Regina v. Varga

[Indexed as: R. v. Varga]

18 O.R. (3d) 784
[1994] O.J. No. 1111
Action No. C7291

Court of Appeal for Ontario,
Brooke, Labrosse and Doherty JJ.A.
May 25, 1994

Criminal law -- Appeals -- Crown appeal against acquittal -- On appeal Crown attempting to raise issues not objected to at trial -- Crown cannot raise new issues on appeal nor advance new theory of liability -- Despite two errors made by trial judge as case dependent entirely on evidence of complainant whom the judge disbelieved -- Crown appeal dismissed.

The complainant, a nurse, alleged that she had been raped in 1979 by the accused who was then a staff doctor at the clinic at which she worked. She complained about the rape in 1990 during a confrontation with her parents about her alcohol abuse.

After she alleged that the accused raped her, the complainant underwent both psychiatric and alcohol treatment. Prior to trial counsel for the accused sought production of various medical and counselling records pertaining to the complainant, including the records of her psychiatrist, Dr. F, and the records of the alcohol treatment facility she had attended. The motions judge (who ultimately became the trial judge) ordered that the documents be given to the complainant's counsel so that the complainant could decide which, if any, of the records she would agree to release. The complainant agreed that the accused be provided with all of the records apart from the

psychiatric and alcohol treatment records noted above. A motion was brought by the complainant claiming that these records were privileged and should not be disclosed to the accused. Prior to the motion, both the court and the Crown were given copies of the records. The Crown indicated that as he had seen the records and defence counsel had not, he would take no submissions about privilege as he was in a "superior position" due to his access to the records. The judge ruled that the records were not privileged and he directed that they be produced to defence counsel. The accused was tried and acquitted as the trial judge stated that he did not accept the complainant's evidence.

The Crown advanced several grounds of appeal. The first was that the trial judge erred in applying the ultimate burden of proof beyond a reasonable doubt to the single issue of whether the accused had a vasectomy. It was part of the Crown's case that the accused told her during the assault that he had undergone a vasectomy. Second, the Crown objected to the cross-examination of the complainant's father in which he indicated that he did not have much confidence in the complainant's credibility during the period she complained.

The Crown asked the court to set out a detailed set of procedures to govern applications in which the accused seeks access to the confidential medical and/or psychiatric records of the complainant. There had been a pre-trial motion brought by counsel for the complainant asserting that the documents were privileged and should not be released to the accused. The Crown sought now to assert, for the first time on the appeal, that the records were privileged and ought not to have been released to the accused. At trial, the Crown had not submitted that the records should have been withheld from defence counsel's inspection (following the ruling that no privilege attached to the documents) until defence counsel demonstrated the materiality of the proposed evidence arising from the document prior to the documents being delivered to defence counsel for his inspection. The Crown also objected, for the first time on appeal, to many of the questions put to the complainant in cross-examination based upon her psychiatric and treatment records on the basis that the prejudicial value

greatly exceeded the probative value of such evidence. It was asserted on the appeal that the cross-examination of the complainant was abusive and that the cumulative effect of the questioning was tantamount to character assassination.

The Crown asserted that it was the evidence of statements which the complainant's psychiatrist alleged were made to him during their therapy sessions were inadmissible. This objection was also made at trial. The complainant had been cross-examined on these statements and she denied making some of the statements and asserted that others were incorrectly reported by her former psychiatrist.

Held, the appeal should be dismissed.

With respect to the vasectomy issue, the trial judge did wrongly apply the burden of proof. However, his reasons for rejecting the complainant's evidence were untainted by his inappropriate application of the burden of proof to a single piece of evidence. The error had no impact on the verdict.

The Crown's right of appeal from an acquittal is an appellate remedy and not a licence to refer legal questions to the Court of Appeal for its consideration and advice. With respect to the procedure to be followed where the defence seeks access to the records of a complainant, the court should not, absent some alleged error of law that could have affected the verdict, pass upon the suitability of the procedure or an alternate procedure suggested by the Crown. To do so would transform the appellate function into a consultive or advisory one.

There are situations in which an appellate court should not address the merits of a ground of appeal advanced by the Crown even though that ground alleges an error in law that is germane to the acquittal. For example, the Crown cannot advance a new theory of liability on appeal. Nor can the Crown raise arguments on appeal that it chose not to advance at trial. A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial. It offends double jeopardy principles, even as modified by the Crown's right of appeal, to subject an accused, who has been

acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal. Double jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial.

Crown counsel took no objection at trial to the trial judge's direction that all the documents be turned over to defence counsel. At no time did Crown counsel suggest that defence counsel's access to the documents required a preliminary showing of materiality. It would be an abuse of the appellate process to accede to the Crown's new argument on appeal. Just as the Crown cannot challenge an acquittal by advancing a theory of liability for the first time on appeal, it cannot secure a new trial by advancing a new test for admissibility that contradicts the one advanced at trial.

The Crown's contention that the potential prejudicial effect of the cross-examination of the complainant on the contents of her psychiatric and treatment reports outweighed its probative value was also advanced for the first time on appeal. The trial judge did not err in not foreclosing cross-examination on the basis that its potential prejudicial effect far exceeded its probative value: he was never asked to do so by the Crown. The trial judge was entitled to rely on Crown counsel, who was aware of the issues and the contents of the documents, to challenge the cross-examination if its prejudicial potential clearly exceeded its probative value.

The argument that the cross-examination was an attempt at character assassination was raised for the first time on appeal. In deciding whether a trial judge should have prohibited cross-examination as abusive, an appellate court must recognize the advantaged position of the trial judge. He or she is able to watch the witness and the questioner as the cross-examination proceeds, to observe the effect of the cross-examination, and to hear the tone of voice in which questions are asked or answered. The trial judge is able to use these oral and visual aids in distinguishing between cross-examination which is persistent and exhaustive, and that which is abusive. Given the position of the defence in this case that the entire allegation was a fabrication, defence

counsel was obliged, in the service of his client, to use every legitimate means available to him to challenge and undermine the credibility of the complainant. A consideration of the entirety of the cross-examination showed that counsel did not, save perhaps in a few isolated instances, go beyond the bounds permitted by the adversarial process.

The evidence of Dr. F as to statements made to him by the complainant was introduced to contradict the complainant's evidence concerning the content of her statements to Dr. F and to thereby undermine her credibility. Section 11 of the Canada Evidence Act, R.S.C. 1985, c. C-5, which applies to prior oral statements, had potential application to the statements made by the complainant to Dr. F. To be properly admissible through the evidence of Dr. F, the statements made by the complainant had to be inconsistent with her evidence, and they also had to be relative to the subject matter of the case. Defence counsel could not elicit evidence from Dr. F that merely confirmed that the complainant had made a statement she acknowledged making during cross-examination. Nor could defence counsel elicit evidence of a prior inconsistent statement made by the complainant going only to a collateral matter. Most of the examination of Dr. F concerning statements made by the complainant came within the limits imposed by s. 11 of the Canada Evidence Act. However, some parts of his evidence went beyond those limits imposed by s. 11.

The trial judge's error with respect to the application of the burden of proof to a single fact in issue, together with his improper admission of some of Dr. F's evidence, did not warrant quashing the acquittal and directing a new trial. The Crown's case depended entirely on the credibility of the complainant. The trial judge found that her evidence could not satisfy him beyond a reasonable doubt that she had been raped by the accused. He listed several factors that led him to that conclusion, all of which were supported by the evidence. He made no reference to, and did not appear to have relied on, the evidence of Dr. F.

Cases referred to

R. v. Cassibo (1982), 39 O.R. (2d) 288, 70 C.C.C. (2d) 498 (C.A.); R. v. Cullen, [1949] S.C.R. 658, 94 C.C.C. 337, 8 C.R. 141, [1949] 3 D.L.R. 241; R. v. Egger, [1993] 2 S.C.R. 451, 82 C.C.C. (3d) 193, 15 C.R.R. (2d) 193, 21 C.R. (4th) 186, 103 D.L.R. (4th) 678, 45 M.V.R. (2d) 161, 153 N.R. 272; R. v. Evans, [1993] 2 S.C.R. 629, 82 C.C.C. (3d) 338, 21 C.R. (4th) 321, 104 D.L.R. (4th) 200, 153 N.R. 212; R. v. Grant (1989), 49 C.C.C. (3d) 410, 71 C.R. (3d) 231, [1989] 5 W.W.R. 762, 58 Man. R. (2d) 281 (C.A.); R. v. Handy (1978), 45 C.C.C. (2d) 232, 5 C.R. (3d) 97, [1979] 1 W.W.R. 90 (B.C.C.A.); R. v. Huot, [1969] 1 C.C.C. 256, 70 D.L.R. (2d) 703, 11 Cr. L.Q. 101 (Man. C.A.); R. v. Khan, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 281, 41 O.A.C. 353, 113 N.R. 53; R. v. Litchfield, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137, 14 Alta. L.R. (2d) 1; R. v. Merson (1983), 4 C.C.C. (3d) 251 (B.C.C.A.); R. v. Morgentaler, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 82 N.R. 1, 63 O.R. (2d) 281n, revg (1985), 52 O.R. (2d) 353, 17 C.R.R. 223, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 11 O.A.C. 81 (C.A.); R. v. Morin, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193, 66 C.R. (3d) 1, 88 N.R. 161; R. v. Penno, [1990] 2 S.C.R. 865, 59 C.C.C. (3d) 344, 44 C.R.R. 50, 80 C.R. (3d) 97, 29 M.V.R. (2d) 161, 42 O.A.C. 271, 115 N.R. 249; R. v. Savard and Lizotte, [1946] S.C.R. 20, 85 C.C.C. 254; R. v. Seaboyer, [1991] 2 S.C.R. 577, 6 C.R.R. (2d) 35, 7 C.R. (4th) 117, 83 D.L.R. (4th) 193, 48 O.A.C. 81, 128 N.R. 81, 4 O.R. (3d) 383n; R. v. Wexler, [1939] S.C.R. 350, 72 C.C.C. 1, [1939] 2 D.L.R. 673

Statutes referred to

Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 10, 11

APPEAL by the Crown from a judgment acquitting the respondent on a charge of rape.

David B. Butt, for the Crown, appellant.

David M. Porter and Simon Johnson, for respondent.

The judgment of the court was delivered by

DOHERTY J.A.: --

I OVERVIEW

The respondent was charged with raping Kellie Waddell. He elected trial by judge alone and was acquitted. The Crown appeals from that acquittal.

The rape allegedly occurred in the last two weeks of August 1979, when Ms. Waddell was 21 years of age. She went to the police 11 years later in February 1990.

Ms. Waddell went to work at an allergy clinic as a nurse in March 1979. Dr. Varga was one of four doctors on staff at the clinic. Ms. Waddell did not know Dr. Varga before she went to work at the clinic. In the five months before the alleged rape, Dr. Varga treated her in an entirely appropriate manner.

Ms. Waddell testified that on the day of the alleged rape she was working late in the clinic. She had finished her work and was standing in the clinic waiting-room in front of a large window watching for her bus. Dr. Varga came into the room and started to talk to Ms. Waddell. Ms. Waddell saw her bus and stood up to leave. Dr. Varga stood up and walked along side her. He then grabbed her by the arms and kissed her. Ms. Waddell resisted Dr. Varga's advances, but he pinned her against the wall and kissed her again. At the same time he put his hands underneath her blouse and down her skirt. Ms. Waddell told Dr. Varga that she was sexually inexperienced and she was not using any contraceptive. He told her not to worry as he had had a vasectomy. Dr. Varga forced Ms. Waddell into his office, pushed her to the floor while removing her pantyhose and underwear, and raped her. After Dr. Varga got up, Ms. Waddell stood and noticed a blood stain on the back of her uniform and on the office carpet. She took a lab coat from Dr. Varga's office, put it around her uniform, and went outside to wait for her bus. The incident took about ten or fifteen minutes. Ms.

Waddell did not call out for help as she thought there was no one else in the office.

Some time prior to the alleged rape, Ms. Waddell had given notice that she would be terminating her employment at the clinic as she had obtained a job at a local hospital. The day after the rape, Ms. Waddell returned to the clinic and worked there every day until she left to take up her new position. Dr. Varga said nothing about the incident and, as he had before the alleged rape, acted in an appropriate way toward Ms. Waddell.

Ms. Waddell initially testified that she did not tell anyone about the rape until 1990 because she "didn't know how to handle it". Later in her evidence, she said that she had told her cousin about the rape some four months after it occurred. She said that she did not provide any details to her cousin. Her cousin testified that the complainant told him about the rape on New Year's Eve of 1980 and that she provided considerable detail. The cousin recounted that detail and it was consistent with the complainant's evidence at trial. The trial judge rejected the complainant's evidence that she had told her cousin about the rape on New Year's Eve of 1980, and referred to the cousin's evidence "as an obvious attempt to assist Ms. Waddell in corroborating her complaint".

The defence contended that Ms. Waddell's allegation was a fabrication. Dr. Varga testified and denied that he had ever assaulted Ms. Waddell. Mrs. Varga and Mrs. Shuttleworth, both of whom also worked in the clinic, and the doctor who was in charge of the clinic all gave evidence to the effect that the events as described by Ms. Waddell could not have happened when and where she said they had happened. They also testified that the size of Dr. Varga's office and the presence of an examination table in that office made it virtually impossible for two people to lie on the floor. Ms. Waddell had testified that there was no examination table in Dr. Varga's office, but Ms. Shuttleworth testified that she recalled using the examination table in Dr. Varga's office regularly during the summer of 1979.

The defence vigorously challenged the credibility of Ms.

Waddell. It was the position of the defence that events in the life of Ms. Waddell during the 1980s left her emotionally unstable and addicted to alcohol. Ms. Waddell had begun to drink excessively in about 1987. At the same time, she was involved in a deep but turbulent love affair with a doctor named Tom O'Hara. By 1990, her parents were very concerned about her abuse of alcohol and confronted her about that abuse. She was intoxicated at the time. It was at this point that Ms. Waddell first alleged that Dr. Varga had raped her. According to the position of the defence, Ms. Waddell did not want to tell her parents about her relationship with Dr. O'Hara and the problems it was causing her, so she made up the story about being raped by Dr. Varga to explain her alcohol abuse and emotional problems.

II THE REASONS FOR JUDGMENT

As is often the case in allegations like this, the Crown's case depended on the credibility of the complainant. If she was not believed to the exclusion of any reasonable doubt, Dr. Varga had to be acquitted. The trial judge did not accept Ms. Waddell's evidence. After reviewing the evidence he concluded:

> . . . the fact that the complainant waited until more than ten years after the alleged incident to make a formal complaint, the fact that the complaint at that time was made at a time when the complainant was a heavy abuser of alcohol and that her own stepfather, on hearing the complaint, having known both Dr. Varga and Kellie Waddell, had feelings of doubt as to the truthfulness of the complaint, the fact that there is a serious discrepancy in what Ms. Waddell said she told her cousin, Randy Barlett, as to detail and his obvious attempt to assist Ms. Waddell in corroborating her complaint, the fact of her attitude and behaviour after the alleged incident, her manner of giving evidence in this trial, leaving the definite impression that she was more interested in giving evidence which was corroborative of her complaint than in giving a truthful recollection of events, having regard to all that evidence and what I have previously found and said during a review of the evidence, I am not satisfied that the Crown has proved that the incident occurred as set

forth in the indictment beyond a reasonable doubt. Therefore, the charge will be dismissed.

III THE GROUNDS OF APPEAL

The Crown alleges several errors in the conduct of the trial and in the trial judge's reasons. It is convenient to consider the alleged errors in his reasons for judgment first.

A. The alleged misdirection as to the burden of proof

Dr. Varga had undergone a vasectomy prior to August of 1979. The Crown relied on this fact to support Ms. Waddell's evidence that Dr. Varga told her during the assault that he had undergone a vasectomy. There was evidence from Mrs. Varga and Ms. Shuttleworth that Dr. Varga's vasectomy had been discussed openly in the office. The defence argued that Ms. Waddell had learned of the vasectomy through these discussions.

After reviewing the relevant evidence, the trial judge said:

> . . . the Crown has not satisfied me beyond a reasonable doubt that the only way that Ms. Waddell would have known of Dr. Varga's vasectomy was by reason of a statement to that effect during the alleged incident. I therefore specifically find that that evidence is not supportive of the Crown's position that the incident occurred.

The Crown contends that the trial judge erred in applying the ultimate burden of proof to a single factual issue: R. v. Morin, [1988] 2 S.C.R. 345 at pp. 354-55, 44 C.C.C. (3d) 193 at p. 205.

Counsel for Dr. Varga concedes that the trial judge wrongly applied the burden of proof in the above-quoted passage. He submits, however, that the error was irrelevant to the trial judge's ultimate assessment of Ms. Waddell's credibility and did not result in reversible error.

I agree with this submission. The evidence showed that Ms. Waddell could have learned about Dr. Varga's vasectomy from two

sources: one innocent (office chit chat), and the other inculpatory (his statement in response to her protestations during the attack). The trial judge could only have found that the information came from the second source if he was prepared to accept the evidence of Ms. Waddell. A consideration of the totality of the reasons indicates that he was not prepared to accept her evidence on any contentious issue. His reasons for rejecting her evidence were untainted by his inappropriate application of the burden of proof to a single piece of evidence. The Crown has not satisfied me that this error had any potential impact on the verdict.

B. Did the trial judge err in his consideration of the evidence of Lyle Begbie, Ms. Waddell's stepfather?

Ms. Waddell told her parents about the rape in February of 1990, some 11 years after it had allegedly occurred. As indicated above, it was the position of the defence that Ms. Waddell was drunk when she made the allegation, and that she lied to her parents so as to offer some explanation for her alcohol abuse while avoiding any reference to the ongoing and turbulent nature of her relationship with Dr. O'Hara.

Counsel for Dr. Varga cross-examined Mr. Begbie in an attempt to bolster that position. Mr. Begbie indicated that by February of 1990, his stepdaughter was an alcoholic. He also testified that he and his wife were very concerned about her health and safety and confronted her on occasion about her alcohol abuse in an attempt to get to the root of that problem. When confronted, however, Ms. Waddell regularly lied about where she had been or what she had been doing. Mr. Begbie agreed that as of February 1990, he had little confidence in the veracity of statements made by his stepdaughter. He attributed this to her alcohol abuse.

Mr. Begbie confirmed that Ms. Waddell was drunk when she first indicated that Dr. Varga had raped her. He also said that she made the allegation in the course of being confronted about her alcohol abuse by him and his wife. Mr. Begbie agreed that Ms. Waddell initially did not want to pursue the allegation, but that his wife, whom he said was a very forceful person,

insisted that Ms. Waddell go to see a lawyer. Finally, Mr. Begbie testified that Ms. Waddell did not tell either him or his wife about her relationship with Dr. O'Hara until some time in the summer of 1990. That relationship had existed since 1987. All of this cross-examination was relevant to and potentially supportive of the defence position.

Mr. Begbie also gave the following evidence:

> Q. And she tells you this fact that 11 years earlier she's been raped, and then your wife insists that she go to get advice about this, and she doesn't want to go, did you not think to yourself just maybe what she said in her drunken condition was not true?
>
> A. With my knowledge of Dr. Varga, I felt that it sounded a bit fantastic.
>
> Q. Okay; so I guess the answer to my question is yes, you had some feelings that maybe it wasn't the truth?
>
> A. Feelings of doubt.

The trial judge referred to this evidence in his reasons. Crown counsel characterizes the evidence as an improper comment by Mr. Begbie on the veracity of Ms. Waddell's evidence.

I do not accept that characterization. Considered in the context of the entirety of Mr. Begbie's cross-examination, this evidence was directed to the reliability of the initial revelation made by Ms. Waddell to her parents. Apart from the unsolicited reference to Mr. Begbie's knowledge of Dr. Varga, the impugned passage added very little to the overall effect of the cross-examination. Mr. Begbie had already made it clear that based upon his stepdaughter's alcoholism, her intoxicated state at the time she made the allegation, and her past history of lying to her parents while in that state, he had good reason to doubt the truth of what she said about Dr. Varga in February of 1990.

In my view, the cross-examination of Mr. Begbie, including

the impugned passage, was relevant to facts in issue and properly considered by the trial judge in arriving at his verdict.

C. The grounds of appeal arising out of the conduct of the trial

The Crown alleges that the trial judge made several errors in law in the course of the trial. All of these grounds of appeal involve certain records referable to Ms. Waddell's psychiatric and alcohol abuse treatment in 1990 after she first alleged that Dr. Varga had raped her. The trial judge ordered these records produced to the defence. They were used extensively during the cross-examination of Ms. Waddell, and some of the entries in the records were put to Dr. Fretz, Ms. Waddell's psychiatrist, when he was called as a witness for the defence.

Before addressing the specific grounds of appeal, a more general observation with respect to Crown appeals is necessary. As recently observed by Cory J. in R. v. Evans, [1993] 2 S.C.R. 629 at pp. 645-46, 82 C.C.C. (3d) 338 at p. 350, the Crown's right of appeal from an acquittal is broader in Canada than in virtually any other common law jurisdiction. In bestowing that power of appeal, Parliament determined that acquittals tainted by legal error were sufficiently injurious to the due administration of justice to demand a remedy, even if that remedy trespassed somewhat on traditional double jeopardy concepts. The Supreme Court of Canada has upheld the constitutionality of that policy choice: R. v. Morgentaler, [1988] 1 S.C.R. 30 at p. 156, 37 C.C.C. (3d) 449 at p. 542, per McIntyre J. (for the court on this issue), reversing (1985), 52 O.R. (2d) 353 (C.A.) at pp. 400-10, 22 C.C.C. (3d) 353 at pp. 400-10.

The Crown's right of appeal on any ground that involves a question of law alone is none the less an appellate remedy and not a licence to refer legal questions to the Court of Appeal for its consideration and advice. As Freedman J.A. explained in R. v. Huot, [1969] 1 C.C.C. 256 at p. 259, 70 D.L.R. (2d) 703 (Man. C.A.):

A question of law is certainly appealable to this Court. But it must be not a question of law submitted in the abstract and on which the views of the Court of Appeal are sought as a kind of consultative or advisory body, but rather a question of law directly and concretely related to the acquittal in question.

In addition, there are situations in which an appellate court should not address the merits of a ground of appeal advanced by the Crown even though that ground alleges an error in law that is germane to the acquittal. For example, the Crown cannot advance a new theory of liability on appeal: R. v. Wexler, [1939] S.C.R. 350 at pp. 353-56, 72 C.C.C. 1 at pp. 4-5, 8; R. v. Savard and Lizotte, [1946] S.C.R. 20 at pp. 33-34, 37, 49, 85 C.C.C. 254 at pp. 266, 270, 282-83; R. v. Merson (1983), 4 C.C.C. (3d) 251 (B.C.C.A.) at pp. 272-73, 273-74. Nor can the Crown raise arguments on appeal that it chose not to advance at trial: R. v. Penno, [1990] 2 S.C.R. 865 at p. 895, 59 C.C.C. (3d) 344 at p. 365, per McLachlin J. (concurring in result); R. v. Egger, [1993] 2 S.C.R. 451 at pp. 480-81, 82 C.C.C. (3d) 193 at p. 214.

These examples share a common feature. A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial. It offends double jeopardy principles, even as modified by the Crown's right of appeal, to subject an accused, who has been acquitted, to a second trial based on arguments raised by the Crown for the first time on appeal. Double jeopardy principles suffer even greater harm where the arguments advanced on appeal contradict positions taken by the Crown at trial.

D. The rulings with respect to Ms. Waddell's psychiatric and alcohol abuse treatment records

(i) The proceedings

Prior to trial, counsel for Dr. Varga sought production of numerous medical, psychiatric, employment and counselling records pertaining to Ms. Waddell. The records sought included psychiatric records from Dr. Fretz, and the records from the

House of Sophrosyne, an alcohol abuse treatment centre that Ms. Waddell had attended from July to September of 1990.

The motions court judge (who also presided over Dr. Varga's trial) made an order that the documents referred to in the notice of motion should be turned over to counsel for Ms. Waddell so he could decide whether Ms. Waddell was prepared to consent to the release of any of the records to counsel for Dr. Varga. Ms. Waddell, through counsel, agreed to release all of the requested documents save those from Dr. Fretz and the House of Sophrosyne.

Counsel for Ms. Waddell then brought a motion returnable before the trial judge, but before the commencement of the trial, for an order directing that the records from Dr. Fretz and the House of Sophrosyne were privileged at the insistence of Ms. Waddell and could not be released to counsel for Dr. Varga. On the return of the motion, the court and the Crown were provided with copies of these documents. The defence had not seen the documents. These documents were not made part of the trial record and are not before this court. Their content can be gleaned only from the references made to them in the course of the trial.

Counsel for Ms. Waddell had carriage of the motion. He called Ms. Waddell as a witness. She was cross-examined briefly by the Crown and more extensively by counsel for Dr. Varga. No other witnesses were called on the motion. Counsel for Ms. Waddell and Dr. Varga then made submissions on the privilege issue. Crown counsel said:

> . . . I'm not going to make argument on this motion, but I think I may be in a position, having seen the documents, that puts me in a superior position, so I am going to make no argument on the motion.

The trial judge ruled that the records were not privileged and directed that they be produced to counsel for Dr. Varga. Dr. Varga was arraigned the next day and the trial proceeded.

It would appear that the motion challenging production of the

documents on the basis of privilege was not part of Dr. Varga's trial. It was not suggested, however, by either the appellant or the respondent that in these circumstances the Crown cannot raise alleged errors arising out of that motion by way of an appeal from the acquittal of the respondent: R. v. Litchfield, [1993] 4 S.C.R. 333 at pp. 346-51, 86 C.C.C. (3d) 97 at pp. 108-11.

(ii) The arguments

In his factum, Crown counsel states:

> It is respectfully submitted that the case at bar raises not only the issue of what use may be made of sensitive records that are disclosed but also the issues surrounding the question of whether the records ought to be disclosed in the first place.

The issues identified by the Crown raised important and difficult questions of law. None the less, these issues, like all others, should only be addressed on a Crown appeal if, upon a consideration of the trial record, they raise questions of law that are properly the subject of a Crown appeal.

Crown counsel's first submission related to the procedure to be followed where the defence seeks access to the records of a complainant and the complainant asserts a privacy claim and resists production. Crown counsel asked the court to set down a detailed procedure governing such applications. He pointed to the absence of statutory or appellate court authority, and submitted that this court should fill that void on this appeal. At the same time, Crown counsel acknowledged that the procedure actually followed by the trial judge was appropriate and fair to all (including the complainant) concerned. In other words, Crown counsel did not allege any error of law in the procedure followed by the trial judge.

In my opinion, the court should not, absent some alleged error in law that could have affected the verdict, pass upon the suitability of the alternate procedure suggested by the Crown. To do so would be to transform the appellate function

into "a consultative or advisory one": R. v. Huot, supra, at p. 259.

The Crown next submits that the trial judge erred in holding that the defence was entitled to access to all of the contested records. Crown counsel submits that the trial judge erred in holding that none of the material was privileged, and that he further erred in failing to require the defence to demonstrate the potential materiality of the documents before gaining access to them.

The Crown took no position on the privilege issue at trial. The trial record reveals that Crown counsel had seen all of the documents, and that his decision not to advance any argument in favour of the privilege asserted by the complainant was a considered one. This is more than an instance of the Crown failing to object, which, as the law now stands, is not necessarily fatal to a Crown appeal: R. v. Cullen, [1949] S.C.R. 658 at p. 664, 94 C.C.C. 337 at p. 343. It amounts to an affirmative decision not to litigate an issue at trial. That decision had certain potential benefits for the Crown in the conduct of the trial. A conviction following unrestricted access to the records would be potentially easier to sustain on appeal than one following restricted access to these records. The Crown must live with that decision both at trial and on appeal. The accused's liberty should not be jeopardized by permitting the Crown to join issue on the question of privilege for the first time on appeal.

The second part of the Crown's submission, relating to the trial judge's ruling that the defence should have access to all of the documents, raises the same fairness concerns as the first, but in even starker terms. After the trial judge had ruled that the documents were not privileged, he directed that all of the documents should be turned over to defence counsel so that he could determine which documents he wished to refer to during cross-examination of the complainant. Crown counsel took no objection to this direction. The trial judge further indicated that after counsel had decided which documents he wished to refer to, counsel could argue the relevancy of those documents. Crown counsel then suggested that relevancy should

be argued if and when defence counsel sought to refer to the contents of one of the documents in his cross-examination. The trial judge agreed with this suggestion and copies of the documents were turned over to defence counsel. At no time did Crown counsel suggest that defence counsel's access to the documents required a preliminary showing of materiality. Privilege was the only objection to production raised at trial.

On appeal, Crown counsel resiles from that position, and argues that the trial judge was required to make some additional finding of materiality before the documents could be turned over to the defence. It would be an abuse of the appellate process to accede to this argument. Just as the Crown cannot challenge an acquittal by advancing a theory of liability for the first time on appeal, it cannot secure a new trial by advancing a new test for admissibility that contradicts the one advanced at trial: R. v. Penno, supra, at p. 895 S.C.R., p. 365 C.C.C.

Given the position taken by the Crown at trial, this is not an appropriate case in which to pass upon the standard that should be applied in determining whether the defence should have access to documents which are the subject of a complainant's privacy claims.

Crown counsel next submits that the cross-examination of the complainant concerning the contents of her psychiatric and treatment records related to matters that were of no, or marginal, relevance to the facts in issue or her credibility; and that the potential prejudice to the proceedings was much greater than any potential probative value inherent in the answers to these questions. He submits that as the potential prejudicial effect was substantially greater than any probative value, the trial judge should not have allowed cross-examination on the contents of the records. Counsel relies on R. v. Seaboyer, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321.

This contention is also advanced for the first time on appeal. Defence counsel cross-examined the complainant at length concerning the contents of her psychiatric and treatment records. That cross-examination proceeded uninterrupted for

some 65 pages of the transcript. When, after this lengthy cross-examination, Crown counsel did object, his objection related only to the cross-examination of the complainant on a specific reference in her psychiatric records. The objection was not a general one like that now advanced by the Crown. That particular objection was rejected by the trial judge. The Crown made one further specific objection to the relevancy of the cross-examination on the records during the course of a 210-page cross-examination. That objection was also rejected. Crown counsel does not contend that either ruling in and of itself amounted to reversible error.

Assuming the discretion to exclude evidence proffered by the defence, referred to in Seaboyer, is applicable here, I cannot say that the trial judge erred in not foreclosing cross-examination on the basis that its potential prejudicial effect far exceeded its probative value: He was never asked to do so by the Crown. A trial judge is always reluctant to interfere with the cross-examination of a witness, particularly a crucial witness. This trial judge was entitled to rely on Crown counsel, who was aware of the issues and the contents of the documents, to challenge the cross-examination if its prejudicial potential clearly exceeded its probative value. Nor can I assume, as Crown counsel argues I should, that because the trial judge rejected the specific objections made at trial, he would necessarily have rejected the argument now advanced had counsel seen fit to make it.

I am also satisfied that most of the cross-examination concerning the contents of the psychiatric and treatment records was proper. Some questions did address matters that were irrelevant to any fact in issue and to the complainant's credibility. These could have been prohibited by the trial judge had he been asked to do so. I would not, however, hold that the trial judge erred in law in failing to prohibit those questions on his own initiative.

In oral argument, Crown counsel also submitted that the entirety of the cross-examination of the complainant did not amount to a legitimate challenge to her credibility, but rather was an attempt at character assassination. He submits that the

cross-examination was abusive and should not have been permitted by the trial judge. In making this submission, Crown counsel does not suggest that any particular question was so abusive as to warrant reversal, but rather submits that the cumulative effect and overall tenor of the cross- examination demonstrates its abusive nature and counsel's determination to distort the trial process by putting the complainant on trial.

This argument is also raised for the first time on appeal.

A trial judge has a responsibility to ensure that no witness is harassed or otherwise mistreated when giving evidence. At the same time, a trial judge must be sensitive to an accused's right to make full answer and defence through effective cross-examination of the witnesses called by the Crown. In weighing both concerns, a trial judge is entitled to consider the position of trial counsel, and specifically the absence of any objection to the overall tenor of the cross-examination.

In deciding whether a trial judge should have prohibited cross-examination as abusive, an appellate court must also recognize the advantaged position of the trial judge. He or she is able to watch the witness and the questioner as the cross-examination proceeds, to observe the effect of the cross-examination, and to hear the tone of voice in which questions are asked and answered. The trial judge is able to use these oral and visual aids in distinguishing between cross-examination which is persistent and exhaustive, and that which is abusive. The trial judge is also able to assess the extent to which the attitude and answers of the witness contribute to the nature and tone of the cross-examination.

The cross-examination of Ms. Waddell was detailed, vigorous, and confrontational. This is hardly surprising, given that it was the position of the defence that the entire allegation was a fabrication. Defence counsel was obliged, in the service of his client, to use every legitimate means available to him to challenge and undermine the credibility of the complainant. A consideration of the entirety of the cross-examination satisfies me that counsel did not, save perhaps in a few isolated instances, go beyond the bounds permitted by our

adversarial process.

E. The evidence of Dr. Fretz

Dr. Fretz was the complainant's psychiatrist. He treated her for several months in 1990 immediately after she went to the police with her allegation that the respondent had raped her some 11 years earlier. Dr. Fretz testified as to certain observations he made concerning the complainant's mental state in the months immediately following the making of the allegation against the respondent. He also testified with respect to certain statements that had been made to him by the complainant during their therapy sessions. The Crown submits that this part of Dr. Fretz's evidence was inadmissible. This objection was taken at trial.

The statements of the complainant that the defence wished to elicit through Dr. Fretz had been put to the complainant during her cross-examination. The complainant denied that she had made many of the statements. In some instances, she testified that she had said something quite different to Dr. Fretz.

There is some authority that out-of-court statements made by a complainant in a sexual assault case are admissible under the admissions exception to the hearsay rule: R. v. Grant (1989), 49 C.C.C. (3d) 410, 71 C.R. (3d) 231 (Man. C.A.). That proposition was not advanced in this case. Nor was it argued that the complainant's statements to Dr. Fretz were admissible for their truth under the principled approach to hearsay announced in R. v. Khan, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92.

The evidence of Dr. Fretz, as to the statements made to him by the complainant, was introduced to contradict the complainant's evidence concerning the contents of her statements and to thereby undermine her credibility. His evidence was admissible for that purpose only if it met the criteria of s. 10 or s. 11 of the Canada Evidence Act, R.S.C. 1985, c. C-5. Section 10 has no application as Dr. Fretz's notes of his conversations with the complainant were not shown to be statements made by the complainant "in writing or reduced

to writing": R. v. Handy (1978), 45 C.C.C. (2d) 232 at p. 237, 5 C.R. (3d) 97 (B.C.C.A.); R. v. Cassibo (1982), 39 O.R. (2d) 288 (C.A.) at pp. 300-01, 70 C.C.C. (2d) 498 at pp. 512-13.

Section 11 of the Canada Evidence Act, however, applies to prior oral statements, and had potential application to the statements made by the complainant to Dr. Fretz. Two of the requirements of that section are significant in determining the admissibility of this part of Dr. Fretz's evidence. To be properly admissible through the evidence of Dr. Fretz, the statements made by the complainant had to be inconsistent with her evidence, and they had also to be "relative to the subject matter of the case". Defence counsel could not elicit evidence from Dr. Fretz that merely confirmed that the complainant had made a statement she acknowledged making during her cross-examination. Nor could defence counsel elicit evidence of a prior inconsistent statement made by the complainant going only to a collateral matter.

Most of the examination of Dr. Fretz concerning statements made by Ms. Waddell to him honoured the limits imposed by s. 11 of the Canada Evidence Act. For example, her statements concerning her relationship with her boyfriend and her parents were relevant to a fact in issue (the reason she made the initial allegation in February of 1990), and were arguably inconsistent with at least parts of her evidence during cross-examination. Similarly, Ms. Waddell's statement concerning her mother's role in causing her to pursue the allegation against the respondent was relevant to a fact in issue (the reason she pursued the allegation), and was clearly inconsistent with her evidence on cross-examination.

Other parts of Dr. Fretz's evidence went beyond limits imposed by s. 11 of the Canada Evidence Act. For example, the evidence that the complainant told Dr. Fretz that she had started to masturbate some time shortly after the alleged rape, if properly put to Ms. Waddell in cross-examination, certainly was not "relative to the subject matter of the case", and was therefore not provable through s. 11 of the Canada Evidence Act. Her statements concerning ongoing nightmares after Dr. Fretz put her on certain medication, and her statements with

respect to her relationship with her sister in the spring of 1990 fall into the same category. The defence should not have been permitted to prove these prior inconsistent statements. Consequently, I would hold that parts of Dr. Fretz's evidence with respect to statements made to him by Ms. Waddell were inadmissible.

IV CONCLUSION

In my view, the Crown has demonstrated that the trial judge made two errors in law. I have already addressed the effect of his error with respect to the application of the burden of proof to a single fact in issue. I must now consider whether that error, considered in combination with the improper admission of some of the evidence of Dr. Fretz, warrants the quashing of the acquittal and the directing of a new trial.

In my view, it does not. The Crown's case depended entirely on the credibility of Ms. Waddell. The trial judge found that her evidence could not satisfy him beyond a reasonable doubt that she had been raped by Dr. Varga. He listed several factors that led him to that conclusion, all of which were supported by the evidence. He made no reference to, and does not appear to have relied on, the evidence of Dr. Fretz at all.

The case against Dr. Varga was not a strong one. In addition to the problems relating to Ms. Waddell's credibility, the defence evidence, apart entirely from Dr. Varga's evidence, went some distance toward disproving the allegation as detailed by Ms. Waddell. In these circumstances, the Crown has not convinced me to a reasonable degree of certainty that the verdict would not necessarily have been the same had the trial judge not made the two errors set out above: R. v. Evans, supra, at pp. 645-48 S.C.R., pp. 350-52 C.C.C.

I would dismiss the appeal.

Appeal dismissed.