See para. 52

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1995 CarswellOnt 18

Action No. C14366

Court of Appeal for Ontario,

Osborne, Doherty and Laskin JJ.A.

March 14, 1995

Counsel:

Brian H. Greenspan and Sharon E. Lavine, for appellant.

Scott Hutchison and David Lepofsky, for the Crown, respondent.

The judgment of the court was delivered by

DOHERTY J.A.: --

I. OVERVIEW

1 As 1991 arrived, the appellant was a parish priest in Daysland, Alberta. He had been a priest for 20 years and, by all accounts, had been a valued and respected member of the communities in which he lived and served as a priest. At the same time the appellant was performing his duties in Daysland, the Ontario Provincial Police began an investigation into allegations that inmates at St. John's Training School in Uxbridge, Ontario had been sexually and physically abused by members of the Christian Brothers in the 1950s and 1960s. St. John's housed adolescent males sent there by the juvenile justice system. While there, the boys lived in large dormitories, attended school, and did various jobs around the institution. The Christian Brothers, a religious teaching order associated with the Catholic Church, operated the institution. The appellant was a Christian Brother and worked at St. John's in 1960-61 as the grade 8 teacher and a dormitory supervisor. He took the name Frederick Morgan when he became a Brother and was known at the school as Brother Frederick. The appellant was 20 years old when he was assigned to St. John's.

2 As a result of a public request by the police for information, several former inmates came forward and alleged that they had been sexually and physically abused by one or more of the Christian Brothers. Some of these complainants identified the appellant as their assailant. The appellant found himself facing seven allegations arising out of events which had occurred 30 years earlier. The charges referred to a time span of some four years (August 1960 to August 1964), involved four complainants and can be summarized as follows:

-- With respect to the complainant F.P., charges of indecent assault, gross indecency and attempted buggery (counts 1, 2 and 6).

-- With respect to the complainant B.G., one count of indecent assault (count 3).

-- With respect to the complainant G.S., one count of indecent assault and one count of assault (counts 4 and 5).

-- With respect to the complainant A.S., one count of assault causing bodily harm (count 7).

3 The trial judge acquitted the appellant on the counts involving G.S., convicted him on the five counts involving the three other complainants, and imposed sentences totalling 18 months. The appellant appeals conviction and sentence. There is no appeal from the acquittals.

4 The evidence in support of the four charges involving F.P. and B.G. described a course of

sexual abuse perpetrated by the appellant. The Crown relied on the evidence of F.P. and B.G., school records, the personnel record of the appellant, and similar fact evidence from another inmate to make its case on these counts.

5 The count involving A.S. related to a single incident of alleged physical abuse. The Crown contended that the appellant struck A.S. on the side of the head with his hand. The force of the blow perforated A.S.'s eardrum. The Crown relied on the evidence of A.S., two other inmates who it was said witnessed the assault, medical records pertaining to A.S. and school records to establish the appellant's guilt on this charge.

6 As I read the evidence, the defence challenged both the contention that the assaults occurred, and the complainants' identification of the appellant as the perpetrator. The appellant testified and denied the allegations. He admitted that on occasion he put his arm around various inmates at St. John's in a friendly or consoling manner, but denied any of the sexual or physical improprieties alleged by the complainants. The defence also called extensive character evidence and expert evidence from two witnesses. That evidence was proffered to support the position that the appellant was not the sort of person who would have engaged in the conduct described by the complainants. The expert evidence was directed to the allegations involving sexually abusive conduct.

7 The trial judge gave extensive reasons for judgment. Using the school records he narrowed the time period during which the assaults could have occurred. Those records showed that the appellant was at St. John's between September 1960 and the end of 1961 when he was transferred to Montreal. The records also showed that while F.P. and B.S. were at St. John's on various occasions, they were there when the appellant was there only between the middle of October 1961 and the end of 1961. Consequently, if the assaults they alleged occurred and were committed by the appellant, they had to have occurred between the middle of October 1961 and the end of that year. With respect to the count involving A.S., the trial judge found, relying on hospital records, that A.S. suffered the injury to his ear in December 1960. Both A.S. and the appellant were at the school at that time.

II. THE CONVICTION APPEAL

A. The grounds of appeal

8 The appellant raises the following issues:

(i) Was the verdict with respect to the count involving A.S. unreasonable?
(ii) Did the trial judge err in law in his treatment of the defence character evidence?
(iii) Did the trial judge err in law in his treatment of the defence expert psychiatric evidence?
(iv) Did the trial judge proceed on the assumption that the appellant had committed the offences alleged against him?

(v) Did the trial judge limit his assessment to the credibility of the complainants instead of considering whether, apart from their credibility, their evidence was sufficiently reliable to warrant convictions?

(vi) Did the trial judge fail to consider the evidence of the appellant in arriving at his verdicts?

(vii) Did the trial judge resort to speculation in holding that certain evidence supported inferences which buttressed the evidence of B.S. and F.P.?

(viii) Did the trial judge misapprehend the evidence of B.G. and F.P., and did that misapprehension occasion reversible error?

9 The first ground of appeal challenges the conviction on the charge involving A.S. The remaining grounds of appeal relate primarily to the four counts involving F.P. and B.G.

B. Was the conviction on count 7 unreasonable?

10 A.S. testified that at dinner time one evening two other inmates, Fred Briggs and Donald Shildrick, were engaged in horseplay and one of them pushed A.S. out of the line waiting to go into dinner. Brother Frederick, who was supervising, asked A.S. if he was "fooling around". When A.S. denied it, the appellant struck A.S. on the side of the head with his open hand. A.S. was uncertain about the exact date of the assault. He placed it in January or February of 1961. Medical records indicated that he suffered the injury to his eardrum in December of 1960. The injury as described in those records was consistent with A.S. having been struck on the side of the head with an open hand. As a result of the blow, A.S. suffered a perforated eardrum which later required corrective surgery.

11 A.S. testified that he complained about the assault to the nurse at St. John's, the doctors at the hospital, and his mother. The hospital records confirmed that A.S. complained about being struck by a "Brother", but did not identify the Brother. A.S.'s mother also confirmed that A.S. had complained to her about being struck by Brother Frederick. Briggs and Shildrick both testified that they recalled the appellant striking a student on the side of the head with his open hand while the students were lining up for dinner one night. Neither could recall the student who was struck.

12 A.S.'s description of the appellant as he appeared in 1960 was inaccurate in several respects. He maintained, however, that he was certain that it was the appellant, whom he knew as Brother Frederick, who assaulted him. There was no other Brother Frederick at St. John's. A.S. also picked the appellant's photograph out of a group of photographs of the Brothers who were at the institution in the early 1960s. It was suggested to A.S. that he recalled the appellant because the appellant had taught him for a number of months while he was at St. John's. A.S. could not recall being taught by the appellant, however, the school records showed that A.S. was in the appellant's grade eight class.

13 On a consideration of all of the relevant evidence, including the appellant's, I cannot say the verdict is unreasonable. There is overwhelming evidence that A.S. was hit by a Brother and suffered bodily harm. The evidence identifying the appellant as the person who inflicted the blow is perhaps

less cogent but still meets the reasonableness standard of review: R. v. François, [1994] 2 S.C.R. 827 at pp. 835-38, 91 C.C.C. (3d) 289.

C. Did the trial judge err in his treatment of the defence character evidence?

14 The trial judge addressed the character evidence in his reasons.

> As this evidence relates to his honesty it is to be considered as going to his credibility as a witness. As it relates to his reputation for morality it calls for a consideration of whether or not this accused is the type of person who would commit crimes having the immoral nature of the crimes alleged.

15 The trial judge next observed that the illicit sexual activity referred to in the allegations was the sort of thing that if it had occurred would be unknown to those likely to be aware of an accused's general reputation in the community. In making this observation as to the limited evidentiary value of reputation evidence in cases involving allegations of abuse against children, the trial judge anticipated the comments of Sopinka J. in R. v. Profit, [1993] 3 S.C.R. 637, 85 C.C.C. (3d) 232 at 248, reversing (1992), 11 O.R. (3d) 98, 85 C.C.C. (3d) 232 (C.A.).

16 The trial judge did not, however, remove the character evidence from the evidentiary mix. He went on to instruct himself that the evidence was relevant both to his assessment of the credibility of the complainants and the credibility of the accused. This approach finds support in the reasons of Goodman J.A., speaking for the majority in this court, in Profit, supra, at p. 107 O.R., p. 239 C.C.C. I do not understand the Supreme Court of Canada to have disagreed with that aspect of his judgment.

17 I see no error in the trial judge's treatment of the character evidence.

D. Did the trial judge err in his treatment of the expert psychiatric evidence?

18 The defence led evidence from two experts, Dr. Orchard, a psychiatrist and Dr. Resnick, a psychologist. Both examined the appellant. Dr. Orchard testified that assuming one person had committed all of the acts alleged against the appellant, it was likely that the perpetrator of the offences was a homosexual paedophile. In his view, the appellant was not a homosexual paedophile. Dr. Resnick came to a similar conclusion. It was his opinion that the appellant was heterosexual and did not display any personality disorders suggesting a propensity towards paedophiliac behaviour.

19 Dr. Collins, a psychiatrist called by the Crown in reply, challenged both opinions and the means used by the defence experts to arrive at those opinions. He testified that one could not identify a paedophile through clinical study, especially where the subject denied any paedophiliac tendency. Dr. Collins was also of the view that the person who committed the offences was not necessarily a homosexual or a paedophile. He suggested two other possibilities, neither of which need be explored in these reasons.

20 The admissibility of the expert evidence was not contested at trial. On appeal, the Crown, relying on R. v. Mohan, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, submitted that the evidence was not admissible. I will assume admissibility and proceed directly to the arguments arising out of the trial judge's treatment of that evidence in his reasons.

21 The trial judge appreciated the purpose for which the evidence was proffered and the conflict between the defence and Crown experts. He accepted the evidence of the Crown expert as he was entitled to do. In accepting that evidence, the trial judge found that there was no clinically identifiable profile of a paedophile, that he could not say whether the appellant was a paedophile at the time of the trial or in 1960-61, and that the offences charged were not necessarily committed by a paedophile.

22 The trial judge set out several reasons for rejecting the opinions advanced by the defence experts. With one exception, these reasons are fully supported by the evidence adduced at trial. The exception is contained in this extract from the trial judge's reasons:

> Dr. Orchard first requested Dr. Resnick to carry out the MMPI and Rorschach tests on the accused and only then and thereafter interviewed the accused after having seen the conclusions of the psychologist.

(Emphasis in original)

23 Dr. Orchard, in fact, had interviewed the appellant before he referred him to Dr. Resnick and before he reviewed Dr. Resnick's report.

24 I do not regard this error as fatal. The trial judge's misapprehension of a part of the evidence does not, standing alone, render his verdicts unreasonable, constitute an error in law, or result in a miscarriage of justice. The impact of that error on the trial judge's reasoning process and the product of that process must be assessed.[1].] Here, the trial judge's mistaken belief that Dr. Orchard did not interview the appellant before sending him to Dr. Resnick provided but one of several bases for the trial judge's expressed preference for the evidence of the Crown expert. The error was irrelevant to the trial judge's finding that paedophiles did not have an identifiable clinical profile. That finding alone neutralized the defence experts' evidence. Examined in the context of the trial judge's entire analysis of the expert evidence, this isolated misapprehension of one piece of that evidence did not have any impact on the trial judge's overall assessment of the expert evidence or on the conclusions he reached in relation to that evidence.

E. Did the trial judge proceed on the assumption that the appellant had committed the offences alleged?

25 In support of his submission that the trial judge ignored the presumption of innocence and proceeded in direct contradiction to that fundamental principle, counsel relies on four passages from the extensive reasons delivered by the trial judge. The first passage appears after the trial judge had

made certain non-controversial findings as to when the various complainants and the appellant were at St. John's. The trial judge then said:

> If any of the events complained of in fact occurred, they had to have occurred within that short time frame.

26 The appellant submits that the phrase "the events complained of" refers only to the assaultive acts. He contends that the trial judge's finding that the assaults had to have occurred while the appellant was at St. John's demonstrates that the trial judge presumed that the appellant was the perpetrator of those assaults. With respect, this is a tortured interpretation of the passage from the trial judge's reasons. "The events complained of" consisted not of acts unconnected to any actor, but of acts allegedly committed by the appellant. The trial judge was merely stating that if the complainants had been assaulted by the appellant as they alleged, then the assaults had to have occurred during the "short time frame" that the complainants and the appellant were both at St. John's.

27 Even if the passage set out above was ambiguous and could bear either the interpretation I place on it or the interpretation advanced on behalf of the appellant, I would adopt my interpretation. Trial judges are presumed to know the law: R. v. Burns, [1994] 1 S.C.R. 656 at pp. 664-65, 89 C.C.C. (3d) 193 at pp. 199-200. That presumption must apply with particular force to legal principles as elementary as the presumption of innocence. Where a phrase in a trial judge's reasons is open to two interpretations, the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law: R. v. Smith (D.A.) (1989), 95 A.R. 304 (C.A.) at pp. 312-13, affirmed [1990] 1 S.C.R. 991.

28 In any event, it is wrong to analyze a trial judge's reasons by dissecting them into small pieces and examining each piece in isolation as if it described, or was intended to describe, a legal principle applied by the trial judge. Reasons for judgment must be read as a whole: R. v. C.(R.) (1993), 81 C.C.C. (3d) 417 at p. 418 (Que. C.A.), per Rothman J.A. in dissent at p. 419; dissenting reasons adopted by the Supreme Court of Canada [1993] 2 S.C.R. 226, 81 C.C.C. (3d) 417; R. v. Telmosse (1945), 83 C.C.C. 133 at p. 138, [1945] 1 D.L.R. 779 (S.C.C.). Furthermore, they must be read with an appreciation of the purpose for which they were delivered. Where a case turns on the application of well-settled legal principles to facts as found after a consideration of conflicting evidence, the trial judge is not required to expound upon those legal principles to demonstrate to the parties, much less to the Court of Appeal, that he or she was aware of and applied those principles.

29 In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision. The reasons should be responsive to issues raised at trial and must be read in the context of the entire trial. Reasons for judgment should offer assurance to the parties that their respective positions were understood and considered by the trial judge in arriving at his or her conclusion: R. v. Smith, supra, at pp. 313-14; M. Taggartt, "Should

Canadian Judges be Legally Required to Give Reasoned Decisions in Civil Cases" (1983), 33 U.T.L.J. 1 at pp. 5-6; A. Hooper, "Criminal Procedure -- Trial Without Jury -- Obligation to Give Reasons for Judgment" (1970), 48 Can. Bar Rev. 584. In cases like this, where the result turns on fact-finding and not on the application of contested legal principles, it is appropriate that the reasons should focus on telling the parties what evidence was believed and why it was believed.

30 A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict.

31 Reasons for judgment are not required as a matter of law in criminal cases: R. v. MacDonald, [1977] 2 S.C.R. 665 at p. 672, 29 C.C.C. (2d) 257. That is not to say, however, that reasons should not be given. Reasons for judgment enhance the quality of justice and should be encouraged. Appellate courts can offer that encouragement by approaching reasons for judgment, not as if they were intended to be a dissertation on the applicable law or a comprehensive catalogue of the evidence, but rather as an attempt by the trial judge to articulate the conclusions reached and the bases for those conclusions. Appellate courts must resist the invitation to microscopically examine reasons for judgment, lest trial judges decide that silence is indeed golden.

32 I do not propose to set out the remaining three passages relied on by the appellant in support of this ground of appeal. My conclusion with respect to the passage quoted above applies to those three passages. Considered alone or in combination, they do not lead me to conclude that the trial judge presumed guilt in assessing the evidence and arriving at his verdicts.

F. Did the trial judge err in law in limiting his assessment to the credibility of the complainants instead of considering whether their evidence, even if credible, was sufficiently reliable to warrant conviction?

33 Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross- examination.

34 At the outset of his reasons the trial judge observed:

> The passage of time since the alleged incidents have caused great difficulty to all of the witnesses including the accused in trying to recall exactly what transpired at the training school over 30 years ago. Obviously, the credibility of the witnesses and the accuracy of their memory of the events are very important issues in this trial.

(Emphasis added)

35 The trial judge recognized the importance of both credibility and reliability. He also stressed the passage of time as a key feature in the case. The passage of time impacts on the reliability of evidence as opposed to the credibility of witnesses. While the trial judge's subsequent references were to the credibility of key witnesses and did not refer specifically to the reliability of their testimony, he did address factors which were relevant to both. For example, he returned to the significance of the passage of time when considering the testimony of the complainants. He also referred to other factors (e.g., prior inconsistent statements) which were relevant to both the witnesses' credibility and the reliability of the witnesses' testimony. Lastly, the trial judge actually found parts of the evidence of B.G. to be unreliable and yet found him to be a credible, that is, honest witness. This treatment of B.G.'s evidence leaves no room for the argument that the trial judge did not appreciate the distinction between reliability and credibility and did not consider both in assessing the evidence of the complainants.

G. Did the trial judge err in law in that he failed to consider the evidence of the appellant in arriving at his verdicts?

36 The appellant testified at length although much of his testimony related to non-contentious matters. Given the nature of the allegations and the 30 years that had passed since the events in question, it is not surprising that the appellant could not offer much more than a blanket denial.

37 The trial judge neither reviewed the evidence of the appellant, nor gave reasons for rejecting the evidence of the appellant where it stood in contradiction to that given by the complainants. The absence of any review of the appellant's evidence and the failure to set out express reasons for rejecting the contentious parts of his evidence does not necessarily demonstrate that the trial judge failed to consider that evidence in arriving at his verdicts: R. v. Burns, supra, at p. 664 S.C.R., p. 199 C.C.C. The trial judge indicated on three occasions that a consideration of the appellant's evidence formed part of his deliberations. He noted that the passage of time was an important consideration in assessing the appellant's testimony. He also observed that the character evidence called by the defence was a significant feature when assessing the evidence of the appellant. Furthermore, the trial judge indicated specifically that he had considered the evidence of the appellant along with the evidence of F.P. and B.G. in addressing the allegations involving F.P.

38 The trial judge's conclusion based upon a consideration of all of the evidence, that the evidence of the complainants combined with the other supporting evidence satisfied him beyond a reasonable doubt that the appellant had committed the assaults made any separate exposition of his

reasons for rejecting the contrary evidence of the appellant unnecessary. The trial judge clearly considered all of the evidence including the appellant's and rejected the appellant's denials because they were inconsistent with the conclusions that he had arrived at based upon his assessment of all of the evidence. While it would have been preferable for the trial judge to deal expressly with the appellant's evidence, I would not hold that his failure to do so demonstrates that he did not give full and fair consideration to the evidence of the appellant.

H. Did the trial judge resort to speculation in holding that certain evidence supported inferences which buttressed the evidence of F.P. and B.S.?

39 The appellant was a Christian Brother from 1958 to the summer of 1962. He returned in 1967 and left again in 1969. While a Brother, the appellant, like other Brothers, applied to renew his vows each year. A record of the results of these applications was kept in a book referred to as the Chapter of Vows. Although no witness was called to explain how the process worked, how the records were made, or how they were kept, it would appear that a group of Brothers voted on each application for renewal and that the votes were recorded in the Chapter of Vows along with a brief comment on the progress of each applicant.

40 Crown counsel first sought to introduce the parts of the Chapter of Vows pertaining to the appellant during the case for the Crown. She relied on s. 30 of the Canada Evidence Act, R.S.C. 1985, c. C-5. The trial judge refused to admit the documents as the appellant's counsel had not been given the appropriate notice. In the course of so ruling he said:

> Well, I certainly don't need any more documents which we cannot interpret.

41 Crown counsel responded:

> The main concern of the Crown was to give the court and counsel the opportunity to have everything <u>that we have before the court should it be relevant to where this gentleman was at a particular time</u>.

(Emphasis added)

At this stage of the trial Crown counsel offered the documents for a very limited purpose.

42 In the course of his examination-in-chief, the appellant made brief reference to the Chapter of Vows and the application process described above. He indicated that he applied to renew his vows in the spring of 1962 and was told that he was not suited to be in the Christian Brothers. The appellant also indicated that he returned to the Brothers in 1967, but was again told in 1969 that he could not renew his vows. He testified that by 1969 he had told his superior that he was interested in the priesthood. This apparently counted against the appellant when he applied to renew his vows.

43 During cross-examination of the appellant, Crown counsel addressed the admissibility of the

relevant pages of the Chapter of Vows for a second time. She indicated:

> It is now my view that the character of the accused has clearly been put in issue and more particularly, his character during that period of time and the comments in the Chapter of Vows or certainly the comment of the community in which he lived that determined whether or not he be permitted to take his vows and what their views of him were at that time and it is my position they are relevant. It is also my position, in fairness to the accused, I should address them directly and then seek to adduce those documents in reply.

44 It would appear that Crown counsel considered the entries in the Chapter of Vows to be relevant to the appellant's character.

45 The trial judge held that Crown counsel could cross-examine on the contents of the Chapter of Vows stating:

> I think reasonable cross-examination is proper, without badgering the witness, and I am going to permit her to do that bearing in mind that she will have to prove to your satisfaction and to mine, of course, that this is a public record before I will grant her permission to introduce it under s. 30. I am granting that permission assuming it can be proved to be a public record . . .

46 Crown counsel cross-examined on the contents of the Chapter of Vows relating to the years 1959-62 and 1967-69. She read each entry in its entirety to the appellant and asked him to comment on it. The appellant had not seen the documents until after he was charged, knew nothing about their contents or creation and could offer no explanation for any of the comments in the book. The Crown did not call any reply evidence relating to the Chapter of Vows.

47 The entry dated February 25, 1961 indicated that 11 Brothers voted in favour of the appellant renewing his vows and none voted against him. The comments beside the vote were all positive. This vote took place about two months after A.S. was assaulted. The trial judge made no use of this entry.

48 The entry dated April 15, 1962, some four or five months after the alleged assaults on F.P. and B.G., showed two votes in favour of allowing the appellant to renew his vows and 12 against. The comment beside the vote read:

> Devoted to class work and rel. obligations, evidence of emotional immaturity and of indiscretion. Pleasant character.

49 The appellant said that shortly after April 15, 1962 he was told that he would not be allowed to renew his vows. He had no knowledge of and no explanation for the comments set out above.

50 The appellant does not challenge the admissibility of the excerpts from the Chapter of Vows, although on the record before this court it is difficult to understand the basis upon which they were received.[2].] The appellant does, however, take strong exception to the use the trial judge made of the April 15, 1962 entry. After reviewing the evidence of F.P., the trial judge then went on to outline the independent evidence which he regarded as confirmatory of the testimony of F.P. In the course of that outline he said:

> I also have regard to the excerpt from the Chapter of Vows Exhibit 43, in which an entry was made on the 15th of April, 1962 that the accused was refused his vows by a vote of 12 to 2 with the observation noted, inter alia, "evidence of emotional immaturity and of indiscretion". This would lead to an inference that he had experienced some sort of problem in the preceding months and is consistent with the evidence of F.P. and B.G.

51 The appellant submits that no such inference could be drawn and that it is pure speculation to conclude that the reference to an "indiscretion" in the April 15, 1962 entry was a reference to the incidents complained of by F.P. and B.G.

52 A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in R. v. White (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):

> These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

53 The trial judge drew two inferences from the April 15, 1962 commentary. The first was explicit. He inferred that the appellant "had experienced some sort of problem in the preceding months". The second inference was implicit in the trial judge's conclusion that the commentary was "consistent with the evidence" of F.P. and B.G. It could only be consistent with that evidence if the trial judge inferred that the "problem" related either to the incidents described by F.P. and B.G. or to their complaint about the appellant. The April 15, 1962 commentary had probative value as supportive of the evidence of F.P. and B.G. only if this second inference was a logical and reasonable one.

54 I agree with the appellant's submission that no such inference was available. The word "indiscretion" is ambiguous, the author or authors of the commentary unknown, the information on which it was based undisclosed, and the process through which it was produced a total mystery. I must conclude that the trial judge reached beyond the realm of reasonable inference in holding that the April 15, 1962 commentary was consistent with and therefore provided support for the evidence

of F.P. and B.G. Only through speculation could one link the commentary to any part of the testimony of the two complainants.

55 The trial judge went beyond reasonable inference on a second occasion. The appellant taught grade 8 at St. John's. He taught grade 4 when he was transferred to Montreal and again when he was subsequently sent to De la Salle School in Toronto. The trial judge observed:

> It may also be significant that his assignment at those schools was in teaching lower grades than grade 8.

56 The significance escapes me. The appellant testified that he was sent to Montreal to replace a certain teacher. There was no evidence to the contrary and no other explanation as to why he was assigned to teach grade 4. In oral argument, Crown counsel submitted that the assignment to teach a lower grade was somehow a demotion and was consistent with a complaint having been made against the appellant by F.P. and B.G. There is nothing in the evidence or common experience to support this hypothesis.

57 In his reasons, the trial judge appears to have regarded the assignment of the appellant to teach a lower grade as providing some independent support for the evidence of F.P. and B.G. As there is no reasonable inference from that evidence capable of supporting the evidence of either complainant, the trial judge erred in giving that evidence any evidentiary value.

58 The trial judge erred in law by drawing factual conclusions based on speculation and not reasonable inferences. Unless the Crown can demonstrate that the error caused no substantial wrong or miscarriage of justice, the convictions touched by that error must be quashed. In seeking to invoke the proviso, the Crown may rely on findings of fact made by the trial judge to the extent that those findings are not tainted by legal error: R. v. Haughton, [1994] 3 S.C.R. 516, 93 C.C.C. (3d) 99 at p. 107; R. v. Whitley, a decision of the Supreme Court of Canada, released December 1, 1994 [now reported [1994] 3 S.C.R. 830]. The legal error made in this case was relied on by the trial judge in the course of his assessment of the credibility of F.P. and B.G. and the reliability of their evidence. The error figured directly in his ultimate conclusion that the complainants were credible and their evidence was reliable. Since those conclusions are tainted by the error, they cannot be relied on by the Crown in support of an argument that the error occasioned no substantial wrong or miscarriage of justice. Once the findings that the complainants were credible and their evidence reliable are set aside, it cannot be said that no trier of fact, properly instructed and acting reasonably, could have acquired on counts 1, 2, 3 and 6. The curative proviso cannot be applied to the conviction on those counts. This error, however, had no impact on the conviction involving the complainant A.S. (count 7) and I would apply the curative proviso to save that conviction.

I. Did the trial judge misapprehend the evidence of F.P. and B.G., and did that misapprehension occasion reversible error?

59 F.P. and B.G. were close friends at St. John's and testified to events which involved both of

them. They also testified that they had discussed their abuse at the hands of the appellant while they were at St. John's. The trial judge found that their evidence was consistent on several material points. That finding, combined with his conclusion that F.P. and B.G. had no opportunity to jointly concoct their evidence, was central to his conclusion that both were credible and reliable witnesses. The appellant submits that the trial judge misapprehended the evidence in several respects and that this misapprehension tainted his conclusion that the evidence of the two complainants was consistent and, therefore, mutually corroborative.

60 F.P. was first sent to St. John's in October of 1961. He remained there until August of 1962. He returned in November of 1962 and remained there until August of 1963. His third and final stay at St. John's began in October of 1963 and ended in August of 1964. F.P. was almost 13 years old when he arrived at St. John's in October of 1961. He was assigned to the appellant's dormitory. B.G. arrived at St. John's about the same time and was also placed in the appellant's dormitory. F.P. and B.G. became good friends although, according to F.P., B.G. was moved to a different dormitory a few months later.

61 F.P. testified that about three weeks or a month after his arrival he was playing soccer on the sports field with the other boys. The appellant was supervising the game and then became involved. He tackled F.P. and while on the ground placed his hand inside F.P.'s shorts and squeezed and fondled his penis. F.P. testified that he was shocked by this act, looked to the sky and saw the image of Jesus Christ. F.P.'s parents were devout Roman Catholics. F.P. said that he was the only one approached by the appellant during the game and that the appellant "singled" him out.

62 A few days after the incident on the soccer field, F.P. was assigned to clean up the appellant's room which adjoined the dormitory. F.P. said that he was sexually assaulted by the appellant on a number of occasions when he was in the appellant's room. The assaults included fondling, simulated anal intercourse, at least one attempt at anal penetration, and at least one act of fellatio. These incidents happened after the dinner hour, but usually before lights out in the dormitory. The other boys were in the dormitory.

63 F.P. was adamant that he did not discuss any of these assaults with any of the other Brothers at St. John's, nor with his parents until much later. He did tell some of the other inmates including B.G. F.P. testified that he and B.G. discussed the abuse of them by the appellant although he could not recall the details of that conversation. He specifically could not recall ever telling B.G. that the appellant had assaulted him by coming to his bed late in the evenings and fondling him while he was lying in his bed in the dormitory. F.P. saw no improper contact involving B.G. and the appellant.

64 F.P. testified that shortly before Christmas of 1961 he was told by B.G. that his father was coming to visit. F.P. recalled that it was on a Sunday and that B.G.'s father was driving a 1956 Meteor. He said that he and B.G. ran to the car and B.G. referred to the driver as "dad". F.P. and B.G. then had a conversation with this man in which they complained about the conduct of the

appellant. According to F.P., B.G.'s father then went to see Brother Adrian, the supervisor of the institution, and very shortly after that the appellant was transferred to another institution. F.P. said that this occurred around Christmas of 1961. He indicated that he had no direct involvement in the complaint apart from speaking to B.G.'s father.

65 B.G. was 14 years of age when he first arrived at St. John's. He was there from October of 1961 until June 1962 and again from December 1962 to August 1963. According to B.G., he and F.P. lived in the same dormitory for virtually the entire period that B.G. was at St. John's. During his first stay (October 1961 to June 1962) they lived in Brother Mark's dormitory and during his second stay (December 1962 to August 1963) they lived in the appellant's dormitory. B.G.'s testimony that he lived in a dormitory supervised by the appellant during his second stay at St. John's was clearly wrong. The appellant had left the school a year earlier.

66 B.G. testified that during his first stay at St. John's the appellant would sometimes supervise the outdoor games. He said that the appellant would often wrestle with various boys including himself and F.P. When he was doing so, he would "kind of let his hands wander all over you, like feel your breasts and your buttocks and your crotch area". B.G. referred to this as horseplay which took on a sexual connotation. He also said that it was a common occurrence on the playground and happened to many of the boys although he noticed that the appellant seemed to pay more attention to F.P. than anybody else. B.G. had no recollection of any specific incident on the playground involving F.P. and the appellant. According to B.G., these incidents on the playground began within a few months of his arrival in October 1961. At another point in his testimony he indicated that they occurred in the spring.

67 B.G. also testified that he was assaulted in the washroom by the appellant on two occasions. On one occasion, the appellant came up behind B.G. and grabbed him in the crotch area while B.G. was standing in front of a urinal. He said that the appellant felt his testicles and penis. B.G. also said that he was confronted by the appellant on at least two occasions in the stairwell. On one occasion, the appellant "cornered" him and rubbed his breast and crotch. On the second occasion, B.G. pushed the appellant backward and got away from him.

68 B.G. was asked when these various incidents occurred. He said that most of the incidents occurred while he was in Brother Mark's dormitory during his first stay at St. John's. He was also asked the following question and gave the following answer:

> Q. While you were in Brother Frederick's dorm did anything further occur to you?
>
> A. No.

69 During cross-examination B.G. said that the incidents in the washroom occurred only during his first stay at St. John's and that the incident in the stairwell occurred near the end of his first stay (April to June of 1962).

70 B.G. said that he and F.P. became friends and on occasion discussed their abuse at the hands of the appellant. B.G. testified that F.P. told him that the appellant came to F.P.'s bed in the dormitory late at night and molested him while F.P. was lying in bed. F.P. gave no such evidence and could not recall whether or not he had so described the assault to B.G. F.P. did not tell B.G. about the assaults which occurred in the appellant's room.

71 B.G. gave extensive evidence about the complaints which led to the removal of the appellant from St. John's. B.G. fixed the time of the complaints by reference to an incident involving his escape from St. John's. He testified that he had not tried to escape during his first stay at St. John's, but that he had escaped on four occasions during his second stay. The school records indicated that his first escape during his second stay was in December of 1962. There was no suggestion that records made any reference to an escape during his first stay. B.G. testified that after one of these escapes, and he believed it may have been the one in December 1962, he fled to St. Catharines where he met with his family including his brother. He told his brother that he was being beaten by the Brothers. He made no mention of sexual molestation because he was too embarrassed. He and his brother returned to St. John's and his brother went to see Brother Adrian. B.G. did not attend this meeting. A few weeks passed after the meeting and nothing changed at the school. B.G. and F.P. discussed what should be done and B.G. decided to go see a Brother Francis. He went to Brother Francis and told him that he and F.P. were being molested by the appellant and asked if anything could be done about it. B.G. described Brother Francis as one of the kinder Brothers at St. John's. B.G. also asked to see the supervisor, Brother Adrian. A few days later he was called to the office and explained to Brother Adrian that he and F.P. were being molested. B.G. believed that F.P. was also interviewed privately by Brother Francis and Brother Adrian. A short time later, B.G. and F.P. were told to see Brother Adrian together. According to B.G.:

> We just explained to him what was going on and that and two or three weeks after that, maybe even a month, Brother Frederick was transferred somewhere.

72 In cross-examination, B.G. indicated that he told Brother Francis basically what he had described in his examination-in- chief. He told Brother Adrian that the appellant was "bothering us and feeling us up and that". He said that similar disclosures were repeated when he and F.P. went to see Brother Adrian together.

73 B.G. testified that F.P. did help clean the appellant's room while they were living in the dormitory supervised by the appellant. He had no evidence to give with respect to anything that may have happened to F.P. while he was in the appellant's room. B.G. confirmed that upon arriving at St. John's he was told by other inmates that the appellant was "a queer".

74 The trial judge reviewed the evidence of F.P. and B.G. He acknowledged there were inconsistencies between their versions of events, particularly with respect to the year in which the events occurred. He preferred the evidence of F.P. on this point. He went on to conclude:

> Lastly, F.P. and B.G. who have not seen each other for 30 years have

> nevertheless given testimony that is substantially corroborative of each other's version of the events.

(Emphasis added)

75 The trial judge reiterated this conclusion when addressing the appellant's liability on the counts involving F.P. and again when considering the appellant's liability on the count involving B.G.

76 I understand the trial judge to have used the word "corroborative" in its modern non-technical sense as evidence independent of a witness's testimony rendering it more probable that the witness's testimony is true: R. v. B.(G.) (No. 1), [1990] 2 S.C.R. 3 at pp. 26-28, 56 C.C.C. (3d) 161 at pp. 178-80. I also accept the proposition that, where joint concoction is excluded, the fact that two complainants give evidence which is consistent on material matters may make the evidence of one complainant confirmatory of the evidence given by the other complainant: R. v. P. (P.N.) (1993), 81 C.C.C. (3d) 525 at pp. 538-40, 107 Nfld. & P.E.I.R. 141 (Nfld. C.A.).

77 The trial judge's finding that the evidence of B.G. was consistent with that given by F.P. is, however, undermined by several mistakes made by the trial judge as to the substance of B.G.'s evidence. The mistakes include the following:

-- The trial judge indicated on at least two occasions that B.G. testified that the assaults occurred during his second stay at St. John's when he was living in the appellant's dormitory. In fact, B.G. testified that most, if not all, of the assaults occurred during the latter part of his first stay at St. John's when he was living in Brother Mark's dormitory. He described most, if not all, of these assaults as occurring after Christmas of 1961 and before the end of June of 1962.

-- The trial judge found that B.G.'s second stay at St. John's commenced at a time subsequent to or "almost concurrent to" the appellant's departure from the institution. In fact, according to B.G. and the school records, his second stay at St. John's commenced a year after the appellant had left.

-- The trial judge found that B.G. testified that his brother went to Brother Adrian to complain about the appellant bothering B.G. and F.P. In fact, B.G. testified that he did not tell his brother about any sexual abuse committed by the appellant. Rather, he told his brother that he and the others who had escaped with him (not F.P.) had been physically abused while at the institution. According to B.G., his brother went to complain about that physical abuse. There is no evidence from B.G. that he said anything to his brother about F.P. or sexual abuse.

-- The trial judge found that F.P. testified that B.G.'s father spoke to Brother Adrian about the appellant. The trial judge went on to say that B.G. "could not recall that". In fact, B.G. expressly testified that his father never visited St. John's and that it was his brother who made a complaint about physical abuse.

-- The trial judge found that B.G. testified that both he and F.P. were living in the appellant's

> dormitory when the incidents occurred. B.G. testified to the contrary. He said most, if not all, of the assaults occurred while he was in Brother Mark's dormitory, and he specifically said there were no further incidents of sexual abuse involving him when he was in the appellant's dormitory.

78 These factual errors were repeated and compounded when the trial judge turned to the specific features of B.G.'s evidence which he regarded as consistent with and, therefore, confirmatory of the evidence of F.P. The trial judge said that B.G.'s evidence that the appellant wrestled with students on the soccer field and fondled them while doing so was consistent with F.P.'s evidence. It was, except for the fact that B.G. described these activities as a daily occurrence on the playing field involving many of the boys and most commonly F.P. F.P. said that it happened once and he was singled out by the appellant.

79 The trial judge also regarded B.G.'s evidence that he and F.P. discussed the appellant's abuse of them as confirmatory of F.P.'s evidence that he had discussed the abuse with B.G. This finding of consistency ignores B.G.'s evidence that F.P. told him that the assaults occurred late at night when the appellant would come to F.P.'s bed in the dormitory. According to B.G., F.P. said nothing about having been assaulted while in the appellant's room. F.P. did not testify to any such conversation with B.G. and denied during his evidence that the appellant assaulted him while he was in his bed in the dormitory.

80 Finally, and in my view, most significantly, the trial judge found that the evidence of F.P. and B.G. as to how the complaint was made against the appellant was different in "detail" but "essentially" the same. This finding does not accurately reflect the evidence on this point. F.P. testified that he and B.G. met with B.G.'s father shortly before Christmas of 1961 and that after this meeting B.G.'s father went to Brother Adrian to complain about the appellant's conduct toward B.G. and F.P. According to F.P., the appellant was transferred shortly after B.G.'s father went to visit Brother Adrian. B.G. testified that his 21-year-old brother made a complaint of physical abuse probably around Christmas of 1962. B.G. did not suggest that F.P. had any prior knowledge of, or any involvement in, the complaint made by his brother. B.G. went on to testify that after his brother's efforts produced no results, he and F.P. discussed what they should do about the appellant. As a result of these discussions, B.G. said that he went first to Brother Francis and then to Brother Adrian to complain about the appellant's sexual abuse of himself and F.P. B.G. also said that he believed that F.P. went alone to speak to each Brother and that on one occasion he and F.P. were summoned to Brother Adrian's office to discuss their allegations of sexual abuse against the appellant. It was a few weeks after this joint meeting that the appellant was moved.

81 I cannot characterize these two stories as differing only in detail with respect to the identity of the complainant and the timing of the complaint. On F.P.'s version, he played no direct role in the making of the complaint and would not have played any such role because of his distrust of the Brothers. On B.G.'s version, his brother made no complaint involving F.P. or sexual abuse by the appellant, and it was only after B.G. and F.P. went separately and jointly to Brother Adrian (and Brother Francis) and made specific complaints of sexual abuse against the appellant that their

complaints resulted in the transfer of the appellant. B.G. and F.P. described very different complaint processes leading to the removal of the appellant. Their evidence is substantially inconsistent on the point.

82 In my opinion, the trial judge misapprehended the evidence of B.G. in several respects. In fairness, I should add that the evidence of B.G. was lengthy and even with the assistance of a transcript and of the luxury of time for repeated readings of that evidence, it was not easy to distil the net effect of B.G.'s evidence on some points.

83 I will now address the effect of the trial judge's misapprehension of the evidence. Submissions premised on an alleged misapprehension of evidence are commonplace in cases tried by a judge sitting without a jury. A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence. Where, as in the case of Crown appeals from acquittals (Criminal Code, R.S.C. 1985, c. C-46, s. 676(1)(a)) and appeals to the Supreme Court of Canada pursuant to s. 691, the court's jurisdiction is predicated on the existence of an error of law alone, characterization of the nature of the error arising out of the misapprehension of evidence becomes crucial. The jurisprudence from the Supreme Court of Canada demonstrates the difficulty in distinguishing between misapprehensions of the evidence which constitute an error of law alone and those which do not: Harper v. R., [1982] 1 S.C.R. 2, 65 C.C.C. (2d) 193; Schuldt v. R., [1985] 2 S.C.R. 592, 23 C.C.C. (3d) 225; R. v. Roman, [1989] 1 S.C.R. 230, 46 C.C.C. (3d) 321; R. v. B.(G.) (No. 3), [1990] 2 S.C.R. 57, 56 C.C.C. (3d) 181; R. v. Morin, [1992] 3 S.C.R. 286, 76 C.C.C. (3d) 193. The recent trend in that court suggests that most errors which fall under the rubric of a misapprehension of evidence will not be regarded as involving a question of law: R. v. Morin, supra; J. Sopinka, M.A. Gelowitz, The Conduct of an Appeal (Markham: Butterworths, 1993), pp. 85-89.

84 The need, for jurisdictional purposes, to classify a misapprehension of the evidence as an error of law, as opposed to an error of fact or mixed fact and law, does not arise in this court where the appeal is from conviction in proceedings by way of indictment. Section 675(1)(a) gives this court jurisdiction to consider grounds of appeal which allege any type of error in the trial proceedings. The wide sweep of s. 675(1)(a) manifests Parliament's intention to provide virtually unobstructed access[3].] to a first level of appellate review to those convicted of indictable offences.

85 The scope of this court's power to quash convictions is commensurate with the broad jurisdiction given to it by s. 676(1)(a). Section 686(1)(a) provides that:

> 686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that is unreasonable or cannot be supported by the evidence,
(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
(iii) on any ground there was a miscarriage of justice;

86 The powers granted in that section are qualified to some extent by s. 686(1)(b)(iii) and (iv). For present purposes I need reproduce only s. 686(1)(b)(iii):

(b) [the Court of Appeal] may dismiss the appeal where
(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred . . .

87 While s. 686(1)(a) provides three distinct bases upon which this court may quash a conviction, each shares the same underlying rationale. A conviction which is the product of a miscarriage of justice cannot stand. Section 686(1)(a)(i) is concerned with the most obvious example of a miscarriage of justice, a conviction which no reasonable trier of fact properly instructed could have returned on the evidence adduced at trial. Section 686(1)(a)(ii) read along with s. 686(1)(b) (iii) presumes that an error in law produces a miscarriage of justice unless the Crown can demonstrate the contrary with the requisite degree of certainty. Section 686(1)(a)(iii) addresses all other miscarriages of justice not caught by the two preceding subsections. In so far as the operation of s. 686(1)(a) is concerned, the distinction between errors of law and all other types of error has only one significance. Where the error is one of law the Crown bears the burden of demonstrating that the error did not result in a miscarriage of justice. Where the error is not one of law alone the appellant bears that burden.

88 In my opinion, on appeals from convictions in indictable proceedings where misapprehension of the evidence is alleged, this court should first consider the reasonableness of the verdict (s. 686(1)(a)(i)). If the appellant succeeds on this ground an acquittal will be entered. If the verdict is not unreasonable, then the court should determine whether the misapprehension of evidence occasioned a miscarriage of justice (s. 686(1)(a)(iii)). If the appellant is able to show that the error resulted in a miscarriage of justice, then the conviction must be quashed and, in most cases, a new trial ordered. Finally, if the appellant cannot show that the verdict was unreasonable or that the error produced a miscarriage of justice, the court must consider the vexing question of whether the misapprehension of evidence amounted to an error in law (s. 686(1)(a)(ii)). If the error is one of law, the onus will shift to the Crown to demonstrate that it did not result in a miscarriage of justice (s. 686(1)(b)(iii)).

89 In considering the reasonableness of the verdict pursuant to s. 686(1)(a)(i), this court must conduct its own, albeit limited, review of the evidence adduced at trial: R. v. Burns, supra, at pp.

662-63 S.C.R., pp. 198-99 C.C.C. This court's authority to declare a conviction unreasonable or unsupported by the evidence does not depend upon the demonstration of any errors in the proceedings below. The verdict is the error where s. 686(1)(a)(i) is properly invoked. A misapprehension of the evidence does not render a verdict unreasonable. Nor is a finding that the judge misapprehended the evidence a condition precedent to a finding that a verdict is unreasonable. In cases tried without juries, a finding that the trial judge did misapprehend the evidence can, however, figure prominently in an argument that the resulting verdict was unreasonable. An appellant will be in a much better position to demonstrate the unreasonableness of a verdict if the appellant can demonstrate that the trial judge misapprehended significant evidence: R. v. Burns, supra, at p. 665 S.C.R., p. 200 C.C.C.

90 I need not pursue the relationship between a misapprehension of the evidence and an unreasonable verdict any further. On the evidence adduced in this case and bearing in mind the errors made by the trial judge in his appreciation of that evidence, I cannot say that the convictions of counts 1, 2, 3, and 6 were unreasonable.

91 I turn next to s. 686(1)(a)(iii). This subsection is not concerned with the characterization of an error as one of law, fact, mixed fact and law or something else, but rather with the impact of the error on the trial proceedings. It reaches all errors resulting in a miscarriage of justice and vindicates the wide jurisdiction vested in this court by s. 675(1). The long reach of s. 686(1)(a)(iii) was described by McIntyre J., for a unanimous court, in Fanjoy v. R., [1985] 2 S.C.R. 233 at p. 240, 21 C.C.C. (3d) 312 at pp. 317-18:

> A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.

92 Fanjoy, like most cases where s. 686(1)(a)(iii) has been invoked, involved prosecutorial or judicial misconduct in the course of the trial: e.g., see R. v. Stewart (1991), 62 C.C.C. (3d) 289, 43 O.A.C. 109 (C.A.); R. v. R. (A.J.) (1994), 20 O.R. (3d) 405, 94 C.C.C. (3d) 168 (C.A.). Such conduct obviously jeopardizes the fairness of a trial and fits comfortably within the concept of a miscarriage of justice. Nothing in the language of the section, however, suggests that it is limited to any particular type of error. In my view, any error, including one involving a misapprehension of the evidence by the trial judge, must be assessed by reference to its impact on the fairness of the trial. If the error renders the trial unfair, then s. 686(1)(a)(iii) requires that the conviction be quashed.

93 When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process

resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

94 I am satisfied that the trial judge's errors with respect to the content of the evidence of B.G. were significant and resulted in a miscarriage of justice. The trial judge treated the evidence of F.P. and B.G. as if it was consistent on all significant points relating to the events surrounding the assaults except for the year in which those assaults actually occurred. In fact, as indicated above, there were other inconsistencies between the evidence of the two complainants which went unnoticed by the trial judge as a result of his misapprehension of the substance of the evidence. Similarly, the trial judge regarded the complainants' evidence concerning their initial complaint about the appellant as consistent save for minor details such as the exact familial relationship between B.G. and the person first complained to by him. Here too, the trial judge's misapprehension of the content of the evidence obscured numerous differences in the versions of events described by the two complainants. The cumulative effect of these errors was significant in that it infected the very core of the reasoning process which culminated in the conviction of the appellant on the four counts involving F.P. and B.G. Without the finding of mutual confirmation, the trial judge may not have found either F.P. or B.G. to be credible and their evidence to be reliable. Those findings were essential to the verdicts rendered by the trial judge.

95 The observation of Laycraft J.A. in Whitehouse v. Reimer (1980), 116 D.L.R. (3d) 594, 14 Alta. L.R. (2d) 380 (C.A.), has application here. In that case, the trial judge was faced with two conflicting versions of the relevant event. He found in favour of the plaintiff but in doing so misstated the evidence on three significant factual issues. In ordering a new trial, Laycraft J.A., speaking for a unanimous court, said at p. 595:

> Where a principal issue on a trial is credibility of witnesses to the extent that the evidence of one party is accepted to the virtual exclusion of the evidence of the other, it is essential that the findings be based on a correct version of the actual evidence. Wrong findings on what the evidence is destroy the basis of findings of credibility.

96 The appellant has demonstrated significant errors in the trial judge's understanding of the substance of the evidence. He has further demonstrated that those errors figured prominently in the reasoning process which led to crucial findings of credibility and reliability, and then to crucial findings of fact. In these circumstances, the appellant has met the onus of showing that the convictions on the counts relating to F.P. and B.G. constitute a miscarriage of justice. Those convictions must be quashed and a new trial ordered.

97 As I have concluded that the misapprehension of the evidence by the trial judge produced a miscarriage of justice, it is not necessary for me to decide whether that error constituted an error in law. I will, however address that issue. In my opinion, the trial judge's mistaken apprehension of the content of the evidence of a witness cannot be classified as an error in law. There is no suggestion that he did not consider all of the relevant evidence (R. v. Harper, supra) or that he misdirected himself on the applicable law and thereby misapprehended the evidence (R. v. B. (G.) (No. 3), supra). The trial judge addressed his mind to all of the evidence and as revealed by his reasons for judgment, was simply mistaken as to what was said by B.G. in his evidence. That error was made in his fact-finding capacity and is not, in my view, an error in law: Telmosse, supra, at pp. 138-39.

III. CONCLUSION WITH RESPECT TO THE CONVICTION APPEAL

98 The convictions on counts 1, 2, 3, and 6 must be quashed and a new trial ordered. Neither the trial judge's mistakes as to the content of some of the evidence, nor his resort to speculative conclusions had any impact on the conviction on count 7. The appeal from that conviction should be dismissed.

IV. THE SENTENCE APPEAL

99 It is necessary to consider only the sentence imposed on the charge of assault causing bodily harm. The trial judge imposed a sentence of one month. Given my conclusion that there must be a new trial on the other counts, the assault on A.S. must be viewed as a single isolated act for sentencing purposes. Considering the passage of time between the offence and the conviction, the appellant's relative youth when the offence occurred, and the exemplary life he has led over the last 30 years, I do not regard further incarceration at this point as necessary or appropriate. I would reduce the sentence to time served.

V. CONCLUSION

100 In the result, I would quash the convictions on counts 1, 2, 3, and 6 and direct a new trial. I would dismiss the appeal from the conviction on count 7, grant leave to appeal the sentence imposed on that count, allow the appeal, and reduce the sentence to time served.

Conviction appeal allowed in part; sentence appeal allowed.

101 Note 1: The relationship between mistakes with respect to the substance of the evidence and this court's power to quash a conviction is developed below in the context of the final ground of appeal advanced by the appellant.

102 Note 2: As admissibility was not challenged, the record for appeal purposes does not set out in full the submissions made by counsel on the admissibility of the documents.

103 Note 3: Where the ground of appeal does not allege an error in law, the appellant must receive leave to appeal. In Ontario, at least, leave to appeal poses no bar. All grounds of appeal are considered on their merits in a single hearing.