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CANADA / JUDGMENT

## R. v. Meyn

2003 BCCA 401

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COURT

British Columbia Court of Appeal

DECIDED

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2003BCCA0401

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Meyn,

2003 BCCA 401

Date: 20030704

Docket: CA29118

Between:

Regina

Respondent

And

Andreas Alexander Meyn

Appellant

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

P.M. Bolton, Q.C.

J.B. Gratl

Counsel for the Appellant

F.G. Tischler

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

June 9, 2003

Place and Date of Judgment:

Vancouver, British Columbia

July 4, 2003

Written Reasons by:

The Honourable Chief Justice Finch

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

- [1] The appellant appeals from his conviction on 28 March 2001 on two counts of sexual assault after a trial by judge and jury. The appellant raises four grounds of appeal. He says the learned trial judge: erred in his charge and re-charge as to the use the jury could make of the appellant's prior statement to the police; erred in his instruction to the jury concerning the application of the standard of proof beyond a reasonable doubt to the issue of credibility; erred in his instruction as to the standard of proof beyond a reasonable doubt; and erred in admitting the opinions of an expert concerning the relationship between the appellant and the complainant, and the behavioural consequences of sexual abuse, or in failing to give proper instructions as to the use of such testimony. This was the appellant's second trial on these charges. The first trial ended in a mis-trial after the appellant suffered a heart attack.
- [2] The complainant was born on 23 November 1980. Count one alleged sexual assault against the complainant between 1 January 1989 and 23 November 1994, when the complainant attained the age of 14. Count two alleged sexual assault between 23 November 1994 and 6 July 1996. The defence of consent was available to the appellant for the events alleged in count two.

## II. THE CROWN'S CASE

- [3] The complainant moved with her family to Canada from Poland in 1989. The family rented and lived in an apartment on East Hastings Street owned by the appellant. The family moved to Maple Ridge in the summer of 1991. During their time as tenants, and later, the complainant and her family became friends of the appellant. He bought the family gifts and took them out for meals. He took a special interest in the complainant, and favoured her with gifts.

The complainant's evidence.

- [4] The complainant testified that the sexual assaults began with fondling, while the family still lived in Vancouver. On the complainant's twelfth birthday, after the move to Maple Ridge, the appellant took her shopping, and then to a trailer which he kept in the Kitsilano area. The complainant testified to more aggressive and intimate physical contact in the trailer. She said that there were numerous subsequent trips to the trailer where the appellant engaged in similar conduct.
- [5] When the complainant was in grade nine, the appellant signed her up for a modelling course. He persuaded her parents that it would be good for the complainant's self-esteem. The appellant paid for the modelling courses. He took the complainant shopping and bought her many new clothes. He photographed her in the new clothes, and he promoted her to clothing stores as a promising model.
- [6] The complainant testified that after the modelling courses and shopping trips, the appellant almost always took her to his trailer where the sexual assaults were repeated.
- [7] In June 1996 there was an incident at the complainant's home in which the appellant became angry with the complainant. She declined to go with him when he arrived unexpectedly. Although the appellant subsequently apologized for his angry outburst, the complainant thereafter avoided contact with him.
- [8] The appellant then began focusing his attentions on the complainant's friend, Christine. He began to take Christine shopping. The complainant tried to dissuade her friend from contact with the appellant. She testified that eventually she phoned the appellant and told him to stop seeing Christine, otherwise she would tell her own parents that the appellant had molested her. There was no further contact between the complainant and the appellant after that phone call.
- [9] Sometime in the next year, the complainant disclosed the sexual assaults to her friend Christine. Christine told her mother, who spoke to the complainant. The complainant's mother was advised and the complainant and her mother then went to the police.

Other evidence.

[10] The complainant's friend Christine, Christine's mother and the complainant's mother all testified, as did the owner of a modelling company.

[11] The Crown also called a forensic psychologist, Dr. John C. Yuille. The judge admitted Dr. Yuille's opinions as to the behavioural consequences of sexual assault on the abused person, and as to the dynamics of victim/offender relationships, and the "feature of repeated and continuing involvement between victims and their abusers [as] not uncommonly observed in victims of child abuse." (T7, 1211)

[12] Dr. Yuille's opinion evidence in its entirety was as follows:

Q. The big build-up, Dr. Yuille, to just two or three questions. First of all, I want to sketch out a very basic hypothetical circumstance, a circumstance or a situation involving child sexual abuse that occurred over a number of years, where the abuser was an adult male and the victim a female child, just going from that simple, factual outline. In such a factual circumstance is it - can you say whether it's common or uncommon for the association between the abuser and the victim to continue?

A. It's very common.

Q. Can you say whether it's common or uncommon for there to be a bond between the victim and the offender that includes positive elements?

A. Positive elements are definitely a frequent feature of such a long term interaction and, in fact, are one of the contributing factors to the continuation.

Q. I see. Turning now to behavioural consequences. Has there been any research into whether one can find a constellation of symptoms, of behaviour, from which one can conclude this person has been sexually abused?

A. This is something that we have been looking for and researching for, for years, to determine whether or not there's some predictable, expected, or normal or usual consequence to the victim, and the answer, at this point, is pretty clear, and that is that there is not. And there's a tremendous range of responses, from almost nothing to quite considerable distress in a victim, and no matter what the response is, there's nothing that is unique to child sexual abuse, that is, that the same problems can appear in people who have other difficulties in their life; so there's nothing that sexual abuse causes that's unique to sexual abuse or, if you like, diagnostic of sexual abuse.

Q. Now, that's - you're using the examples of difficulties, that may be apparent, that can be caused by other factors than sexual abuse. What about the absence of apparent difficulties; for example, the absence of problems with academic performance in school?

A. The absence of problems in victims of childhood sexual abuse is not uncommon at all and there's quite a bit understood of why this can occur. And one issue that's been looked at, for example, is academic performance, whether or not it is negatively impacted in someone who's been victimized sexually as a child. And the answer is there's no systemic relationship. Some

children who are victimized, improve at school. Some stay the same. Some do worse. And so there's no systematic relationship, and the research is clear on this, no systematic relationship between school performance and childhood sexual abuse.

Q. From what you have said there is, just going back to the first question I had, then no correlation between a continued association between a child and an adult and the truth or falsehood of allegations of sexual abuse?

A. That's correct.

Q. And in this case you haven't interviewed either the complainant or the accused?

A. That's correct.

Q. And are not here to offer any opinion of the credibility of either side?

A. That's correct.

Q. Thank you. Those are my questions.

THE COURT: Mr. Cooper.

MR. COOPER: Thank you, My Lord.

CROSS-EXAMINATION BY MR. COOPER:

Q. Just very briefly. I understand from my friend's last question, Dr. Yuille, that you're not, of course, intending in your testimony today, to offer any opinion as to whether the allegations that we've hearing about in this courtroom are true or false, are you?

A. No, I'm not.

Q. In fact, you have no such opinion, do you?

A. Not one that I would share with the court, no.

### III. THE DEFENCE EVIDENCE

[13] The appellant testified. He was born in 1932. The allegations against him covered a period between his ages of 57 and 64. He said that during the two years the complainant's family lived in his apartment building on Hastings Street he developed a close relationship with them. He visited them more frequently after they moved to Maple Ridge and their relationship grew closer. He considered them as family.

[14] He testified that the complainant wanted to get into modelling and asked him to pay for it and to persuade her parents to let her do so. He agreed. He thought the complainant had great potential as a model because she was outgoing, intelligent, polite and had a nice personality. He assumed the role of the complainant's manager and took her to many clothing stores where he bought clothes for her and asked store managers to hire her as a model. He testified that the shopping trips were frequent and that he spent a lot of money

buying her clothes. He said he took many pictures of her and hired professional photographers and makeup artists to work with her.

[15] He testified to an incident in the summer of 1996 when he and the complainant had a falling-out. He said that later that fall he took the complainant and her mother shopping and bought them cosmetics and clothes at a cost of \$3,600. He felt he had been taken advantage of and decided to discontinue his association with the family.

[16] He said that after cutting off contact with the family he continued to see the complainant's friend, Christine, whom he took shopping a few times. He said this made the complainant jealous. He said that in December 1996 the complainant telephoned him and told him that he had to deposit \$25,000 to her bank account or she would tell her parents and the police that he had sexually assaulted her. The appellant expressed shock at this but did not report the complainant's threat to the police. He did consult a lawyer who advised him to report the threat to the police but he did not do so because he did not wish to get the complainant into trouble.

[17] He denied committing any sexual assault on the complainant.

#### IV. ERRORS ALLEGED IN THE JUDGE'S CHARGE

Use of the appellant's prior inconsistent statement.

[18] The Crown acknowledged at trial that in his original instruction to the jury, the learned trial judge erred in telling the jury that the appellant's statement to the police could be used in deciding his guilt or innocence. The appellant contends on this appeal that the re-charge was inadequate to correct the original error.

[19] The offending passage in the charge was this:

In this trial, you heard Mr. Meyn give evidence. In the course of his cross-examination, a prior statement given to the Vancouver police was presented to him by Crown counsel. It was done for the purpose of showing that he said something different at the previous time than he said in his examination in chief. It is for you to decide whether it is inconsistent with the evidence he gave at this trial. Unlike the prior statement of an ordinary witness, Mr. Meyn's prior statement can be used by you as evidence concerning the issue of his guilt or innocence. It is not just restricted to the issue of his credibility. The law considers the prior statement of an accused to be a past admission or declaration that may be put to the accused on cross-examination, if the accused chooses to testify. I know that is complex, but I hope it is of some assistance for you in assessing those times in the trial when you heard reference made to previous statements made out of court.

[20] In his re-charge on this issue, the learned trial judge said this:

And in instructing you how to treat out of court statements, I said to you that you could only use an out of court statement made by a witness to assess his or her credibility.

I did go on, however, to say to you that in this trial, that you heard Mr. Meyn gave evidence, and in the course of his cross-examination, a prior statement given to the Vancouver police was presented to him by Crown counsel and it was done for the purpose of showing that he said something different at the previous time than he said in his examination in chief. I told you that it was for you to decide whether it is inconsistent with the evidence he gave at trial, but I said to you or certainly implied to you that Mr. Meyn's evidence or Mr. Meyn was in a different position from any other witness in the way in which that evidence could be viewed.

That statement that I made to you was incorrect. Mr. Meyn is in no different position from any other witness with respect to that issue and what that really means is that if you look at that statement at all, you can only use it from the standpoint of dealing with assessing Mr. Meyn's credibility. In other words, what I said in relation to other witnesses applies to your treatment of an out of court statement by Mr. Meyn as well. It may only be used when you assess his credibility to the extent that it differs from what he said in this trial.

- [21] The appellant submits that the re-charge was inadequate to correct the original error for three reasons. First, the judge did not expressly tell the jury that the prior statement could not be used as evidence from which they could infer the appellant's guilt. Second, the judge failed to tell the jury that there was nothing inculpatory in the appellant's statement to the police. Counsel submitted that the charge and re-charge may have left the jury with the impression that the appellant made inculpatory statements to the police in parts of that statement that were not before the jury. And third, counsel argued that the effect of the re-charge was to emphasize the question of the appellant's credibility, subjecting it to a higher level of scrutiny than was applied to the complainant's credibility. Counsel says the re-charge on this issue should have included an instruction on the application of reasonable doubt to the appellant's credibility.
- [22] I have not been persuaded that the re-charge did not adequately correct the error in the original charge. Although the learned trial judge did not expressly tell the jury that he erred in saying that they could use the statement as evidence of the appellant's guilt, there was a risk that if he had done so, he might have reinforced the original mistake in their minds. It would have been apparent to the jury that there was nothing inculpatory in those parts of the appellant's statement admitted in evidence. I do not think it was necessary to remind the jury that they should not speculate about matters that were not in evidence.
- [23] Nor do I consider that the re-charge would have improperly focused the jury's mind on the appellant's credibility. The judge told the jury that the appellant's position was the same as that of any other witness with respect to the use of prior statements. The jury would have understood that the re-charge supplanted the original charge. The re-charge did not come in response to a question from the jury. It was provided shortly after the incorrect instruction had been given, and before the jury had commenced its deliberations.
- [24] Defence counsel did not take exception to the re-charge, and appeared to be satisfied that the corrected instructions rectified the earlier mistake.

[25] I would not give effect to this ground of appeal.

Reasonable doubt and credibility.

[26] The appellant alleges error in the following part of the charge to the jury:

The rule of reasonable doubt also applies to the issue of credibility, and by credibility I mean both the honesty of a witness, and the reliability of his or her evidence because an honest witness can be mistaken. You need not fully believe or disbelieve one witness or a group of witnesses. If you have a reasonable doubt as to the guilt of Mr. Meyn arising from the credibility of the witnesses, then you should find him not guilty. In this trial, as you know, Mr. Meyn testified on his own behalf. In addition to the instruction I just gave you as to the credibility of all the witnesses, I must also instruct you on the issues of credibility and reasonable doubt in circumstances such as this trial, where Mr. Meyn testifies.

The law requires that you find Mr. Meyn not guilty: first, if you believe him; second, even if you do not believe Mr. Meyn, but you still have a reasonable doubt as to his guilt after considering his evidence in the context of the evidence taken as a whole; finally, if after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must find Mr. Meyn not guilty.

(my emphasis)

[27] Counsel for the appellant says the charge is inadequate because it does not follow the model suggested by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397. There Cory J. for the court said at ¶¶27,28:

[27] In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Secondly, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole: see *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont.C.A.); approved in *R. v. Morin*, *supra*, at p.207.

[28] Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony

of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

(my emphasis)

[28] Counsel for the appellant says the charge in this case omitted the second step suggested in W.(D.). He says the jury was not told that even if they did not believe the appellant's testimony, it might still raise a reasonable doubt in their minds, and that if it did, they were required to acquit. The appellant says that by omitting this second step as a separate instruction, the jury may have been left with the impression that they were simply to decide whether the complainant or the appellant was the more credible witness. The appellant contends that "the evidence as a whole" in this case was effectively the evidence of the complainant and the appellant, and that the judge's charge amounted to an erroneous "either/or" approach.

[29] The suggested charge in W.(D.) has been incorporated into the charge now suggested by CRIMJI at s.4.04, ¶6:

The law requires that you find [THE ACCUSED] not guilty,

- (1) first, if you believe (him/her), and
- (2) second, even if you do not believe [THE ACCUSED], but you still have a reasonable doubt as to (his/her) guilt after considering (his/her) evidence in the context of the evidence taken as a whole.

Finally, if after a careful consideration of all the evidence, you are unable to decide whom to believe, you must find [THE ACCUSED] not guilty.

[30] The last sentence of the CRIMJI charge is taken from R. v. H.(C.W.) (1991), 68 C.C.C. (3d) 146 at 155 (B.C.C.A.) per Wood J.A.

[31] In my view, there is nothing in this charge which suggests that the jury must choose either the complainant's or appellant's account of what occurred between them.

[32] The judge's instruction on reasonable doubt as it applied to credibility of witnesses correctly told the jury that the appellant was to be acquitted if any evidence, including his own, gave rise to a reasonable doubt, and further told the jury that they were to acquit if they could not decide whom to believe.

[33] Moreover, this was not simply a case of conflicting evidence between the appellant and the complainant. The complainant's evidence was corroborated in several important particulars by the evidence of her mother, her friend Christine, and the owner of the modelling school. The instruction to assess the appellant's credibility "in the context of the evidence taken as a whole" did not place the jury in the position of simply having to choose between the credibility of the complainant and the appellant.

[34] I would not give effect to this ground of appeal.

The charge on reasonable doubt generally.

[35] The appellant alleges error in the following part of the charge to the jury:

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It must logically come from the evidence or the lack of evidence. Even if you believe that Mr. Meyn is probably guilty, that is not sufficient. In those circumstances, you must give the benefit of the doubt to Mr. Meyn and find him not guilty. This is because the Crown will have failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do that. Such a standard of proof is impossibly high. The Crown only has the burden of proving the guilt of Mr. Meyn beyond a reasonable doubt. In short, if, based upon the evidence before the court, you are sure that Mr. Meyn committed the offence, you should convict, since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[36] Counsel for the appellant says this instruction is erroneous for four reasons. First, it does not tell the jury that proof beyond a reasonable doubt is closer to absolute certainty than to a balance of probabilities. Second, telling the jury that the Crown "only" had to prove the appellant's guilt beyond a reasonable doubt diminished the meaning of that phrase. Third, it was an error to tell the jury that they should convict if they were "sure" of the appellant's guilt, without first defining proof beyond a reasonable doubt correctly. Fourth, the appellant says that using the phrase "in short" suggested that the judge was summarizing his previous description of reasonable doubt with the word "sure", a lower standard than proof beyond a reasonable doubt.

[37] The first objection is based on what the Supreme Court of Canada said in *R. v. Starr*, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 2000 SCC 40 at ¶242:

In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict.

[38] Mr. Justice Iacobucci held that the trial judge erred by failing to instruct the jury that something more than probable guilt was necessary in order to convict. In this case, the trial judge did not make such an error as is clear from his instruction that "even if you believe Mr. Meyn is probably guilty, that is not sufficient".

[39] In *R. v. Paul* (2002), 170 C.C.C. (3d) 107 (Ont.C.A.) and *R. v. Cerra* (2002), 174 B.C.A.C. 52, 2002 BCCA 515, the appellants made the same complaint as the appellant in this case. In *Cerra*, Mr. Justice Donald concluded that the jury charge adequately conveyed the reasonable doubt standard. He said, at ¶¶15-16:

The trial judge in the present case charged according to *Lifchus*, but, as mentioned, did not include the refinement later suggested in *Starr*. It is important to remember that in *Starr* while the trial judge told the jury that reasonable doubt did not require absolute certainty, he said nothing about the balance or probabilities. The reversible error in *Starr* was the failure to tell the jury that it could not convict on a mere balance of probabilities.

[40] In my view, it was not an error in this case for the trial judge to fail to tell the jury that proof beyond a reasonable doubt was closer to absolute certainty than the balance of probabilities, because he correctly told the jury that a balance of probability was not sufficient.

[41] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, 118 C.C.C. (3d) 1, Cory J. for the majority listed the essential elements of a proper charge on reasonable doubt at ¶36:

Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably inter-twined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty - a jury which concludes only that the accused is probably guilty must acquit.

[42] The charge in this case includes all of those necessary elements.

[43] At ¶37 of *Lifchus*, Cory J. lists references which should be avoided in the charge on reasonable doubt. The charge in this case contains none of those elements.

[44] Finally, at ¶39 of *Lifchus*, Cory J. sets out a suggested charge. It concludes:

In short if, based upon the evidence or lack of evidence you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[45] In this charge, the addition of the word "only" in the sentence "The Crown only has the burden of proving the guilt of Mr. Meyn beyond a reasonable doubt" is the one addition to a charge on reasonable doubt that was otherwise unexceptional. In the context of the charge as whole, the addition of that word does not weaken the meaning of proof beyond a reasonable doubt.

[46] At ¶40 of *Lifchus Cory J.*, after setting out a suggested charge, said:

This is not a magic incantation that needs to be repeated word for word. It is nothing more than a suggested form that would not be faulted if it were used. Any form of instruction that complied with the applicable principles and avoided the pitfalls referred to would be satisfactory.

[47] I would not give effect to this ground of appeal.

The expert opinion evidence.

[48] The appellant says the trial judge erred in admitting the expert evidence of Dr. Yuille. Dr. Yuille testified that, based on his knowledge and experience, it is common to observe the feature of repeated and continuing involvement between the victims of child abuse and their abusers. Dr. Yuille also testified that there is not a normal or usual victim response to child sexual abuse.

[49] The appellant argues that this evidence was not necessary to assist the trier of fact, and that its admission only served to bolster the complainant's credibility in the eyes of the jury. The appellant relies on *R. v. D.(D.)*, [2000] 2 S.C.R. 275 for the proposition that there is no evidence that ordinary people are unlikely to understand victim/offender dynamics and the behavioural responses of victims to the abuse.

[50] The trial judge, in his ruling on the voir dire, considered the requirements for the admission of expert evidence set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.): a properly qualified expert, relevance, necessity, and the lack of any other exclusionary rule. He noted that, even if these criteria are met, the evidence may be excluded on the basis that its prejudicial effect outweighs its probative value.

[51] The trial judge gave careful consideration to the criterion of necessity. He found the sheer number of alleged assaults rendered this case unusual. As a result, he held "the evidence concerning the victim/offender relationship may very well be outside the experience and knowledge of the jury." In respect of the evidence of behavioural consequences, the judge said this:

it would appear to me from the range of evidence discussed and sought to be admitted in a number of cases that there is a real possibility that there exists substantial misinformation about this subject. In my view, it meets the precondition of being necessary information for the jury.

- [52] With respect, I have not been persuaded that the trial judge erred in admitting the expert evidence.
- [53] Expert evidence going directly to the issue of credibility is generally inadmissible because it offends the rule against oath-helping. However, the admission of expert evidence regarding human behaviour or psychological factors relevant to credibility is justified where the evidence goes beyond the ordinary experience of a lay person: *R. v. Marquard* (1993), 85 C.C.C. (3d) 193 (S.C.C.); *R. v. E.A.N.* (2000), 135 B.C.A.C. 154, 2000 BCCA 61.
- [54] In *R. v. Tayebi* (2001), 161 C.C.C. (3d) 197 (B.C.C.A.), 2001 BCCA 697, this court discussed D. (D.) at some length to demonstrate that the decision is not a ruling that all expert evidence on the behaviour of sexual assault victims is inadmissible. Rather, the necessity of such evidence turns on the specific features of a case. The important question is whether the evidence goes beyond the ordinary experience of a lay person.
- [55] I am satisfied that the expert evidence met the requirement of necessity for the reasons given by the trial judge. The protracted nature of the sexual assaults alleged by the complainant in this case is an unusual feature. The expert evidence was necessary to ensure the jury did not draw misinformed common sense inferences from the dynamics of the relationship between the appellant and the complainant, and the behaviour of the complainant.
- [56] I would not give effect to this ground of appeal.
- [57] The appellant also says the trial judge erred in failing to instruct the jury on the proper use of the expert evidence. In particular, the appellant attacks Dr. Yuille's response to defence counsel's question regarding whether Dr. Yuille had an opinion on the veracity of the allegations. Dr. Yuille responded: "Not one that I would share with the court, no." The appellant says this was tantamount to saying: "I believe the complainant, but I am not permitted to tell the jury that." The appellant says the trial judge was obliged to warn the jury not to accept the expert evidence as an endorsement of the complainant's credibility.
- [58] In my respectful view, the trial judge did not err in his charge to the jury.
- [59] In his direct examination, Dr. Yuille specifically stated he had not interviewed the complainant or the appellant, and he was not offering an opinion of the credibility of either side. In cross-examination, Dr. Yuille again declined to offer an opinion. Dr. Yuille did not give an opinion directly going to the issue of the complainant's credibility and in my view, based on the whole of the evidence, the jury would not likely view his testimony as an invitation to believe the evidence of the complainant.

- [60] In his charge to the jury, the trial judge stressed to the jurors that they were the sole judges of the facts, and that they must decide the credibility or truthfulness of the witnesses. The judge specifically discussed the evidence of Dr. Yuille, and again told the jury they must decide how much weight, if any, to give the opinion. He then outlined a three-step process to decide how much weight to give an expert opinion.
- [61] In Marquard the court said a jury must be carefully instructed as to its responsibility to make the final decision, without being "unduly influenced" by the expert opinion. In my view, the jury could not have been under any misapprehension as to its function and in his charge, the trial judge provided the jury with an adequate framework within which to evaluate the expert evidence.
- [62] Defence counsel did not take exception to the judge's failure to charge the jury not to accept Dr. Yuille's evidence as an endorsement of the complainant's credibility. In my view, the trial judge did not err on this aspect of the charge.
- [63] I would also dismiss this ground of appeal.
- [64] Accordingly, I would dismiss the appeal.

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Mr. Justice Mackenzie"

Date of Corrigendum: July 11, 2003

Corrigendum to Written Reasons by:

The Honourable Chief Justice Finch

The Honourable Chief Justice Finch:

- [1] At ¶¶18-23 of our Reasons for Judgment filed 4 July 2003, we addressed the appellant's ground of appeal based on the trial judge's charge and re-charge concerning the use of the appellant's prior inconsistent statement. The Crown conceded at trial that the original charge was in error, and repeated that concession on appeal. We addressed the issue on the basis of that concession.
- [2] Our attention was not directed to R. v. Mannion [1986] 2 S.C.R. 272, which is authority for the instruction in the trial judge's original charge. The Reasons at ¶¶18-23 were therefore given per incuriam, and should be corrected to say that the original charge contained a "purported" error on this issue.

[3] This correction does not affect the disposition of this appeal.

"The Honourable Chief Justice Finch"

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