Regina v. Norman

[Indexed as: R. v. Norman]

16 O.R. (3d) 295
[1993] O.J. No. 2802
Action No. C13342

Court of Appeal for Ontario,
Finlayson, McKinlay and Abella JJ.A.
November 26, 1993

Criminal law -- Evidence -- Expert evidence -- Complainant claiming to have remembered rape by accused 18 years later during therapy -- Complainant's therapists testifying as to her memory recall process -- Trial judge erring in taking evidence of therapists as corroborative of complainant's story.

Criminal law -- Trial judge erring in determining credibility solely on basis of complainant's demeanour despite psychiatric evidence that persons in complainant's position often believe what they say regardless of whether or not it is true -- Trial judge neglecting to examine reliability of complainant's testimony and in effect failing to give effect to presumption of innocence.

The accused was charged with raping the complainant, then 13 years old, in 1973. The complainant alleged that she had forgotten the rape, and remembered it in fragments in the course of therapy sessions. The Crown led expert evidence to describe the symptoms constituting child abuse accommodation syndrome in order to provide a psychiatric basis for the complainant's explanation for the lapse of time between the alleged offence and the laying of the information. Two therapists who treated the complainant also testified, describing the complainant's memory recall as fragmented

initially and disclosing more details as the sessions went on. A psychiatrist testifying for the defence stated that, in his opinion, a memory suppressed by disassociation from post-traumatic stress disorder would not come back in fragment and be built up over time. He also stated that a therapeutically induced memory recall process may or may not elicit real memories of what actually occurred, and that, in either case, the patient is convinced of the truth of what he or she is recalling.

The accused was able to establish that the colour of the car he drove at the time of the alleged offence was different from that described by the complainant and a friend of hers who testified for the Crown. Further, he proved that he was not working at the Co-op at the time or place where the complainant said he was, and she had testified that she recalled walking past him five days a week and that the accused had called out to her. Moreover, the complainant had not noticed that the accused's index finger was amputated and that the first and second joints of his next finger were permanently bent, despite the fact that she testified that the accused had large hands. Those injuries were the result of an accident that preceded the alleged offence.

The trial judge made no findings with respect to these details and inconsistencies. He found that the complainant was a credible witness, and stated that the evidence of the two therapists corroborated her testimony. He ignored the testimony of a number of defence witnesses who gave evidence as to the accused's general reputation for integrity and his lack of disposition towards aggressive or violent conduct. The Crown asked the complainant in re-examination if she had heard "rumours" about the accused, and the complainant replied that she had heard that he had been dismissed from a job because of inappropriate sexual advances. This was a rumour that the complainant had earlier asked the police to investigate; she had received back a report that it was entirely unfounded. The trial judge overruled the defence objection to the question, ruling that the defence had put character in issue.

The accused was unable to remember many details about the occasion on which the offence was alleged to have been committed. The trial judge described the accused's evidence as "inconsistent" and "selective".

The accused was convicted. He appealed.

Held, the appeal should be allowed and a new trial ordered.

Expert evidence is of considerable value in cases such as this one. The trier of fact is unlikely to be familiar with such phenomena as child abuse accommodation syndrome. However, the knowledge that a psychiatric condition exists that could be responsible for the complainant's lack of memory does not relieve the trier of fact of the responsibility to satisfy himself whether the accused committed the alleged offence. The expert evidence in this case was neutral so far as the fact-finding process was concerned. The trial judge apparently treated the evidence of the therapists as corroborative of the validity of the memories recalled. Alternatively, he may have regarded the statements to the therapists as corroborative in the sense that they were prior consistent statements. Either treatment of the evidence was erroneous. Moreover, the trial judge failed to appreciate that a significant feature of the therapists' testimony was that it described a recall process which did not conform to a real memory disclosure as described by either the Crown or defence psychiatric witnesses. Lastly, the trial judge effectively disregarded the defence expert evidence by relying upon an improper question put by the Crown in cross-examination asking whether the expert's opinion would have been affected if there had been an independent witness to the sexual assault.

The question by the Crown to the complainant about rumours she may have heard was improper, and effect should have been given to the defence objection.

As the expert evidence adduced at this trial indicated, the appearance of honesty and integrity on the part of witnesses such as the complainant is of little assistance in assessing the credibility of their testimony, since these witnesses

believe in what they are saying, whether it is accurate or not. This insight was apparently lost on the trial judge.

The trial judge failed to give effect to the presumption of innocence. He described the accused's inability to recall the minutiae of the occasion on which the offence allegedly occurred as "selective" recall, while excusing the complainant's inconsistencies as "insignificant when related to the charge". Thus, he effectively shifted the onus onto the accused to prove his innocence.

The trial judge apparently determined credibility solely on the basis of the demeanour of the complainant and a friend of hers who testified for the Crown. An assessment of credibility based on demeanour alone is not good enough in a case where there are so many significant inconsistencies. The demeanour and credibility of the complainant are not the only issues; the reliability of the evidence is what is paramount. The evidence in this case should have been subjected to more careful scrutiny than it received. The trial judge wrongly failed to consider evidence which bore directly on the issue of guilt or innocence.

R. v. Marquard (1993), 159 N.R. 81 (S.C.C.), consd

Other cases referred to

Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354 (B.C.C.A.); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 14 C.C.L.T. (2d) 1, 142 N.R. 321; R. v. Franois (1993), 14 O.R. (3d) 191, 21 C.R. (4th) 350, 82 C.C.C. (3d) 441 (C.A.); R. v. Harper, [1982] 1 S.C.R. 2, 65 C.C.C. (3d) 193, 133 D.L.R. (3d) 546, 40 N.R. 255; R. v. Howard, [1989] 1 S.C.R. 1337, 48 C.C.C. (3d) 38, 69 C.R. (3d) 193, 34 O.A.C. 81, 96 N.R. 81; R. v. Jones (1988), 44 C.C.C. (3d) 248, 66 C.R. (3d) 54, 29 O.A.C. 219 (C.A.); R. v. Manahan (1990), 61 C.C.C. (3d) 139 (Alta. C.A.); R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) [affd [1985] 1 S.C.R. 662, 19 C.C.C. (3d) 1, 45 C.R. (3d) 289, 19 D.L.R. (4th) 314, 9 O.A.C. 321, 59 N.R. 241]; R. v. Mohan (1992), 8 O.R. (3d) 173,

71 C.C.C. (3d) 321, 13 C.R. (4th) 292 (C.A.); R. v. Pressley (1948), 94 C.C.C. 29, 7 C.R. 342, [1949] 1 W.W.R. 682 (B.C.C.A.); R. v. Profit (1993), 15 O.R. (3d) 803n (S.C.C.); White v. R., [1947] S.C.R. 268, 3 C.R. 232, 89 C.C.C. 148

Statutes referred to

Criminal Code, R.S.C. 1970, c. C-34, s. 144 [repealed 1980-81-82-83, c. 125, s. 6]

APPEAL by the accused from his conviction for rape.

Marc Rosenberg, for appellant.

Catherine A. Cooper and Susan L. Reid, for the Crown, respondent.

The judgment of the court was delivered by

FINLAYSON J.A.: -- David L. Norman appeals his conviction on July 23, 1992 of having sexual intercourse with X, a female person who was not his wife, without her consent, contrary to s. 144 of the Criminal Code, R.S.C. 1970, c. C-34, as amended. The offence is alleged to have taken place in September 1973, when the appellant was 28 years of age and the complainant was 13 years old. The matter went to trial in the spring of 1992, over 18 years after the events in question transpired.

The facts

The complainant, X, and George Coggins, a witness in this case, belonged to the Waterford Baptist Church. The appellant belonged to the Villa Nova Baptist Church. The appellant and Coggins were adult leaders for the area's Baptist youth groups. Each church had its own group, and from time to time they would get together for joint events. A corn roast at Hay Creek Conservation Area on September 8, 1973 was such an occasion. It is here that the rape, as such it was in 1973, is said to have

occurred. The following is an analysis of the evidence.

Evidence of the complainant

The complainant testified that she went to the corn roast in Coggins' car with Karen Thompson (nee Zimmermaker), an older member of her church's youth group, and Brenda Goebel (nee Cooper), a close friend and neighbour who did not regularly attend either Baptist Church. The complainant testified that once they had arrived at the picnic site, the appellant asked her if she wanted to come with him to his car to get corn for the roast. The car was some 300 feet away. She said she remembered feeling honoured and proud to be asked and so she went with him. As they were walking, she put her arm through his and "was kind of dancing around being silly and just talking".

When they reached the car, the appellant told her he had something to show her and guided her through the car park to some bushes. She stopped and asked him what he was going to show her; he pulled her into the bush. While she struggled and tried to break free he took off his belt, "whipped" it around her waist and flipped his wrist to make her fall. The complainant then described a violent sexual assault in which she was forced to perform fellatio and was raped. She testified that she shook her head back and forth and said "No" to the fellatio but the appellant replied, "You want it you sexy bitch". When he forced his penis inside of her, she again said "No", and he laughed and said "Yes". She said the appellant put his hands around her throat to prevent an outcry, threatened to kill her if she did not stop trying to shout, and punched her in the side of the head knocking her unconscious.

When the complainant regained consciousness, it was darker. She returned to the area of the campsite. She went into the bathroom (an outhouse I believe) and sat on the floor crying. People came to the bathroom and asked if she was "okay"; she told them to "take off". After some time, the complainant left the bathroom and approached her friend Brenda who was sitting by herself away from the group. She asked Brenda if her mascara was smeared. Brenda replied that "she looked fine", and asked

if she was alright. Although the complainant was not certain at trial, she thought she also remembered Coggins asking her if she was alright later on in the evening. She was certain, however, that she expressed to him a desire to go home. As a result she, Brenda and Coggins left the corn roast early.

The complainant told no one but Brenda about what had occurred. But even this was only a passing reference. While walking to school soon after the incident the complainant said to Mrs. Goebel that she did not want to take their normal route because it took them past where she said was the appellant's place of employment. Mrs. Goebel testified that she responded to this by asking "so?" The complainant replied, "well that's the guy that raped me".

In October of 1987, the complainant began counselling for childhood sexual abuse which appears on the limited record to be unrelated to the sexual assault in issue here. According to her best friend Goebel, this childhood abuse involved many persons including the complainant's great uncle, her uncle and her grandfather. The complainant testified that through counselling she was able to recall memories of both the incident with the appellant and the earlier abuses she had suffered. These memories, she said, had been completely blocked from her mind until she entered therapy in 1987. Over the course of her counselling she experienced a number of memory flashbacks with respect to these events. There was expert evidence at trial concerning this self-induced memory blockage which is now called by some psychologists child abuse accommodation syndrome.

Before entering therapy, the complainant had no memory of the rape she later alleged David Norman to have committed. She knew only that seeing the appellant Norman aroused in her great fear. She recalled that she and the appellant had been together at the corn roast, and she could remember that she went with the appellant to get corn, but she could not recall what occurred after that, until she underwent therapy treatment. After approximately 100 treatments, the complainant's recollection of the alleged rape gradually returned. The recollection included details of what the appellant had been

wearing: a belt made of gold and silver with an unusual design; a brown plaid shirt; brown work pants with a good crease; and dark boots with a zipper on the side. She also recalled that he had freckles or a rash on the shaft of his penis.

In October 1988, after regaining some memory of her alleged assault at the hands of the appellant and after determining the date of the corn roast by calling Reverend Hahn, a Baptist minister who had been present at the event, the complainant went to the Waterford police. She asked the police not to lay charges immediately, however, because she was involved in another sexual abuse case against her uncle. She did not feel that she could handle two cases at the same time.

During the period following the recovery of her memory about her various sexual abuses, the complainant became active in a child sexual assault survivors group and was interviewed by various newspapers and other media.

In early October of 1989, she accosted the appellant and his wife at a fair and said to Mrs. Norman: "Did David ever tell you that he raped me on September 24th, 1973 at a corn roast?" In a letter to Mrs. Norman, dated October 10, 1989, the complainant repeated the allegation of rape and expressed concern that the appellant might be committing incest with his daughters. She also asked the police to investigate whether the appellant had been fired from his employment for improper behaviour; she had, she said, heard rumours to this effect. On April 16, 1990, her parents wrote to the appellant demanding that he resign from the office of vice-president of the 4-H Leaders Association because they had been "aware of his crime for some time now, and finding you in this position of trust where similar incidents could occur causes us great distress". A lawyer for the appellant informed [X's parents] that they should stop harassing the appellant or they would face a civil suit.

According to police notes, the complainant asked that charges be laid on May 5, 1990. These notes also make reference to a letter from the appellant's lawyer to the complainant's parents. At some point in this narrative, the uncle, whose

sexual abuse case she had accorded priority, died.

Evidence of Brenda Goebel

Brenda Goebel was described by the Crown as an independent witness; she was scarcely that. She had been, since Grade 5, the best friend of the complainant. Their relationship was described by the complainant as sisterly. Further, the manner in which Mrs. Goebel's memory was recalled should have caused her testimony to be subjected to the closest of scrutiny. She had been with the complainant on the night of the alleged rape but she could recall nothing about the evening until she was reminded of it in 1988. Sometime in that year, the complainant asked Mrs. Goebel in a telephone conversation if she remembered the corn roast. When she replied that she did not, the complainant said: "Oh sure you do, you were there with me. That was the corn roast that I was raped at." According to Mrs. Goebel, at that point she had a flashback or a memory of the complainant coming out of the bush and she said: "You know, you're right, I do remember." The complainant told her to write down what she remembered. Mrs. Goebel later told the police that she had a memory of the complainant coming out of the bush but that she could not recall seeing the rape itself.

Sometime later in 1988, at Mrs. Goebel's request, the two friends went to the conservation area to see if their joint observations would trigger some further memory. Apparently it did not in the case of Mrs. Goebel. However, she had another memory flashback subsequently when she received a Christmas card from a mutual friend of hers and the complainant's. On the basis of this flashback she recalled far more of the events of 1973 than she had hitherto. In addition to the information set out in her police statement, Mrs. Goebel now remembered that she had gone looking for the complainant after being told that she and the appellant were "fucking". She followed a path in the bush, pushed aside some limbs, and saw the complainant lying on her back with the appellant on top of her. They appeared to be having intercourse. She was stunned and returned to the picnic table. Later, the appellant arrived at the campsite with the corn. In Mrs. Goebel's words, "he seemed very happy", laughing as if someone had told him a good joke.

There is nothing on the record which explains why Mrs. Goebel would be subject to the same memory blockage and recall process as the much-abused complainant. Mrs. Goebel explained, without elaboration, that she came from a dysfunctional family. No other explanation was offered for her having forgotten what she saw her friend do or say that evening. Crown counsel made an attempt in this court to relate Mrs. Goebel's flashbacks to child abuse accommodation syndrome, but there was no expert testimony to this effect at trial. I will deal with this disorder later when I touch on the expert evidence. In my view, however, it trivialises post-traumatic stress disorder to say, as the Crown did on appeal, that Mrs. Goebel suffered from a form of this syndrome as a result of her friend's experience.

Another aspect of Mrs. Goebel's memory recall concerns me: the complainant insisted at trial that she had no memory of the content of her first telephone conversation with Mrs. Goebel in 1988, the conversation that provoked Mrs. Goebel's first flashback. Indeed, the complainant appeared anxious to distance herself from Mrs. Goebel's memory recall process, stressing that on their revisiting the scene of the alleged rape, they were careful not to influence each other's memories. However, notwithstanding these precautions, as counsel for the appellant pointed out, there were remarkable similarities in their evidence. It concerns me that these similarities often arose when the particulars were wrong or at least seriously in dispute. I note, for example, the erroneous testimony of both these witnesses concerning the colour of the appellant's car and the location of his place of employment. This testimony suggests collaboration in the development of the memory process.

Evidence of neutral witness

(a) Karen Thompson. She testified to having grown up in the Waterford area and being close to both the [X] and the Norman families. She was older than the complainant, however, and did not have a close personal relationship with her. Mrs. Thompson recalled that she and the complainant had attended the corn roast. According to her own testimony, Mrs. Thompson left the

picnic area for a while to walk along the creek with a group of young people. When she returned, she had a sense that someone was missing but could not remember who it was. She went up to what she thought was a change room and heard a girl crying. She did not know who. Mrs. Thompson recalled asking the girl if she was alright and being told she was. She did not report the matter to anyone.

(b) Reverend Adolph Hahn. This witness was truly independent. He testified that the complainant had first contacted him in the summer of 1987 to ask about the date of the corn roast. After looking it up in his diary, he informed her that the event had taken place on September 8, 1973. She expressed some surprise that it was so long ago.

Reverend Hahn, like George Coggins, had no memory of anything untoward happening at the corn roast, but, significantly, he did recall the appellant coming up to him and asking if it was time to get the corn. Upon being told that it was, the appellant turned to a girl who Reverend Hahn later discovered was the complainant, and they both left together. The appellant returned to the fire with a bag of corn. He was alone, but shortly after, the girl appeared. This is important because both the complainant and Mrs. Goebel testified that the complainant did not return to the fire at all that night.

Reverend Hahn's evidence is also significant because it is entirely consistent with one of the memories of the complainant recorded in the note book where she described her memory recall. She stated therein: "I know when we came back to the circle that I had grass in my hair and someone commented knowingly on how long we had been gone."

(c) George Coggins. Mr. Coggins was called as a character witness for the appellant. His testimony on the events at the corn roast is notable only for what it does not say. He did not recall anything unusual happening at the corn roast including being asked by the complainant to take her home early.

(d) Robert Raafleub. This witness had been employed at the Norfolk Co-op for 38 years and was for many of those years the

branch manager at Waterford. The importance of his evidence stems from the complainant's claim that she and Mrs. Goebel used to see the appellant working at the Alice Street outlet of this Co-op on their way to school in Grade 9. Mrs. Goebel said that they saw him at least four out of the five days a week they went past the Co-op. The appellant, she says, would often say "Hi" to the complainant, but not to her. He would also come out and watch them as they walked by. The complainant said that the appellant would be loading a truck or just working and would come to the window and say "Hello", and they would "goof around a little bit, just talk". Raafleub corroborated the appellant's evidence that he did not work for the Co-op in the summer and fall of 1973. Instead, said Raafleub, the appellant was employed by the Co-op from March 29, 1971 to April 28, 1973 at the McCool St. outlet, not at the one on Alice St. He left to work for a farmer at the end of April 1973, and was re-employed at McCool St. on October 29, 1973. He worked there until July 31, 1987 when he took up farming full-time. The McCool St. outlet was not on the complainant's route to school.

The trial judge did not deal with Mr. Raafleub's evidence in his reasons at all. Neither did he mention the evidence of another Norfolk Co-op employee, Donald Snow. Mr. Snow testified that the appellant was in his crew at the Alice Street outlet in March of 1971. In cross-examination Mr. Snow casually stated that Mr. Norman started to work with him in 1971, "usually December to March". This was a cryptic comment but it was subject to no further cross-examination or re-examination. Crown counsel on appeal suggested that Snow's evidence was capable of supporting a finding that the appellant lied and Raafleub was mistaken about the location of the appellant's usual place of work. However, no such finding was made. There was at minimum a duty on the part of the trial judge to consider this evidence in light of the suspicion it casts on the complainant's and Mrs. Goebel's view that the appellant was interested in the complainant.

Additionally, the joint evidence of the change of route after the corn roast was put forward to support the complainant's testimony about the sexual assault and her consequent fear of the appellant. But was this evidence accurate? Also, why did

Mrs. Goebel have to ask her friend the reason for the change in route if, as she later testified, she had seen what had happened? If Mrs. Goebel had witnessed the rape, as she alleges, would it not have been obvious to her that the complainant would wish to avoid her assailant? Mrs. Goebel could not have already forgotten the incident; even the complainant had not lost her memory of the event that soon. These obvious questions should have been addressed in the reasons of the trial judge.

Evidence of the appellant

The appellant testified and denied any sexual contact with the complainant. His memory of what did take place was understandably vague; he was not, after all, accused of any impropriety until some 15 years after the event. He attempted to prove factually what was provable, but, in the final analysis, he relied upon a categorical denial. The sum of the collective remembrances of the other witnesses at the corn roast was that nothing happened to remember.

The appellant recalled attending the corn roast. He testified that when he went to his car to get supplies he was accompanied by a girl whom he had not known previously. She was flirtatious, he recalled, and sat on the trunk of his car as he was trying to open it. After repeated requests, she removed herself, the appellant got the supplies and they both returned to the fireside. Some days later he ran into the girl and, recognizing her from the corn roast, they briefly spoke. He denied all contact with the girl, apart from these two occasions. Furthermore, he stated that he did not work at the Alice St. outlet of the Co-op.

The appellant denied that he even owned, much less wore to the corn roast, the clothing the complainant alleged he was wearing. The belt she described at trial was particularly distinctive. In her initial statement to the police, she made no mention of the belt or the use made of it in throwing her to the ground. Her explanation was that she did not have then a complete memory of the event. The appellant also said that the car he drove at that time was red and he produced a picture of

it along with registration for the year 1973. This contradicted the complainant, who recalled that the car was a brownish colour with gold or greenish metal flake, and Mrs. Goebel, who said it was a light greenish colour. He also denied ever having freckles or a rash on his penis. This latter piece of evidence takes on greater significance when the defence psychiatrist testified that the complainant's memory recall of such a condition on the appellant's penis was "bizarre". It was one of the reasons he gave for doubting the accuracy of her memory. Finally, the appellant showed the court that his index finger was amputated and that the first and second joint of his next finger was permanently bent. This disfigurement was not noticed by the complainant notwithstanding that she testified that he had large hands. The appellant and his doctor testified that the injuries were the result of an accident that preceded the alleged rape. The trial judge made no findings with respect to these significant details and inconsistencies. Indeed, he did not even refer to them.

The trial judge did not give any reasons for disbelieving the appellant, although he must have done so in order to convict. He limited his remarks to saying the appellant's evidence was "inconsistent" and later that it was "selective". His examples of inconsistency and selectivity are unfortunate. He said that the appellant could not recall this specific corn roast. Actually, the appellant testified that he remembered this corn roast because it was the only one held at the Hay Creek Conservation Authority; it was the year he had trouble remembering. The trial judge understood the appellant to have testified that he did not know what supplies he took to the corn roast. This, said the trial judge, was troubling because it had been the appellant, according to Reverend Hahn, who suggested a corn roast due to his good crop of corn. The appellant did not grow corn and he never said that he did not bring corn to the roast; he simply said he could not remember if he brought it on this occasion.

Use of expert testimony

The Crown elected to introduce its case by calling a psychiatrist, Dr. Pickering, to describe an aggregate of

symptoms constituting what is now known as child abuse accommodation syndrome. The expert testimony provided a psychiatric basis for the complainant's explanation for the lapse of time between the alleged offence and the laying of the information. This testimony also explained the role therapy can play in the retrieval of memory. These are proper uses of expert evidence. In a recent decision of the Supreme Court of Canada, R. v. Marquard, unreported, released October 21, 1993 [now reported 159 N.R. 81], McLachlin J., for the majority of the court, stated at pp. 24-25 [p. 105 N.R.]:

> [T]here may be features of a witness' evidence which go beyond the ability of a lay person to understand, and hence which may justify expert evidence. This is particularly the case in the evidence of children. For example, the ordinary inference from failure to complain promptly about a sexual assault might be that the story is a fabricated afterthought, born of malice or some other calculated stratagem. Expert evidence has been properly led to explain the reasons why young victims of sexual abuse often do not complain immediately. Such evidence is helpful; indeed it may be essential to a just verdict.
>
> For this reason, there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact.

However, I have a serious concern that the expert testimony in the case on appeal was not restricted to this purpose. The Crown at trial and the trial judge appear to have treated the Crown's psychiatric testimony and particularly the evidence of two therapists as corroborative of the validity of the memories recalled by the complainant through the counselling process. To quote McLachlin J. again in Marquard, at p. 24 [pp. 104-05 N.R.]:

> A judge or jury who simply accepts an expert's opinion on the

credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter: see R. v. G.B. et al. (No. 1) (1988), 65 Sask. R. 134 (C.A.), affd. [1990] 2 S.C.R. 3 . . . at p. 149, per Wakeling J.A. Credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis. The expert who testifies on credibility is not sworn to the heavy duty of a judge or juror. Moreover, the expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict. Finally, credibility is a notoriously difficult problem, and the expert's opinion may be all too readily accepted by a frustrated jury as a convenient basis upon which to resolve its difficulties. All these considerations have contributed to the wise policy of the law in rejecting expert evidence on the truthfulness of witnesses.

(a) Dr. Margaret Ruth Pickering. This witness was accepted by the defence as an expert in child psychiatry and child sexual abuse. She testified to the condition known as child abuse accommodation syndrome which is a variant of a larger category of psychiatric illness known as post-traumatic stress disorder. A victim of this syndrome would put an experience such as the alleged rape out of her mind, Dr. Pickering said, and it can be literally decades before that memory is restored through a series of flashbacks. These flashbacks frequently occur during therapy when the patient, addressing issues from her past, "begin[s] to access memories that have been closed off". These disassociated memories come back in "bits and pieces", with some early flashbacks being "tiny little discreet bits", yet nonetheless accompanied by powerful and vivid feelings and images. As the trial judge noted, Dr. Pickering's evidence was that the validity of a memory recall can be attested by the intensity of the images at the time the person is experiencing the memory flashback and the consistency of the details.

(b) Diehl Marion Elkin was one of two therapists who treated

the complainant. She is a clinical co-ordinator of an in-patient unit at St. Joseph's General Hospital at North Bay and has a degree in sociology and psychology from Wilfred Laurier University. Ms. Elkin first met the complainant at the Nova Vita Women's Shelter in Brantford when the complainant sought advice and counselling after listening to a radio program on sexual abuse. Following this initial contact, Ms. Elkin was involved in approximately 63 individual and 18 group therapy sessions with the complainant. Her evidence was very brief. When asked about the manner of the complainant's memory recall, she responded in full:

> Fragmented initially and memory became clearer over a time with memory sessions.

(c) Dorothy Maclellan was the other therapist. She has a B.A. in psychology and social work from McMaster University and a Master of Social Work from the University of Toronto. She gave the complainant individual counselling. In her testimony, Ms. Maclellan described the complainant's memory recall process. During the initial disclosure of the rape, she said, the complainant was "muted in terms of not showing a lot of affect, and that's very, very common for incest survivors who are disclosing for the first time, especially in a group situation". Later the complainant disclosed more details and "disclosed more emotion".

The trial judge accepted the written submissions of the Crown that the evidence of these two therapists corroborated the testimony of the complainant. I mention the source of the word "corroborated" because Crown counsel on appeal suggested that the use of this word by the trial judge was inadvertent and of no significance. I do not accept this explanation. I think it is clear from the reasons of the trial judge that he accepted the submissions of the Crown at trial that the testimony of the two therapists in the context of the evidence of Dr. Pickering was corroborative of the complainant's evidence. What is unfortunate is that he did not specify in what regard it was corroborative. This evidence certainly suports the fact that the complainant underwent therapy and experienced a recall process, but these matters were not in

dispute. Because of the brevity of the trial judge's reasons, I am left with a concern that he treated this evidence as corroborative of the validity of the memories recalled, notwithstanding his earlier ruling that this evidence could not be used for oath helping. Alternatively, he may have regarded the statements to the therapists as corroborative in the sense that they were prior consistent statements. They were not, however, admissible for that purpose: see R. v. Jones (1988), 44 C.C.C. (3d) 248, 66 C.R. (3d) 54 (Ont. C.A.), and R. v. Manahan (1990), 61 C.C.C. (3d) 139 (Alta. C.A.). Thus, under either interpretation, the trial judge's treatment of this evidence is very troubling.

My concern in this area is heightened by the trial judge's approach to the issue of credibility. He appears to have relied, in his findings, almost exclusively on his impression of the complainant in the witness box; he undertook virtually no analysis of her evidence. When he then said that her evidence was corroborated by that of the therapists, he could be taken to mean that he considered the fact that her therapists were prepared to testify would by itself support the integrity of the recall process. With corroboration stated as it was in his reasons, the concern is that the trial judge treated the therapists' evidence as confirmation of the truth of the recollections testified to by the complainant.

Even if I am wrong in my assessment of the trial judge's reasons in this respect, it is clear that he failed to appreciate that a significant feature of the testimony of the therapists was that it described a recall process which did not conform to a real memory disclosure as described by either the Crown or defence psychiatric witnesses. Dr. Pickering said that the validity of the memory recall can be partially attested to by the intensity of the images at the time the patient is experiencing the memory flashback. She talked of powerful and vivid feelings and images, not of muted responses. The defence psychiatrist, Dr. Carr, makes the same point as to the vividness of the memory recall and the intensity of emotion associated with it. As I shall develop, Dr. Carr goes further and says that a real memory recall would be total, not fragmented.

(d) Dr. Anthony Carr. This witness is a psychiatrist who testified for the defence. He is an associate professor at McMaster University and a staff psychiatrist at Hamilton Civic Hospital. From 1986 to 1991, he was Chief of Psychiatry at Hamilton Civic Hospital. His practice emphasizes the areas of substance abuse and memory. He has also treated adults who have been sexually abused.

Dr. Carr testified that sexual abuse accommodation syndrome is not a recognized psychiatric disorder but he did, however, confirm much of what Dr. Pickering said about post-traumatic stress disorder and the related concept of rape trauma syndrome. In particular, he agreed that this disorder can produce a dissociative reaction which frequently includes memory suppression or repression. One of the key characteristics of this phenomenon, he said, is that the memory repression will be complete; the patient will have no memory of the traumatic event. At some later point in his or her life, perhaps cued by some experience, the person will recover all of the memory "very vividly, not as a dimly remembered event, but as something which is really very complete in detail. There's a kind of revelation quality to the remembering." In Dr. Carr's opinion, a memory suppressed by dissociation from post-traumatic stress disorder would not come back in fragments and be built up over time as was the complainant's memory.

More significantly, Dr. Carr stated that a therapeutically induced memory recall process may or may not elicit real memories of what actually occurred. In either case, the patient is convinced of the truth of what he or she is recalling. Honesty of recall is not a factor; the concern is instead the reliability of the recall.

Dr. Carr testified that a memory may arise through a process of suggestion from a therapist. A patient may be told that she has a memory, that she must recall it and that it is important for her well-being that she recall it. In such instances, the patient may begin to develop memories, the process of suggestion having instilled in him or her a desire, or a perceived need, to do so.

On the other side of the coin, Dr. Carr testified that the therapist who is encouraging this memory recall process is not disposed to be critical of the memory. He or she does not wish to inhibit this process, for to do so might mean losing the trust and confidence of the patient. The accuracy of the memory is not significant to the therapeutic process. The therapist must work with whatever memory the patient has. While it is difficult to determine whether a memory is accurate, according to Dr. Carr, these traumatic memories are usually recalled very vividly, very clearly, a memory engraved in indelible detail. It does not, in his view, have the fumbling qualities of other memories.

Dr. Carr was asked a hypothetical question which appears to me to accurately reflect the memory disclosure described by the complainant. Dr. Carr answered that on the hypothesised facts "a false memory accumulated by suggestion was very much more likely than that this had been a real recall of childhood experience".

The trial judge did not come to grips with this expert evidence. He neither accepted nor rejected it. At one point, with reference to the hypothetical, the trial judge said that Dr. Carr "assumed certain facts that did not exist in this trial". I do not know to what facts he was referring. It appears to me that the learned trial judge disregarded this expert evidence by relying upon a question put to Dr. Carr on cross-examination. The trial judge said:

> On cross-examination he was asked if he was told that there was a witness to the rape, would that affect this conclusion. He replied that if there was an independent witness that said the rape had occurred, it would very strongly suggest that it had occurred.

(Emphasis added)
This was an entirely improper question. An expert witness may be cross-examined as to whether he or she considered relevant facts in forming an opinion and whether irrelevant facts were relied upon: see R. v. Howard, [1989] 1 S.C.R. 1337, 48 C.C.C.

(3d) 38, and the judgment of Lamer J. at pp. 1348-49 S.C.R., pp. 46-47 C.C.C. In Howard, the issue was whether a footprint belonged to a co-accused or some other person. The expert contended that the footprint was not that of the co-accused. In cross-examination the witness was confronted with the fact that the co-accused had pleaded guilty to the murder and had acknowledged that it was his footprint. Lamer J. held that the question was irrelevant and should not have been asked.

Here, the fact of an "independent witness" was not relevant to the expert's opinion. Dr. Carr based his analysis on two related questions: was the memory recall process of the complainant flawed; and was the memory described by the complainant, in the circumstances of the hypothetical, more probably inaccurate than accurate. If the court has evidence, independent of the victim, on which it is prepared to rely for a finding of guilt, there is no need for it to concern itself with opinion evidence that casts doubts on the validity of the recall process of the victim. But that is a finding that the court must ultimately make and it is not proper to cross-examine an expert witness on the basis that he should accept as part of his hypothesis that there is other evidence that tends to establish the guilt of the accused. The question is the equivalent of asking the expert if his hypothetical would still be valid if the accused was guilty. The inquiry is irrelevant.

Character evidence

The defence called a number of character witnesses who testified as to the appellant's general reputation for integrity and in particular his lack of disposition towards aggressive or violent conduct. This evidence was ignored by the trial judge. I appreciate that the Supreme Court of Canada has recently held in R. v. Profit, unreported, released October 7, 1993 [now reported 15 O.R. (3d) 803n], that as a matter of weight the trial judge is entitled to find that the propensity value of character evidence as to morality is diminished in sexual assault cases involving children because the sexual misconduct occurs in private. The court did not say, however, that the trial judge should ignore character evidence

altogether. Indeed, this evidence was particularly germane in this case, where it went to propensity to violence, not just morality.

Another significant error in this case cannot pass without comment. The Crown at trial asked the complainant in re-examination if she had heard "rumours" about the appellant. She replied:

> I had heard that -- well during his employment at the Co-op that he had been -- made some inappropriate sexual advances to a woman that was purchasing a product there, and that he was dismissed because of that.

This was the very rumour that she had earlier asked the police to investigate; she had received back a report that it was entirely unfounded. It was irresponsible for the Crown to ask this question, knowing the rumour was groundless. The question was improper in any event, and effect should have been given to the defence objection. Accepting the ruling of the trial judge that the defence had put character in issue, the Crown was restricted to calling evidence of general reputation and could not rely on specific acts of bad conduct unless they fell in the category of similar fact evidence: see R. v. McNamara (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) at pp. 348-49. The Crown certainly cannot rely upon a rumour which the police investigation had determined to be unfounded. In ruling the question proper, the trial judge stated:

> The court will consider that. You also have the right to call character evidence.

I agree with counsel for the appellant on appeal: this is another reason why the trial judge was obliged to direct his mind to the evidence of good character tendered by the appellant.

Analysis

From the above synopsis of the evidence, it is apparent to me that the threshold issue in this case is whether the sexual

assault occurred at all. The rape, as described by the complainant, called for careful scrutiny by the trier of fact. "Historical" sexual assault cases are not uncommon and the memory recovery process in young victims of such abuse is well recognized by judicial authority: see R. v. Franois (1993), 14 O.R. (3d) 191 at pp. 195-96, 21 C.R. (4th) 350 (C.A.), and M. (K.) v. M.(H.), [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, and particularly the judgment of La Forest J. at p. 17 S.C.R., p. 293 C.C.C. This does not mean, however, that the trier of fact should not exercise caution. I note that in Franois Robins J.A., speaking for the majority of the court in upholding the conviction of the accused by a jury, emphasized the precautions taken by the trial judge in instructing the jury. The trial judge had reviewed the evidence pertaining to prior inconsistent statements by the complainant and other differences in her evidence relating to the number of times that she had been sexually assaulted. He instructed the jury on more than one occasion that these were matters for it to consider along with her explanations and determine what impact, if any, these concerns had on her credibility.

Expert evidence is of considerable value in these cases. The trier of fact is unlikely to be familiar with such phenomena as the child abuse accommodation syndrome: see Marquard, supra, and discussion on the use of expert testimony in child abuse cases in R. v. Mohan (1992), 8 O.R. (3d) 173 (C.A.) at p. 179, 71 C.C.C. (3d) 321 at p. 327. Without such assistance, the failure of the complainant to come forward with an allegation of a rape said to have occurred so many years ago might well be incomprehensible to the trier of fact. On the other hand, the knowledge that a psychiatric condition exists that could be responsible for the lack of memory does not relieve triers of fact of their responsibility to satisfy themselves whether the appellant committed the alleged criminal offence. The issue is not whether the complainant's memory was real or false, but whether the Crown has made out its case against the appellant beyond a reasonable doubt based on admissible evidence adduced at trial.

We are dealing here with a recall of an isolated rape by a much abused woman who had undergone multiple sexual assaults by

a number of different family members. It appears to me that the expert testimony in this case is neutral so far as the fact-finding process is concerned. In the last analysis, the expert evidence at trial tells us that some of the recollections revealed during therapy are authentic while others are not. It is up to our courts of law to determine, on all of the evidence before us, whether the recollections are reliable or not. We cannot profess to be able to establish the absolute truth, but we can point to time-honoured means of determining whether a series of allegations has been proved to a standard that is acceptable to society: that is to say, beyond a reasonable doubt.

Another significant feature to the expert evidence adduced at this trial is that the appearance of honesty and integrity on the part of such witnesses as the complainant gives us little assistance in assessing the reliability of their testimony. As Dr. Carr stated, these witnesses believe in what they are saying, whether it is accurate or not. This important insight appears to have been lost on the trial judge. He gave a limited analysis of the evidence and relied principally upon his observations of the complainant and the Crown's principal witness, Brenda Goebel, to make his findings of credibility in their favour. There was no attempt to reconcile inherent discrepancies in both of their testimonies or to resolve the significant contradictions between their evidence and that of the few independent witnesses who had some memory of this particular corn roast. In fact, the trial judge was quick to excuse variations in the evidence of the complainant and Brenda Goebel while holding the appellant to a standard of accuracy which was unrealistic for a man who, assuming that he is innocent, was attempting to recall an unremarkable corn roast some 18 years earlier.

This is a case where the trial judge failed to give effect to the presumption of innocence. Here, the trier of fact was called upon to reconstruct a scene that was said to have occurred many years before. An innocent man is unlikely to have a detailed memory of distant uneventful occasions. Yet, unfortunately, the appellant's inability to recall the minutiae of the corn roast appears to have been interpreted by the trial

judge as "selective" recall. The appellant was ultimately called upon to justify his version of events, while his accusers' inconsistencies were excused as being "insignificant when related to the charges". Through this sort of reasoning, the trial judge effectively shifted the onus onto the accused to prove his innocence. For example, the appellant testified that he never had freckles on his penis or had a rash. His doctor testified that he never treated him for a rash and that a current examination does not reveal any freckles. Yet the Crown insisted, and the trial judge appears to have accepted, that the appellant's wife should have been called as a witness on this intimate matter. Similarly, the appellant's denial that he ever owned the clothing that the complainant said he was wearing is dismissed by the trial judge as self-serving. When the appellant did call uncontradicted evidence that he did not own the car he was said to have taken the complainant to, and when he marshalled independent, uncontradicted evidence to support his denial that he did not work at the place where he is said to have worked, the evidence was ignored by the trier of fact.

As I have indicated, the trial judge in this case seems to have determined credibility solely on the basis of the demeanour of the complainant and Mrs. Goebel. He said that he was impressed with the manner in which the complainant testified: she was straightforward and stood up well in cross-examination, and it appeared to him that she was not being vindictive. As for Mrs. Goebel, he said that she testified in an assured and straightforward manner and impressed him as a credible witness.

In White v. R., [1947] S.C.R. 268 at p. 272, 3 C.R. 232, the senior Mr. Justice Estey discussed the issue of credibility. He said it is one of fact and cannot be determined by following a set of rules. He stated in part:

> It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine

> whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

I do not think that an assessment of credibility based on demeanour alone is good enough in a case where there are so many significant inconsistencies. The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. So far as Mrs. Goebel is concerned, her evidence is inherently hard to credit, and should have been subjected to closer analysis. For the purposes of this case, I adopt what was said by O'Halloran J.A., speaking for the British Columbia Court of Appeal in Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171 at p. 174, [1952] 2 D.L.R. 354:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

O'Halloran J.A. pointed out later at p. 175 that "[t]he law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses". He had also made this latter remark in an earlier criminal case: R. v. Pressley (1948), 94 C.C.C. 29 at p. 34, 7 C.R. 342 (B.C.C.A.).

Conclusion

This is a case about a sexual assault that is said to have

taken place a long time ago where the trier of fact should not expect that any memory of the event would be accurate. It is a case where the evidence should have been subjected to more careful scrutiny than it received. This court has the duty to review the record below to determine if the trial judge has properly directed himself to all the evidence bearing on the relevant issues. Where the record, including the reasons of the trial judge, disclose a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, it falls upon this court to intercede: R. v. Harper, [1982] 1 S.C.R. 2 at p. 3, 65 C.C.C. (3d) 193 at p. 201. In my opinion, this is such a case. The trial judge wrongly failed to consider evidence which bore directly on the issue of guilt or innocence.

Accordingly, for all of the reasons I have outlined above, the conviction cannot stand. Yet, because of the seriousness of the charge against the accused, I feel obliged to order a new trial. Therefore, I would allow this appeal, quash the conviction of the appellant, and order a new trial in the discretion of the Crown.

Appeal allowed.