C.J.N.S.

Hallett, J.A.