
CANADA / JUDGMENT

R. v. P.E.L.

2013 BCCA 542

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 542 R. v. P.E.L.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. P.E.L.,

2013 BCCA 542

Date: 20131218

Dockets: CA040074 & CA040136

Docket: CA040074

Between:

Regina

Respondent

And

P.E.L.

Appellant

- and -

Docket: CA040136

Between:

Regina

Respondent

And

S.C.L.

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by initials. This publication ban applies indefinitely unless otherwise ordered.

Restriction on Publication: A publication ban has been automatically imposed under s. 110(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person referred to in this judgment by initials. This publication ban applies indefinitely, unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Corrected Judgment: the name of co-counsel for the appellant, S.C.L., was added to page 2.

Before:

The Honourable Mr. Justice Hall

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Garson

On appeal from: A decision from the Provincial Court of British Columbia, dated November 7, 2011, (R. v. L. et al., 2011 BCPC 0486, Kamloops Registry 8116)

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Place and Date of Hearing:

Vancouver, British Columbia

May 22 and 23, 2013

Place and Date of Judgment:

Vancouver, British Columbia

December 18, 2013

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Madam Justice Smith

Partially Dissenting Reasons by:

The Honourable Madam Justice Garson (Page 18, Para. 39)

Summary:

This was a case of historic sexual assaults. Three accused brothers were convicted of sexually assaulting (at a time when they were teenagers) a number of younger children who were the complainants. Although there were suspicions in the small rural community where the events took place, it was about 25 years later that the complainants came forward, triggering a police investigation.

On appeal from convictions (by two of the brothers), it was argued that the judge had erred in his treatment of similar act evidence concerning the convictions of the two appellants. There were also arguments advanced concerning age of capacity of the appellants.

Held: Age of capacity arguments not accepted. The majority found the trial judge had erred in his analytical approach and application of the similar fact evidence. The result was that convictions against one appellant, P.E.L., were set aside and one conviction of S.C.L. (which did not depend on similar act evidence) was sustained. The partially dissenting judge concurred in the allowance of the appeal concerning P.E.L. but would have sustained all convictions against S.C.L. She found the reasons of the judge for convicting S.C.L. sustainable and would in any event have invoked the curative proviso. New trial ordered on counts on which appeals from conviction allowed.

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] This appeal concerns two of three brothers who were alleged to have been involved during their teenage years in sexual assaults of younger children. The incidents occurred some 30 years ago and involved eight female complainants and two male complainants. Arising out of a statement to police by one of the complainants, a police investigation commenced in 2007 and charges ensued in 2010. The trial occurred in 2011. The trial judge delivered reasons for judgment on November 7, 2011 finding the three accused brothers guilty on a

number of counts. Four of 16 counts in the indictment were dismissed as not proven to the requisite standard of proof.

- [2] The several complainants and the two appellants testified. The appellants in their testimony denied that the alleged assaults occurred. All who testified of course were now adults but since the alleged incidents occurred when the appellants were juveniles, proceedings were under the Youth Criminal Justice Act, S.C. 2002, c. 1. The eldest brother, P.E.L., who was born September 4, 1968, was convicted as follows:

Count 1

[P.E.L.], from the 13th day of January, 1983 to the 30th day of June, 1983, inclusive at or near Lillooet, Province of British Columbia, did sexually assault [L.J.], contrary to Section 246.1 of the Criminal Code.

Count 2

[P.E.L.], from the 13th day of January, 1983 to the 30th day of June, 1983, inclusive, at or near Lillooet, Province of British Columbia, did sexually assault [C.J.], contrary to Section 246.1 of the Criminal Code.

Count 3

[P.E.L.], from the 1st day of October, 1981 to the 31st day of October, 1982, inclusive, at or near Lillooet, in the Province of British Columbia, did indecently assault [G.T.], a female person, contrary to Section 149 of the Criminal Code.

- [3] His youngest brother S.C.L., who was born 21 January 1972, was convicted as follows:

Count 11

[S.C.L.], from the 1st day of January, 1985 to the 31st day of December, 1985, inclusive, at or near Lillooet, Province of British Columbia, did sexually assault [B.C.], contrary to Section 246.1 of the Criminal Code.

Count 12

[S.C.L.], from the 1st day of January, 1985 to the 31st day of December, 1987, inclusive, at or near Lillooet, Province of British Columbia, did sexually assault [A.S.], contrary to Section 246.1 of the Criminal Code.

Count 14

[S.C.L.], from the 1st day of September, 1984 to the 1st day of September, 1985, inclusive, at or near Lillooet, Province of British Columbia, did sexually assault [L.J.L.], contrary to Section 246.1 of the Criminal Code.

Count 15

[S.C.L.], from the 31st day of May, 1987 to the 31st day of May, 1988, inclusive, at or near Lillooet, Province of British Columbia, did sexually assault [T.L.] contrary to Section 246.1 of the Criminal Code.

- [4] The middle brother, D.B.L., who was also convicted of several offences, did not appeal his convictions. Thus this case concerns only the convictions registered against P.E.L. and S.C.L.
- [5] A defence concerning age of capacity is invoked on behalf of both appellants. In the case of P.E.L., who became 14 on September 4, 1982, it is submitted that there was a bar to convicting him on Count 3 in the indictment because it appears the alleged assault occurred in October 1981 when he was 13 years of age. In 1981, then ss. 12 and 13 of the Criminal Code defined the criminal liability of young persons, as follows:
12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.
 13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

These sections were a codification of the common law position, as had previous sections of the Code.

- [6] In April 1984, s. 72 of the Young Offenders Act, S.C. 1980-81-82-83, c. 110, was proclaimed in force repealing these sections.
72. Sections 12 and 13 of the Criminal Code are repealed and the following is substituted therefore:

"12. No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years."

- [7] Shortly put, Canadian law prior to April 1984 provided absolute immunity to a person under seven and qualified immunity to a person between the ages of seven and 14. At that time, the Crown was required to demonstrate that the accused individual appreciated his conduct was wrong in order to obtain a conviction. Since no individual involved in the trial proceedings seems to have been alive to this issue concerning Count 3, it was never passed on by the trial judge. It is submitted that the appeal of P.E.L. from conviction on Count 3 ought to be allowed because there was lack of proof of an element of the offence. A similar argument is advanced concerning S.C.L.'s convictions on Counts 11, 12 and 14. Those cases concerned events after the 1984 amendment when the appellant S.C.L. was over the age of 12.

- [8] The trial judge concluded that the incident of the alleged sexual assault of G.T. by P.E.L. (Count 3), occurred in the fall of 1981. At that time, P.E.L. was 13 years of age. This incident was said to have occurred before the 1984 amendment. The question then becomes, was it demonstrated that P.E.L. had the capacity to know the nature and consequences of his conduct and appreciate that it was wrong? As I observed, this question was never passed on by the trial judge because no one at trial perceived the potential issue. P.E.L. testified in his defence that nothing untoward had occurred between him and G.T. G.T. testified that P.E.L. groped her in a bedroom in a sexual way. Her description of the act would constitute a sexual assault. The trial judge preferred the evidence of G.T. to P.E.L.
- [9] It is material in addressing this issue in this Court to consider the evidence of G.T. She testified in chief that P.E.L. told her this activity was a secret and her parents were not to be told. She repeated in cross-examination that P.E.L. "told me I couldn't tell anybody, not even my parents". It seems clear from those passages that the onus placed on the Crown to demonstrate knowledge and appreciation of wrongful conduct on the part of P.E.L. was made out on the evidence. As I observed, the judge found the evidence of G.T. to be reliable. Therefore, even though P.E.L. was only 13 when this alleged incident occurred (before the 1984 amendment), I do not consider that this circumstance would afford a defence to P.E.L. I would therefore not accede to this argument advanced on behalf of P.E.L.
- [10] A somewhat similar argument is advanced on behalf of S.C.L. concerning three of the counts on which he was convicted. The alleged incidents were after the 1984 amendment but prior to his attaining the age of 14. This submission is based on s. 8(3) of the Criminal Code which preserves common law defences:
- (3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.
- [11] As recited above, before 1984 the law provided that there existed a limited immunity for individuals alleged to have engaged in conduct of a criminal nature when they were aged between seven and 14. On Counts 11, 12 and 14, being three of the four counts of which S.C.L. was convicted, he was 12 but not yet over 14 (save for part of the time on Count 12). These offences were alleged to have occurred after the enactment of the amendment fixing the age of criminal responsibility at 12 years of age. It is submitted that when Parliament enacted this change it did not expressly provide that a common law defence would not continue to be available to persons in the situation of S.C.L. and thus, such a defence should be available to S.C.L.
- [12] It may be doubted whether the so-called common law defence continued to be in effect in Canada after the law referred to as *doli incapax* concerning criminal responsibility of young persons was codified in 1892. Previous authority is not entirely clear on this issue. It was submitted that if Parliament had intended to do away with a common law defence, it would

have expressly done so, as, for instance, s. 16 of the Code concerning mental disorder. However, I do not consider it necessary to address this particular question about express legislation at any length because it seems to me beyond the purview of any doubt or argument that when Parliament by statute altered the age of criminal responsibility from 14 to 12 in 1984, it could only have intended that thereafter 12 was to be the effective age of criminal responsibility. Any other conclusion seems to me, with respect, to be wholly fanciful. I cannot consider it at all logical that Parliament could have intended to have preserved the previous somewhat umbrous situation concerning persons over seven and under 14 when altering the age of criminal responsibility to 12 in 1984. I would therefore not accede to this head of argument advanced on behalf of S.C.L.

- [13] S.C.L. submitted that, particularly in relation to his conviction on Count 11, the analysis of the trial judge was deficient having regard to what is required by *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Having reviewed the reasons of the trial judge, I consider he demonstrated a clear awareness of the task facing him and I would not give effect to this head of argument.
- [14] This leaves for consideration the submissions advanced by the appellants concerning the trial judge's treatment of similar act evidence.
- [15] It was argued on behalf of both appellants, concerning the admission and use of similar act evidence, that the trial judge failed in his reasons to sufficiently address the possibility of collusion or tainting of evidence by reason of interaction and discussion between the various complainants. In my opinion, the trial judge made plain that he was cognizant of the need to address the possibility of collusion between the complainants. He said this at para. 236:

If there is actual collusion, the onus is on the Crown to satisfy the judge on a balance of probabilities, that the similar fact evidence is not tainted with it. Where the evidence of collusion amounts to no more than an opportunity to collude, the issue of collusion is best left with the trier of fact. In the *Shearing* case, which is factually closer to this case than many other decisions referred to, while there was some evidence of opportunity for collusion or collaboration and motive, and of communication among complainants, the evidence of that was not strong, and the trial judge was right to let the question of collusion go to the jury.

- [16] He then said at para. 252:

The opportunity for collusion, as it was defined in the less prejudicial sense of the victims having inadvertently influenced each other in their discussions, as opposed to an outright conspiracy to manufacture evidence, has to be considered here. In most instances in this case, other than identifying that they were abused and by whom, the witnesses did not talk to each other much about the details. Their real interest was often just in providing mutual support for shared traumas from the childhood. This is a very different situation from what occurred in the *Parsons* case, w[h]ere similar fact evidence was excluded because there was a danger of active collusion between the complainant and a former wife of the accused for the purposes of obtaining a monetary gain. The case at bar is rather more like the *Shearing* case discussed above, where the

possibility of collusion did not result in the removal of the evidence as similar fact evidence from the consideration of the trier of fact.

[17] In dealing with credibility issues, the trial judge said at para. 253:

My impression of almost all of the Crown witnesses in this case was that they readily admitted the weaknesses of their memories, and were generally careful not to relate more than they could actually remember. On the whole I found their evidence very credible.

[18] What I deduce from these passages is that the trial judge, applying his gatekeeper function, found against the proposition that the possibility of collusion should render the similar act evidence in this case inadmissible or unreliable. He went on in his function as the trier of fact to conclude that this evidence was not tainted and was credible. In my view, he properly addressed this issue and found against the existence of collusion.

[19] The trial judge made this observation at para. 250 of his reasons:

It is precisely because childhood memories and perceptions, which are processed, catalogued and retained in a certain way over a long time, may be unreliable inherently suspect, that gives similar act evidence such importance in a case like this. That those difficulties are not to be considered insurmountable, may be only because of the counterweight that similar act evidence adds to evidence that would otherwise be too fragmented to get beyond the test in *R. v. W.D.* It is, I find, the similar act aspects of this case that put it well beyond being a case, as was submitted by defence counsel, that makes the job of testing the evidence for reliability and whether there has to be a reasonable doubt as being "tragically easy." I found the complaints testimony to be believable, and the accused who testified not to be.

[20] Similar act evidence exemplifies a type of propensity reasoning. It could be colloquially expressed by the aphorism that a leopard does not change its spots. Of course, this sort of reasoning collides squarely with the long established common law rule that no one should be convicted simply by reason of rascality or a disreputable history - see *Harrison's Trial* (1692), 12 How. St. Tr. 833 (Old Bailey (London)), referred to by Binnie J. in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908 at para. 32. He said at p. 926, para. 37:

The policy basis for the exclusion is that while in some cases propensity inferred from similar facts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer. It is excluded notwithstanding the general rule that all relevant evidence is admissible: *Arp*, supra, at para. 38; *Robertson*, supra, at p. 941; *Morris*, supra, at pp. 201-2; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 613.

[21] It is always a question of weighing probative value against prejudicial effect. Ironically, the more prejudicial (in many cases), because of oft-repeated conduct, the more likely such contested evidence may survive the high hurdle of admissibility because of its great cogency and high probative value.

[22] The leading case of *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, furnishes a good example of when and why such evidence can be admitted. Mr. Makin and his wife were taking in infants and agreeing for consideration to care for them - they were said to be "baby farming". The bodies of several infants were discovered at various premises the accused had occupied over time. Binnie J. said this about Makin at p. 928, paras. 45 and 46 of the Handy case:

45 In Makin itself, the death of one small child found buried in the back garden of the accused could conceivably be thought to be from natural or perhaps accidental causes, but when numerous other bodies were later dug up in the same backyard and at previous residences of the accused, the coincidence of so many premature deaths by innocent causes of babies of recent good health defied belief. Coincidence, as an explanation, has its limitations. As it was put in one American case: "The man who wins the lottery once is envied; the one who wins it twice is investigated" (*United States v. York*, 933 F.2d 1343 (7th Cir. 1991), at p. 1350).

46 It was thus held in Makin that the accumulation of babies found dead in similar circumstances permitted, in relation to the accused, the double inferences of propensity mentioned above. The improbability of an innocent explanation was manifest.

[23] He continued:

47 The policy basis for the exception is that the deficit of probative value weighed against prejudice on which the original exclusionary rule is predicated is reversed. Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation.

48 Canadian case law recognizes that as the "similar facts" become more focussed and specific to circumstances similar to the charge (i.e., more situation specific), the probative value of propensity, thus circumscribed, becomes more cogent. As the differences and variables that distinguish the earlier "similar facts" from the subject matter of the charge in this type of case are reduced, the cogency of the desired inferences is thought to increase. Ultimately the policy premise of the general exclusionary rule (prejudice exceeds probative value) ceases to be true.

[24] Lord Herschell L.C. in Makin had observed that the basis for admissibility of such evidence is that it is relevant and admissible to rebut defences such as accident or mistake. That continues to be a prime basis for the admissibility and use of such evidence but it can also be utilized as being probative of the actus reus and, on occasion, as being probative of identity. In the latter instance, where similar act evidence is admitted to prove identity, a high degree of similarity is requisite, (*R. v. Arp*, [1998] 3 S.C.R. 339 at para. 43, per Cory J.):

It follows that where identity is at issue in a criminal case and the accused is shown to have committed acts which bear a striking similarity to the alleged crime, the jury is not asked to infer from the accused's habits or disposition that he is the type of person who would commit the crime. Instead, the jury is asked to infer from the degree of distinctiveness or uniqueness that exists between the commission of the crime and the similar act that the accused is the very person who committed the crime. This inference is made possible only if the high degree of similarity between the acts renders the likelihood of coincidence objectively improbable. See *Hoch v. The Queen* (1988), 165 C.L.R. 292 (Aust. H.C.). That is, there is always a possibility that by coincidence the perpetrator of the crime and the accused share certain predilections or that the accused may become implicated in crimes for which he is not responsible. However, where the evidence shows a distinct pattern to the acts in question, the possibility that the accused would repeatedly be implicated in strikingly similar offences purely as a matter of coincidence is greatly reduced. [Emphasis in original.]

See also the recent case of *R. v. Butorac*, 2013 BCCA 421.

[25] The case of *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717, furnishes an illustration of admissibility where similar act evidence can be considered probative of the actus reus. A daughter of the accused testified to sexual molestation by her father commencing when she was 11. The Crown was permitted to lead similar act evidence that in a previous common law relationship six years earlier the accused had sexually molested the 15-year-old daughter of his then partner. At p. 732, McLachlin J. (as she then was) said this:

... evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

[26] The incidents that comprised the charges against these appellants were said to have occurred a considerable time ago in a small community. It appears there was some lack of appetite to discuss and address in a timely way what was, in the mores of an earlier time, felt to be a sensitive subject. Most of the complainants were young girls at the time of the alleged incidents but there were also young male complainants. The appellants at the relevant times were entering upon their teenage years but were older and bigger children than the complainants. Interaction between the appellants and the complainants, according to the complainants, occurred out of the presence of adults. There were instances where the brothers were said to be together at the time of an incident but, in the majority of cases, just one brother was alleged to be interacting with a complainant. Quite often, the assaultive incidents were said to have occurred in an area of a community facility away from the presence of adults. One of the witnesses described this location as "a dark dungeony place". The appellants, in their evidence, denied any wrongful conduct concerning the complainants.

- [27] The trial occurred upwards of 25 years after the incidents complained of. It had taken a long time for matters to come to be investigated. By the time of disclosure by the complainants, the appellants and the complainants were adults. In one way, the fact that the complainants were adults testifying about wrongful conduct strengthened the case because this was not evidence emanating from young children, whose capacity and recollection would be that of a child. This situation bears a factual similarity to the situation in *Kendall v. The Queen*, [1962] S.C.R. 469. Of course, a court is still required to consider that those testifying are recalling events long past when they were of tender years. The trier of fact had to bear in mind that the alleged events had occurred when the complainants were very young children and the passage of time could impair accurate recollection of childhood experiences. The trial judge recognized possible frailties in the evidence of the complainants in his above-quoted remarks from para. 250 of his reasons. He did find some lack of reliability in the evidence concerning four of the 16 counts and he dismissed these because he had a reasonable doubt that such had been proven to the requisite degree of proof.
- [28] The trial judge observed more than once in the course of his reasons that he found that the evidence of the complainants was credible in general and that the evidence of the appellants not credible. Credibility is the special province of a trial judge and appellate courts must pay due deference to such findings. After making these findings on credibility, the trial judge went on to observe in the last sentence of para. 250:

Taken together, despite gaps in the evidence, but viewing through the lens of similar act evidence, I am satisfied that there is evidence of abuse that meets the burden of proof on most counts. [Emphasis added.]

- [29] That the judge utilized similar act evidence as at least in part probative of the assaultive behaviour alleged against these two appellants (and their brother) seems to me to be an inescapable inference from these comments at the end of para. 250 of his reasons. He also attached a table of similar acts to the reasons. While it was suggested in argument that the similar act evidence was relevant to an issue of identity, it is difficult to appreciate how identity was much to the fore in this case. These incidents occurred in a small community where people were familiar with each other and mistaken identity was unlikely.
- [30] Rather, it seems to me this is one of those cases where similar act evidence could be probative of the commission of the offences (the *actus reus*) and could serve to enhance the credibility of the various complainants. It was, what I would term, a B.(C.R.) type of case. The trial judge expressly adverted to this usage at para. 247 of his reasons when he spoke of reducing the probability of coincidence in the various counts (in the narratives of the complainants). It served to enhance the credibility of the several complainants and could be considered as probative of the acts alleged. There was, in my view, an intelligible basis to render admissible similar act evidence in this case. As the trial judge observed at para. 228, "the main issue in the case of all three accused is whether any of the acts complained of occurred at all". The narratives of the complainants viewed in the context of a similar act analysis could be probative of the various allegations of assaultive behaviour by the three

brothers. As the judge observed at para. 243, "The number of times such behaviours are repeated increases the weight of such similar fact evidence and the reliability that can be attached to each complainant who talks about it." [Emphasis added.]

- [31] The judge said this *inter alia* about his consideration of the similar act evidence:
- [244] Other factors that I have taken into consideration as similar fact evidence are things like possession of keys to the secluded areas, areas that having common the quality of being out of sight from the prying eyes of adults.
- [245] I have also considered particular kinds of behaviours as being relevant in this sense; whether, for example, someone like S.C.L. is consistently described as being rougher than the other boys. The use of threats to hurt a victim or her family is capable of qualifying as similar act evidence. The use of certain kinds of phrases for instance, soothing words, particularly when they are uttered while having intercourse with a resistant victim, are also acts with a high degree of similar act relevance. D.B.L. showed an inclination to resorting to both tactics and also a tendency to want to kiss his victims. Likewise, peculiar fetishes, for example D.B.L.'s interest in vaginal areas, so that he would inspect and compare them, or lick them, as was alleged, are also facts that I would consider fit the hallmark description of similar act evidence. In that category I would also place S.C.L.'s tendency to victimize male children, as described not just by the two L. brothers, but also by A.S. as well.
- [246] The very fact that all of the complainants were close to the same age when they were victimized is another relevant similar act.
- [247] The seriousness of the offences committed against girls and boys is also something that makes these cases stand apart and reduce the probability of coincidence in the various accounts.
- [248] It is the theory of the crown that P.E.L., the oldest and the highest achiever among the boys, was a leader and orchestrated some of what went on. There is some evidence from more than one complainant that P.E.L. did direct either his brothers or other boys to violate some of the girls, and that may be considered as similar act evidence.
- [249] D.B.L.'s apologies to more than one victim, later on in life, is a distinguishing behavioural trait not entirely inconsistent with the evidence of his apology to the victim he was having intercourse with.
- [32] Certain portions of the above-quoted part of the reasons are problematic. The problem shortly put is that it is not always clear against whom among the three accused persons particular evidence was being found relevant and admissible. This is evident in para. 244. I am not able to appreciate how the "seriousness of the offences committed against girls and boys", referred to in para. 247, is either similar act evidence or probative of anything. I also see difficulty with the comments of the judge in para. 248. This particularly highlights the "against whom" problem.

- [248] It is the theory of the crown that P.E.L., the oldest and the highest achiever among the boys, was a leader and orchestrated some of what went on. There is some evidence from more than one complainant that P.E.L. did direct either his brothers or other boys to violate some of the girls, and that may be considered as similar act evidence.

Is the trial judge here finding such evidence probative against only P.E.L. or also against another participant brother as well?

- [33] In this case, the trial judge appears to have taken what I would characterize as a generally correct analytical approach to the similar act evidence concerning the brother who did not appeal, though I need reach no final conclusion on this. However, his analytical approach to the cases of the two appellants is in parts problematic. There is a lack of a clear indication as to just what similar act evidence he was treating as probative of the allegations against the respective appellants. I am also doubtful whether some of the aspects of evidence (such as seriousness of offences) he considered probative should be found probative of anything. Whilst the appellants argued that the trial judge erred in his analysis of the admissibility of such evidence and in ruling that such evidence could be considered probative, I do not, as I said, perceive any particular problem with admissibility. The narratives of the complainants did portray similarities in the factual circumstances of assaultive behaviour.
- [34] The problem in this case lies in the uncertainty as to just how the trial judge analyzed and considered the similar fact evidence vis-à-vis these two appellants. It is less than clear what portions or aspects of this evidence he found to be relevant and probative against the respective appellants. As Binnie J. noted at para. 58 of *Handy*, the courts have proscribed a "free-wheeling" approach to the treatment of this sort of evidence. It is requisite for a trial court to clearly delineate the issue or issues on which the evidence is to bear. In the present, unusual circumstances (more than one accused), it was also necessary and important to clearly indicate the accused individual against whom particular similar act evidence was considered relevant and probative. After careful consideration of the reasons, I find it difficult to ascertain just how the trial judge utilized the similar act evidence in proof of the counts involving the two appellants. Nor does the appendix listing similar act evidence clarify matters. This lack of clarity and proper delineation discloses an error in the trial judge's approach to, and the utilization of, this evidence.
- [35] This raises the question of whether in this case it would be appropriate to utilize the curative provision, s. 686(1)(b)(iii). In favour of applying it is the circumstance that the judge has made clear credibility findings favourable to the complainants and unfavourable to the appellants. However, if the trial judge erred in treating aspects of the evidence as probative or utilized evidence only relevant to one appellant against another appellant, that would call into question the soundness of the convictions registered against the appellants. The latter utilization would, in effect, be finding guilt by association, an impermissible course. As I see it, the utilization of the similar act evidence is the evidentiary problem demonstrated in the present case. Given the pervasive nature of this error, I am not persuaded it would be appropriate to invoke the curative proviso and I would decline to do so.

- [36] S.C.L. was convicted on Count 11 involving the alleged sexual assault of B.C. There was some evidence given by B.C.'s aunt and mother that could properly be considered as confirmatory that something out of the ordinary had occurred between S.C.L. and B.C. at the time of the incident. S.C.L. also admitted causing harm to this complainant. The trial judge said this at paras. 101-102 of his reasons for convicting S.C.L. on Count 11:
- [101] Constable Cyr said that when S.C.L. was released they had a friendly chat outside the door of the police station, in which Constable Cyr asked S.C.L. if he had been sexually abused himself in the past. To this S.C.L. nodded 'yes.' When Constable Cyr then asked him if he had ever spoken to anyone about it, S.C.L. said that he had spoken to one person, and that was coming back to haunt him. Constable Cyr asked him what he meant. S.C.L. made reference to a report that had been shown to him in the course of the interviews a few hours earlier along with B.C.'s statement. S.C.L. was supposed to have then said that he knew he had caused harm to that girl, referring to B.C., adding that the other reports were not true, but the one about B. was. S.C.L. began to get tears in his eyes. He was visibly upset, said Constable Cyr.
- [102] While it may seem suspicious that these experienced investigators, who were unable to get any sort of admission from S.C.L. during the formal interviews, just happened to obtain a confession that was not recorded in the circumstances described above, I accept that this happened just as the officer said it did. The evidence about S.C.L. saying that he had been abused is very much in line with what he testified to on the witness stand himself, in some detail. Moreover, even without the evidence of this statement, and also without considering anything that might fall under the category of the similar fact evidence, I would have found that S.C.L. abused B.C. just as she said, on the earlier analysis of the evidence about that event. His admission, therefore, is consistent with those findings. [Emphasis added.]
- [37] Because of the particular evidence applicable to this count and the comments of the trial judge in the above passage, I do not consider that the problems I have identified concerning the trial judge's use of similar act evidence affects the validity of this conviction registered against S.C.L. In view of these findings, I rather doubt that there is any necessity to invoke the curative provision concerning this conviction registered against S.C.L. I do observe that if I had found it necessary, I would have been prepared to invoke the curative provision in regard to the conviction of S.C.L. on Count 11.
- [38] In the result, the convictions registered against P.E.L. on Counts 1, 2 and 3 must be set aside and a new trial ordered. The convictions registered against S.C.L. on Counts 12, 14 and 15 must be set aside and a new trial ordered. The appeals from these convictions are allowed. The conviction registered against S.C.L. on Count 11 is sustained and his appeal from this conviction is dismissed.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice Smith"

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

- [39] I have had the privilege of reading in draft the reasons for judgment of my colleague Mr. Justice Hall. I would also allow the appeal of P.E.L. but for the reasons that follow, and with respect, I would dismiss S.C.L.'s appeal.
- [40] I agree with my colleague's disposition of the grounds of appeal concerning the age of capacity discussed at paras. 5–13 of his draft reasons for judgment. I also agree with his discussion of the law of similar act evidence. I agree with him, and for the reasons he gives, that the conviction registered against S.C.L. on Count 11 should be sustained. The conviction on Count 11 did not depend upon similar act evidence.
- [41] The appellants assert, and my colleague agrees, that the judge took a "free-wheeling" approach to the treatment of similar act evidence. The appellants argue that the error made by the trial judge was a failure to make clear against whom among the three accused the similar act evidence was found to be probative. I agree with my colleague that the similar act evidence is admissible and for the reasons that he gives. I also agree with his statement that the similar act evidence must be considered as evidence of a type going to the *actus reus*, not to identity. In the case of P.E.L., I also agree that it is not possible to discern from the trial judge's reasons how he used the similar act evidence to ground the convictions. However, I do not agree that the judge improperly used the similar act evidence in the case of S.C.L.
- [42] The judge analyzed the evidence in this case by summarizing separately the evidence of each complainant and witness with respect to allegations against each brother. Some witnesses testified to assaults by all three brothers, some to assaults by just two brothers or just one brother. In almost all cases, the trial judge found the complainants and witnesses credible and reliable. The exception was in the case of evidence given by B.L.C., who the judge did not find to be reliable: para. 117. After dealing with the complainant and witness evidence, the judge summarized the evidence of the two accused who testified, P.E.L. and S.C.L.: he did not find their evidence credible.
- [43] Other than with respect to Count 11, S.C.L.'s assault of B.C., the judge concluded that to complete the W.(D.) analysis, it was necessary to resort to similar act evidence. At para. 250 he said:

It is precisely because childhood memories and perceptions, which are processed, catalogued and retained in a certain way over a long time, may be unreliable [and] inherently suspect, that gives similar act evidence such importance in a case like this. That those difficulties are not to be considered insurmountable, may be only because of the counterweight that similar act evidence adds to evidence that would otherwise be too fragmented to get beyond the test in *R. v. W.D.* It is,

I find, the similar act aspects of this case that put it well beyond being a case, as was submitted by defence counsel, that makes the job of testing the evidence for reliability and whether there has to be a reasonable doubt as being "tragically easy." I found the [complainants] testimony to be believable, and the accused who testified not to be. Taken together, despite gaps in the evidence, but viewing through the lens of similar act evidence, I am satisfied that there is evidence of abuse that meets the burden of proof on most counts.

[44] In addition to considering the individual allegations of assaults, the judge made findings at para. 243 about the three accused on some occasions collectively assaulting complainants.

That many of these assaults involved more than one accused acting together against more than one victim is a highly relevant similar act consideration. It is unusual to hear about systematic, simultaneous rapes of young pre-pubescent girls by more than one teen-aged boy, acting in concert and in the presence of each other on multiple victims, inflicting the worst kind of sexual abuse. In my assessment, when different victims talk about sexual assaults that contain these elements, the acts can properly be regarded as being not just similar acts that have to be seen as quite unique, but hallmarks, actually. The number of times such behaviours are repeated increases the weight of such similar fact evidence and the reliability that can be attached to each complainant who talks about it.

[45] The judge made clear at the outset of his analysis that he did not intend to "repeat every detail that has already been set out in the findings of fact surveyed above in considerable detail": para. 239. At the conclusion of his analysis, the judge said there was sufficient similar act evidence to convict. What the judge did not do was make explicit findings of what similar act evidence he found probative of the guilt of each accused. Both appellants say that the trial judge did not "consider the linkage between the similar act evidence" and each appellant.

[46] In my view, the judge's reasons are adequate to determine how he used the similar act evidence against S.C.L. but not P.E.L. "The sufficiency of reasons is evaluated by reading them as a whole and in the context of the record": *R. v. Nduwayo*, 2012 BCCA 281 at para. 66. Perfection is not required: *R. v. Sheppard*, [2002] 1 S.C.R. 869 at para. 60. When viewed as a whole, the trial judge's reasons show that he properly used the similar act evidence before him to reach the correct result in the case of S.C.L. but did not adequately separate his findings regarding P.E.L. such that I can reach the same conclusion. I would dismiss the appeal brought by S.C.L. but allow that of P.E.L.

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[47] Below I describe the testimony of each of the key complainants and witnesses whose testimony supported their complaints. As I have already said, the judge found each of them credible and reliable. First, however, I will lay out an approach to similar act evidence that I believe to be particularly helpful in this case.

[48] D.P.P. v. P., [1991] 3 All ER 337, a case cited with approval by the Supreme Court of Canada in R. v. Handy, 2002 SCC 56 at para. 250, concerns a defendant ultimately convicted of rape and incest of his two daughters. D.P.P. bears some strong similarities to this case and the analysis is helpful. The question decided by the House of Lords was whether evidence of the defendant's assaults against one daughter could be used as similar act evidence of assaults on the other. After a detailed review of the leading cases on similar act evidence, Lord Mackay of Clashfern (the other Lords concurring) said at pages 172–173:

When a question of the kind raised in this case arises I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances.

Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.

For the reasons which I have given, I am of opinion that there was sufficient connection between the circumstances spoken of by the two girls in the present case for their evidence mutually to support each other, that the appeal should be allowed, and the conviction restored.

I would answer the first question posed by the Court of Appeal by saying that the evidence referred to is admissible if the similarity is sufficiently strong, or there is other sufficient relationship between the events described in the evidence of the other young children of the family, and the abuse charged, that the evidence if accepted, would so support the truth of that charge that it is fair to admit it notwithstanding its prejudicial effect. It follows that the answer to the second question is no, provided there is a relationship between the offences of the kind have just described.

These matters raise questions of law but also involve judgments on matters of degree. Judgments properly made in the light of the appropriate principles should not, I think, yield results which could properly be described as a lottery.

[Emphasis added.]

- [49] All these complainants and accused knew each other well having grown up in the same small community in British Columbia. Applying the reasoning in *D.P.P. v. P.* to this case, the question may be seen as being whether what is alleged by each complainant to have occurred to her or him is so similar to what another complainant alleges to have occurred in his or her case that the evidence of the one provides support for the evidence of the other, even without striking similarities. The test for the use of similar act evidence articulated in *R. v. Kilbourne*, [1973] AC 729 at 759, cited in *D.P.P.*, is "whether there is such an underlying unity between the offences as to make coincidence an affront to common sense": see also Handy at para. 42. The Kilbourne articulation of the test is particularly apt here.
- [50] I now turn to the evidence.
- [51] The trial judge's organization of his reasons for judgment is important. His method of organization reveals that he tried to carefully assess on an individual basis the evidence of each complainant separately against each accused. He analyzed the evidence by describing the background and circumstances of each of ten complainants and witnesses. He summarized the evidence of each complainant's allegation against each accused.
- [52] In the case of S.C.L., he successfully adhered to this structure, thus enabling me to conclude that he used only the similar act evidence tendered against S.C.L. to corroborate the stories of the complainants. In the case of P.E.L., however, the reasons for judgment do not reflect the same degree of specificity, thus casting doubt on whether the trial judge properly used the similar act evidence before him to convict P.E.L. I explain this conclusion in greater detail below in the section of these reasons concerning P.E.L.
- [53] With the exception of G.T.'s evidence against P.E.L. and D.B.L., which I will explain further below, the judge repeated the process of outlining the testimony of each witness against each accused separately and distinctly for each of the complainants and key witnesses. In each case he made findings about credibility. It is only in the case of P.E.L. where his reasons are less clearly differentiated than is required to ensure that his use of the evidence before him was proper.
- [54] The judge also summarized the evidence of P.E.L. and S.C.L., who denied assaulting any of the complainants.
- [55] In summary, P.E.L. was convicted on three counts concerning complainants: L.J. (Count 1), and C.J. (Count 2) of sexual assault, and G.T. (Count 3) of indecent assault. S.C.L. was found guilty of sexual assault of four complainants: B.C. (Count 11), A.S. (Count 12), L.L. Jr. (Count 14), and T.L. (Count 15), and accused by two witnesses who were not complainants against him, L.J. and C.J.
1. Appellant: S.C.L.

[56] I now turn to the counts and witnesses involving S.C.L. In contrast to the portions of the trial judgment that discuss P.E.L., the portions of the reasons for judgment that refer specifically to S.C.L. display a clarity that allows me to infer that the judge used only the evidence relating to this accused to convict him on all four counts.

a. Complainant: B.C.

[57] S.C.L. was convicted on Count 11 of assaulting B.C. As discussed by Mr. Justice Hall, the conviction under Count 11 did not depend on similar act evidence because there was other corroborative evidence. I have said already that I agree with Justice Hall on this point: the conviction on this count should be upheld. I mention this count in my discussion because S.C.L.'s assault of B.C. is also similar act evidence.

[58] Count 11 charges that from January 1, 1985 to December 31, 1985, inclusive, S.C.L. sexually assaulted B.C. At paras. 62 and 63 of his reasons for judgment, the judge found B.C. credible. As I have already said, the judge did not find S.C.L. or his parents, who were witnesses on his behalf, credible. He said there were no concerns about identity and no concerns about collusion.

[59] The judge was left in no doubt about the guilt of S.C.L. on Count 11 by the testimony of B.C., which was supported by S.C.L.'s admission to the police and corroborating witness evidence: para. 73. The circumstances were that B.C. was playing at a friend's house while her mother was at home canning. S.C.L. went to B.C.'s house and twice offered to fetch B.C. for her mother. On both occasions B.C.'s mother said it was unnecessary. S.C.L., nevertheless, did fetch B.C., telling her that her mother was angry with her for not coming home. B.C. refused the first time S.C.L. tried to get her to leave with him but, on the second occasion, she reluctantly agreed to accompany him. S.C.L. took her to a shed near the L. family home and sexually assaulted her.

[60] The aunt of both B.C. and S.C.L. was a witness to part of this incident. She said that she heard a scream. She approached the shed. S.C.L. was standing there and B.C. was adjusting her clothing. The aunt took B.C. home. B.C.'s father accused S.C.L. of trying to hurt B.C. B.C. was crying. S.C.L. said nothing when at first confronted, but then he said his brother "D.B.L. did it too." Later, in a conversation with the police, he admitted to hurting B.C.: para. 100.

b. Complainant: A.S.

[61] In Count 12, S.C.L. is charged that between January 1, 1985 and December 31, 1987, he did sexually assault A.S. She was between six and seven years old.

[62] S.C.L. babysat A.S. and her brother J. S.C.L. would take them to S. Lake by bicycle. She would ride on S.C.L.'s handlebars. They would stop at the dried spawning channels. S.C.L. instructed J. to pretend he and his sister were having sex, while S.C.L. masturbated. S.C.L. ejaculated on A.S.'s vagina. The judge held that "She would have to clean it up, they would go to S. Lake as if nothing happened": para. 143.

[63] The judge found A.S. to be a forthright and consistent witness. He clearly found her credible.

c. Complainant: T.L.

[64] S.C.L. is charged in Count 15 with sexually assaulting T.L. between May 31, 1987 to May 31, 1988.

[65] T.L. is also a witness to S.C.L. assaulting L.L. Jr. and B.C.

[66] At para. 156 the judge says it is not plausible that T.L. would put himself through the obvious agony of testifying "to avenge some unarticulated family feud". He found T.L.'s testimony believable and persuasive.

[67] T.L. described how he and his brother L.L. Jr. were in the basement of the L. family home with S.C.L. All were naked. T.L. and L.L. Jr. were, in turn, on top of S.C.L. T.L. says S.C.L. told him to get on top of S.C.L. and that T.L. "caressed him all over his body" and kissed him: paras. 158–159. After that, S.C.L. went to the basement door, masturbated and ejaculated. S.C.L. told L.L. Jr. and T.L. not to tell anyone. L.L. Jr. did not testify about this event.

[68] T.L. is also a witness to an assault on B.C. He testified that he witnessed his, "little cousin B.C. being held down by [S.C.L.] on the bed and [he] could hear B.C. crying and screaming, asking him to stop": para. 162. The judge noted that, as a teenager, when he heard B.C. talking about the abuse, "T.L. broke down, remembering that he was there when B.C. was abused and also because it happened to him too": para. 160.

d. Complainant: L.L. Jr.

[69] Count 14 charged S.C.L. with assaulting L.L. Jr. between September 1, 1984 and September 1, 1985. L.L. Jr. is the younger brother of the complainant T.L.

[70] At the time of this assault, L.L. Jr. was between five and six years old. Despite his objections, L.L. Jr. was regularly taken to the L. house to be babysat. The judge noted the evidence of the complainant's mother, N.L., confirming that she took him regularly to the L. family house to be babysat in 1985. L.L. Jr. was five at the time. N.L. said that, after her son had been babysat there for some time, L.L. Jr. would be angry, crying and complaining about being taken to the L. house. L.L. Jr. testified that S.C.L. repeatedly took him into the bathroom and had anal intercourse with him.

[71] The trial judge accepted the testimony of L.L. Jr. and the witnesses who corroborated his evidence of being babysat at the L. home when S.C.L. was present.

e. Witness: L.J.

- [72] In addition to the incidents that are the subjects of the various counts, L.J. and C.J. gave evidence implicating S.C.L. in other assaults. In the case of L.J., she testified that S.C.L. came into her bedroom a number of times and assaulted her. The judge noted that this did not form the basis of a charge because of S.C.L.'s age at the time. The judge said that the evidence, nonetheless, had the potential of being received as similar act evidence.
- f. Witness: C.J.
- [73] Similarly, C.J. related incidents involving S.C.L. which did not form the basis of a charge. S.C.L. took a group of girls into a shed by the community centre and lined them up then instructed them to pull down their pants. He threatened them if they told their mother, a prevalent theme.
- g. Witness: D.J.
- [74] D.J. testified that S.C.L. would approach her and her friends and shout, "Do you guys want to hump?" She and her friends were afraid of him. She also recalled an occasion in which S.C.L. took her with her friends to a dark, stinky, dusty area underneath some bleachers at the community hall. She was afraid, and she ran away: para. 135
- h. Testimony of Appellant: S.C.L.
- [75] At para. 209 the judge describes S.C.L.'s testimony about being bullied and his limited admission about B.C.
- [76] He testified, and I use his words, that he used to get punched, flicked and kicked "in the balls" constantly, and laughed at by other children. He was expelled from school in grade eight for hitting a teacher. He was a big boy even then. He admits having contact with B.C., and even ripping her shirt because she called him names, but not abusing her or any of the other complainants. He denies sexually assaulting any of the victims.
- [77] The judge found "blatant contradictions" in S.C.L.'s testimony (para. 223), describing it as "sufficiently flawed to undermine the evidence he put forward ": para. 213.

Summary of Evidence about S.C.L.

- [78] In summary, the judge believed six witnesses that they were sexually assaulted by S.C.L. The judge accepted the evidence of B.C., A.S., L.L. Jr., T.L., L.J. and C.J. He did not believe S.C.L. The judge's reasons clearly set apart the evidence pertaining to assaults by S.C.L. without appearing to "pool" it with that pertaining to the other accused.
2. Appellant: P.E.L.
- [79] P.E.L. was convicted of sexually assaulting L.J. and C.J. and of indecent assault against G.T. I will describe the evidence of P.E.L. and each complainant and then explain why I conclude that judge did not sufficiently differentiate the evidence against P.E.L. from the evidence against his brothers.

a. Complainant – L.J.

- [80] L.J. testified that in January, 1983, she and her siblings were placed as foster children into the home of the appellants' parents, B. and W.L. Government records adduced in evidence confirmed this testimony. L.J. lived with the L. family for about six months and was five or six years old at the time. All three L. boys were living in the family home when L.J. lived there.
- [81] L.J. testified to three discrete incidents involving P.E.L., although she also testified that there were other assaults. These incidents are described in detail in the judge's reasons at paras. 11–14. I shall summarize them briefly.
- [82] The first incident L.J. recalled happened in her bedroom at the L. family home and included full intercourse.
- [83] L.J. described a second incident when, at the end of a school day, P.E.L. called her into the house, shooed off the other children, and forcibly had intercourse with her. She recalled being shoved in the bedroom closet when P.E.L.'s mother came home, after which P.E.L. had intercourse with her again.
- [84] L.J. also recalled another occasion on which P.E.L. had intercourse with her in his own bedroom. When he heard someone coming he hid her under the mattress. She described feeling as if she was suffocating.
- [85] L.J. testified that P.E.L. had intercourse with her on several other occasions in her bedroom.
- [86] L.J. also described an incident when P.E.L. directed his brothers to assault her, her sister C.J., and other children at either the preschool or the community hall. She recalled that P.E.L. told his brother D.B.L. to assault her. She remembers P.E.L. telling D.B.L. to "put his penis in her vagina." She has a recollection of seeing her sister C.J. being assaulted at the same time as she was being assaulted. L.J. testified that while she was being assaulted by D.B.L., "the other children were lined up, and, in turn, were sexually assaulted by S.C.L., D.B.L. or P.E.L": para. 16. She testified that as an adult D.B.L. apologized to her several times: para. 24.
- [87] The last incident included in this portion of the judge's reasons is problematic. Unlike in the incident previously described where P.E.L. was generally alleged to have assaulted children in the preschool or community hall, in the final incident described by the trial judge, P.E.L. was not present during the assaults L.J. described. It is not clear why the trial judge associated this assault with the evidence against P.E.L. His choice to include this evidence, probative of the charges against his brothers, in a section of his reasons devoted to the charges against P.E.L., militates against the conclusion that the judge applied the similar act evidence relating to P.E.L. only to P.E.L.
- [88] In finding L.J.'s testimony credible (para. 27), reliable (para. 30) and untainted by collusion or collaboration between witnesses (para. 31), the judge said at para. 30:

There is no evidence that her testimony is the stuff of invention or fabrication reconstructed with the help of friends or investigating police officers. I found [L.J.] to have been at pains not to testify about things she did not know about personally, and on the whole, found her evidence to be reliable, both before, and then after, a very thorough cross-examination.

[89] P.E.L. testified that he did not remember L.J. living at his home. The judge did not find him credible. The judge described P.E.L.'s evidence as an amalgam of "guesswork" and "deflection": para. 206.

b. Complainant: C.J.

[90] Count 2 concerns C.J., L.J.'s older sister. P.E.L. is charged with sexually assaulting C.J. between January 13, 1983, and June 30, 1983.

[91] C.J. testified that P.E.L. called her from a park where she was playing and directed her into the basement of the community hall. L.J. was also there. P.E.L. told L.J. she could leave. He then "started jiggling against [a steel pole]": para. 36. C.J. did not understand what P.E.L. was doing or why. She said when he moved away from the pole he looked like he was peeing. He then came towards her and began to assault her but stopped, saying, "I can't do this": para. 36. The judge noted that C.J. identified the steel pole in photographs.

[92] The judge found at para. 38 that C.J. and L.J.'s testimony contained "significant similarities" about the "activities of the L. brothers." The generality of this statement is troublesome. While the trial judge may have meant this statement to go more towards the credibility of C.J. and L.J., than to the similar act evidence against P.E.L., it is unfortunately placed within the portion of his reasons devoted to C.J.'s testimony against P.E.L. specifically.

[93] As with L.J., the trial judge found C.J. to be a credible witness. At para. 48 he described her as a thoughtful, careful witness who paid close attention to the questions and gave careful answers.

[94] The judge commented in respect to P.E.L.'s testimony that:

[204] I noted P.E.L.'s reluctance to admit even obvious details where they might be incriminating, as for instance like the existence of steel poles in the Julianne Hall, as were described by [C.J.], and which were so obviously depicted in the photos.

As noted above, the judge did not find P.E.L. credible.

c. Complainant: G.T.

[95] Count 3 of the indictment charges P.E.L. with assaulting G.T. between October 1, 1981 and October 31, 1982.

[96] Unlike with the previous complainants and accused the trial judge combined G.T.'s evidence against P.E.L. in a section with his brother D.B.L. The section begins by describing an assault on C.J. by D.B.L. that G.T. witnessed in a "dungeon-like" part of the community hall. G.T. testified that P.E.L. seemed to be instructing or educating his brother during the assault.

No allegation was made against P.E.L. in reference to that incident beyond what could be described as his "grooming" role. At para. 59 the judge found the "dungeon place" incident involving C.J. was in 1980, 1981 or 1982, but C.J.'s evidence places it in 1983. Despite the discrepancy in dates, the judge found G.T.'s evidence to be credible.

[97] The incident that forms the basis of the indecent assault charge against P.E.L. in relation to G.T. followed the above-described incident in the judge's reasons. G.T. testified that P.E.L. groped her "private parts": para. 56. He told her to keep it a secret. This happened when they were playing hide and seek in his home. He found her, took her to a nearby bed, kissed her and touched her vagina. She bolted.

d. Testimony of Appellant: P.E.L.

[98] P.E.L. testified in his own defence. He could recall only one foster child being in the L. family home and that was not L.J. or C.J.

[99] At para. 200 the judge noted P.E.L. denied all the allegations of abuse made against him by L.J., C.J. and G.T.:

As to the allegations of abuse made against him, P.E.L.'s testimony is extremely brief. None of it happened. The thrust of his defence was that he was too busy with his sports or work or other activities to have time for it, and also, the children were too closely supervised in the foster home for there to be an opportunity. Also, he relies on discrepancies in the evidence in suggesting that the whole of it is quite possibly a fabrication, and at the very least, seriously in error.

[100] The judge described him as "evasive" (para. 202), and a "confident witness, but not a particularly credible one": para. 202. The judge noted that in giving his testimony, P.E.L. dwelled on his athletic accomplishments, which he exaggerated, but essentially gave blanket denials about the allegations of assaults.

Analysis of Judge's Reasons in respect to P.E.L.

[101] My concern about the use of similar act evidence in the case of P.E.L. may first be illustrated in the section of the reasons for judgment concerning L.J. After describing L.J.'s background and circumstances, he described her testimony concerning multiple assaults by P.E.L. For reasons that are not clear, the judge next described an assault L.J. witnessed that did not involve P.E.L. He wrote:

L.J. remembered a similar type of sexual assault, involving other children, taking place at the Julianne Hall basement behind the stage, when she was there with S.C. and her sister C.J. She remembered C.J. being assaulted by S.C.L., very aggressively, and that she was crying with her head getting banged in the filing cabinet. It is possible that L.J. may have confused S.C.L. and D.B.L. in the incidents in which they were supposed to have been involved at the preschool and the Julianne Hall. S.C.L. was not charged with assaulting L.J. from anything arising out of those incidents. The Counts in the Information specifying charges of assault by D.B.L. on L.J. were also occurrences other than those mentioned above, where P.E.L. was supposed to have directed

assaults at the preschool or the Julianne Hall.

[102] The inclusion of this paragraph in the portion of the judge's reasons devoted to evidence against P.E.L. could suggest that his ultimate conclusion may have been tainted by the sort of reasoning prejudice that must be guarded against when applying similar act evidence: see Handy at para. 31.

[103] The judge went on to describe L.J.'s testimony concerning D.B.L. As there was no charge against S.C.L. where L.J. was the complainant, the trial judge did not devote a separate section of his reasons to S.C.L. when considering L.J.'s evidence. Rather, he moved on to describing the testimony of the next complainant, C.J.

[104] Like with the section of his reasons devoted to L.J., the judge first described C.J.'s background. He then summarized her description of being assaulted by P.E.L. In his discussion of C.J.'s evidence concerning P.E.L., he concludes there is "significant similarities" to L.J.'s evidence concerning the "activities of the L. brothers": para. 38. Separately, he summarized her description of being assaulted by D.B.L., followed by a separate description of an assault by S.C.L. The general finding about the brothers' activities, in a section devoted to recounting evidence against P.E.L. specifically, tends to support the conclusion that the judge may have "pooled" similar act evidence concerning other accused in disposing of the counts against P.E.L.

[105] The reasons, as they describe G.T.'s evidence, do not differentiate the evidence probative of the charges against P.E.L. with evidence that is perhaps more relevant to another accused, in this case D.B.L. If the trial judge found P.E.L. instructing his brother in the assault against C.J., and witnessed by G.T., probative of the charges against P.E.L. it was necessary to be clearer.

e. Summary of evidence against P.E.L.

[106] In summary, the judge accepted as credible the evidence of L.J. about three discrete incidents. He accepted as credible the evidence of C.J. and G.T. about single discrete incidents involving assaults against them by P.E.L. He also accepted the evidence of L.J. about P.E.L. directing his brothers D.B.L. and S.C.L. to assault L.J. and her sister C.J., as well as G.T.'s evidence that P.E.L. directed D.B.L. to assault C.J. Unfortunately, it is not clear what probative value the trial judge attached to the latter evidence and whether he used this potentially highly prejudicial evidence as similar act evidence against P.E.L. and, if so, how. I conclude that it is not sufficiently clear that the trial judge used only the evidence against P.E.L. to reach his final disposition on the three counts before him.

Use of the Similar Act Evidence concerning S.C.L.

- [107] The judge stated that the number of offences is an important consideration: para. 242. In respect to S.C.L., the judge identified his being implicated in about 11 assaults. In computing the numbers of assaults the judge was referring to discrete episodes, although several witnesses such as L.J., L.L. Jr. and T.L. described repeated incidents of assault.
- [108] As I have said, the judge attempted to separate the testimony of each of the complainants or witnesses as applicable to each accused. He did not explicitly state that he only used the similar fact evidence of the complainants who were assaulted by each brother against the applicable brother, but it is clear from the structure of his judgment that he must have done so to the extent that his reasons maintained that structure.
- [109] When the reasons for judgment are examined in the manner I have described, it is clear that the judge could only have been applying similar act evidence of each complainant and witness who accused S.C.L. This is a permissible use of similar act evidence and the judge is entitled to deference as to his findings that the evidence is similar in act. See *R. v. Handy*, 2002 SCC 56. The reasons do not reflect the same requisite clarity as regards P.E.L.
- [110] In my view, the totality of the evidence against S.C.L. is overwhelming. The judge's examination of the evidence by complainant and accused demonstrates that he did not use the "free-wheeling" approach asserted by the appellant. What the appellants' case comes to is an assertion that the judge found guilt by association in the case of both appellants. I disagree.
- [111] As regards S.C.L., the judge carefully reviewed the similar act evidence of each complainant and witness that concerned S.C.L. specifically and, in my view, used that similar act evidence as corroboration of the complainants' own stories which, in each case, he believed. While the trial judge attempted to adhere to this structure when examining the evidence against P.E.L., the instances outlined above make it impossible to say with confidence that he used only the appropriate similar act evidence as concerned P.E.L. In my view, in regards to S.C.L., there is very clearly on the facts of this case, an "underlying unity between the offences as to make coincidence an affront to common sense": D.P.P. at 164, and the trial judge's reasons, taken as a whole, reflect this.
- [112] The reasons for judgment reveal that the judge could only have applied the evidence against S.C.L. to the charges against that accused. In other words, the judge must be taken to have applied the evidence of B.C., A.S., T.L. and L.L. Jr. against S.C.L. As further corroboration, he used the evidence given D.J., L.J. and C.J. He did set out the evidence of similar acts sufficiently clearly in the case of S.C.L. that there can be no doubt as to the basis on which he convicted that appellant, and in a manner that reasonably supports his conclusion of S.C.L.'s guilt on all counts.
- [113] The same cannot be said of his reasons as they relate to P.E.L.

Application of the Criminal Code's Curative Proviso

[114] If it were necessary to do so I would apply the curative proviso in s. 686(1)(b) of the Code to the counts against S.C.L., but would not in the case of P.E.L. The application of the curative proviso is described in *R. v. Trochym*, 2007 SCC 6 at paras. 81 and 82:

In *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, at para. 26, Arbour J., writing for the majority, stated that "[t]here are essentially two classes of errors which have been identified by reviewing courts and which have led to a proper application of the proviso. The first category is that of so-called 'harmless errors', or errors of a minor nature having no impact on the verdict. The second category encompasses serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice." With respect to serious errors, Arbour J. (at para. 31) cited Sopinka J. in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916, in support of the proposition that the proviso is applicable only if the "the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction."

The instant case is one that falls squarely within the second category of serious errors that will justify a new trial unless the properly adduced evidence is so overwhelming that a conviction is inevitable, or would invariably result. This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case "beyond a reasonable doubt" at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

[115] In my view, if the trial judge's reasons do not fully explain the manner in which he applied the similar act evidence as regards S.C.L., no substantial wrong or miscarriage of justice has occurred.

Disposition

[116] I would dismiss the appeal of S.C.L. and allow the appeal of P.E.L. and direct a new trial.

"The Honourable Madam Justice Garson"

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