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COURT OF APPEAL FOR ONTARIO

LASKIN, ROSENBERG AND LAFORME JJ.A.

B E T W E E N :	)	
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HER MAJESTY THE QUEEN	)	**Roger A. Pinnock**
	)	**for the Respondent**
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Respondent	)	
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- and -	)	
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RICHARD BURKE	)	**Gregory Lafontaine**
	)	**for the Appellant**
	)	
Appellant	)	
	)	
	)	**Heard: February 3, 2005**

On appeal from the conviction entered by Justice Sidney N. Lederman of the Superior Court of Justice, dated April 9, 2002.

LASKIN J.A.:

A. OVERVIEW

[1] The appellant R.B. and his wife ran a foster home for adolescent boys. Four boys in their care alleged that the appellant had sexually abused them. The sexual abuse included genital fondling, masturbation, and for two of the boys, anal intercourse. The alleged abuse took place between 1983 and 1991, when the complainants were twelve to eighteen years old. The allegations were first reported to the police in 1999.

[2] In April 2002, the appellant was tried on a ten-count indictment before Lederman J. and a jury. Each of the four complainants gave evidence. The appellant testified and denied the allegations against him. His wife testified in his defence, as did several character witnesses. Nonetheless, the jury found the appellant guilty on all ten counts. The trial judge sentenced him to ten years in the penitentiary.

[3] The appellant appeals both his convictions and his sentence. The two main issues on the conviction appeal are whether the trial judge erred in admitting the evidence of each complainant as similar fact evidence, and , if properly admitted, whether he erred in instructing the jury on how this evidence could be used. The main issue on the sentence appeal is whether the trial judge properly applied this court's decision in *R. v. D.(D.)* (2002), 163 C.C.C. (3d) 471.

B. THE EVIDENCE OF THE FOUR COMPLAINANTS

[4] Each of the four complainants – D.T, C.W., T.B., and O.C. – came to the appellant's foster home from a troubled family upbringing. Each had previously been in the care of the Children's Aid Society. Each came to view the appellant as a father figure. Apart from the sexual abuse, each complainant described living at the foster home in positive terms. Life there was "wonderful", the appellant was a "good person", and he and his wife gave the complainants the "family" they had never had before.

[5] In each case, the alleged abuse began when a complainant was particularly vulnerable – because of injury, illness or inebriation. In each case the abuse began with fondling. In respect of C.W. and O. C., the abuse escalated to repeated acts of anal sex. In respect of D.T. and T.B., the abuse consisted of genital touching, and oral sex, and occurred mainly after each boy had left the foster home. There was no evidence led at trial that the complainants colluded with each other, or even discussed the appellant's misconduct with each other. The following is a brief synopsis of each complainant's evidence:

i. D.T.

D.T. moved into the foster home when he was sixteen years old. He stayed there six months, and then went to live with his mother. No abuse occurred during this period.

However, when he was seventeen, D.T. got into a fight with his sister for which he was charged criminally. He was released on bail. The appellant acted as his surety. The terms of D.T.'s bail required him to live at the appellant's foster home. He stayed eight months.

One evening after school, D.T. told the appellant that he suffered a hamstring or groin pull from running. The appellant offered to give him a massage. He rubbed D.T.'s leg for five minutes and then moved his hands closer to D.T.'s genitals. D.T. ended the massage and went to his room.

On another occasion, D.T. and the appellant were on the balcony of the foster home. The appellant grabbed D.T.'s genitals. D.T. kept telling the appellant to stop. Eventually D.T. broke free. He stayed at the foster home for another four or five months. While he was there, no further acts of sexual impropriety took place.

After D.T. left the foster home he kept in touch with the appellant. Despite the incidents of abuse, D.T. regarded the appellant as a good person who had helped him a lot. Occasionally, they went driving together so they had a chance to talk.

Three or four times, the appellant put his hand on D.T.'s thigh, moved it up and down, and tried to touch his genitals. After these incidents, D.T. ended all contact with the appellant. He did not want the appellant to touch him any more.

ii. C.W.

C.W. came to live at the appellant's foster home when he was twelve years old. The first incident of sexual abuse he described occurred when he was sick with a fever. The appellant put him in a shower to make him "sweat out" his illness. The appellant washed his groin area in a way that seemed inappropriate to C.W. Later that night, C.W. woke up in his bed to find the appellant's hand under his clothes touching, fondling and massaging his groin. The appellant kept doing so until C.W. got an erection.

A month or two later the appellant's conduct escalated significantly. He forced C.W. to have anal sex. C.W. was unsure how often, but said that it happened more than five or six times. The appellant tried to reassure C.W. by telling him that he was a special person and that anal sex was normal. When he was sixteen or seventeen, C.W. moved out of the foster home. However, the appellant found him and the sexual activity continued.

iii. T.B.

T.B. went to live at the foster home when he was thirteen or fourteen. He stayed six months to a year. Nothing improper occurred while he lived with the appellant. However, T.B testified about one incident of sexual abuse, which occurred a few months after he left the foster home. T.B. had been out late, past midnight, drinking with some friends. He could have gone to his grandmother's house, but it was late and he did not want to wake her, so he went to the appellant's residence.

The appellant answered the door in his bathrobe. T.B.told him that he had been drinking, and asked if he could come in and go to sleep. He lay down on the couch with his head on the appellant's lap. The appellant rubbed T.B.'s leg and his stomach, undid his belt and pants, and continued to rub his stomach. Then the appellant put his hands on T.B.'s penis and began rubbing it. Finally the appellant took out his own penis, held T.B.'s head to it and moved T.B.'s head up and down. The appellant's penis became erect but he did not ejaculate. The incident lasted five to ten minutes. After a while, the appellant got up and went away. T.B. left the appellant's residence early in the morning and never returned.

i.v. O.C.

O.C. was placed in the appellant's foster home when he was eleven or twelve years old. He had been living there about one year when one day he got a cold. The appellant suggested a hot shower to sweat out the cold. The heat made O.C. dizzy, and the appellant helped him to bed. O.C. was lying naked under the sheets. The appellant started playing with O.C.'s penis until he ejaculated. The appellant

cleaned it up and then left. O.C. told some other boys in the residence what had happened but they did not believe him.

A few months after this first incident, the appellant's sexual abuse of O.C. became more frequent and more serious. It progressed to masturbation, to O.C. performing oral sex on the appellant, and finally to anal sex. The appellant always initiated the sexual activity.

O.C. stayed at the appellant's residence until he was fifteen years old. He never told anyone in authority about the appellant's sexual abuse until he reported it to the police in 1999.

C. THE ISSUES ON THE CONVICTION APPEAL

[6] In his oral argument, counsel for the appellant advanced four grounds of appeal against conviction: the trial judge's ruling on the similar fact evidence; his instruction to the jury on how to use that evidence; and two grounds on which we did not call on the Crown – whether the trial judge properly instructed the jury on the evidence of the appellant's good character, and whether the trial judge properly instructed the jury on the complainants' delayed reporting of their allegations of sexual abuse.

First issue: did the trial judge err in admitting the evidence of each complainant as similar fact evidence?

[7] At the beginning of the trial, the defence brought a motion for severance so that the charges relating to each complainant would be tried separately. The Crown brought a motion to have the evidence of each complainant admitted as similar fact evidence on the counts relating to the other complainants. The trial judge dismissed the defence's motion and granted the Crown's motion. The appellant does not appeal the ruling denying severance. He does, however, appeal the similar fact ruling.

[8] The appellant attacks the trial judge's similar fact ruling on two grounds. First, he argues that the trial judge erred in holding that the similar fact evidence was relevant to each complainant's credibility because that invited admitting the evidence merely for proof of general disposition. Second, he argues that the trial judge ought to have distinguished between the evidence of C.W. and O.C. on the one hand, and the evidence of D.T. and T. B. on the other. The sexual assaults on C.W. and O.C. included anal intercourse and were more serious than the assaults on D.T. and T.B. The appellant acknowledges that the evidence of C.W. is admissible as similar fact evidence on the counts relating to O.C. and *vice versa*. He argues, however, that the prejudicial effect of admitting the evidence of C.W. and O.C. on the counts relating to D.T. and T.B. outweighs its probative value and should not have been permitted.

[9] In the Supreme Court of Canada's leading similar fact decision, *R. v. Handy* (2002), 164 C.C.C. (3d) 481 at 522, Binnie J. affirmed that a trial judge's decision to admit similar fact evidence is entitled to "substantial deference". But he also stated that "[a]

trial judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value". I would defer to the trial judge's ruling. I am not persuaded that he erred in concluding that the probative value of the evidence of each complainant on the other counts in the indictment outweighed its prejudicial effect.

[10] The appellant's first argument concerns whether the trial judge properly identified the issue for which the similar fact evidence was relevant. The trial judge's similar fact ruling was given in early April 2002, and therefore he did not have the benefit of the Supreme Court's decision in *Handy*, which was released in late June 2002. As in many pre-*Handy* similar fact rulings, the trial judge held that this evidence could be used to enhance each complainant's credibility. In *Handy*, at pages 514-15, however, Binnie J. cautioned that "[I]dentification of credibility as 'the issue in question' may, unless circumscribed, risk the admission of evidence of nothing more than general disposition ('bad personhood')".

[11] I do not think that was a risk here. The trial judge's ruling showed that he admitted the similar fact evidence not to show a general propensity to engage in sexual misconduct but to show the appellant's specific propensity to engage in sexual misconduct with boys in his care who came to him in a vulnerable condition.

> In this case, the evidence has significant probative value beyond mere propensity of the accused to engage in a particular type of conduct or to show a general criminal disposition to commit this type of crime. The similar fact evidence would be tendered to infer the accused's disposition to engage in sexual activity with boys with whom he has had or continues to have a father relationship which is initiated at a time when the boy is in a vulnerable condition and under the guise of trying to assist him. From that, it is open for a trier of fact to infer that the accused acted in conformity with such disposition to commit the subject offence. It is through these inferences that the evidence may be capable of corroborating each complainant's story and thereby enhancing their credibility and establishing design or rebutting any defences such, as innocent association, that may be raised by the accused.

The question to be decided was whether the sexual assaults occurred. The similar fact evidence was probative of the *actus reus* of the offences, which in turn depended on the credibility of the complainants' evidence about the assaults, See *R. v. T.C.* , (11 January 2005), Ontario C39114 (Ont.C.A.) at para. 56.

[12] I turn to the appellant's second argument, whether in his ruling the trial judge should have distinguished between the evidence of C.W. and O.C., and the evidence of D.T. and T.B. The appellant accepts that there is sufficient "connectedness" between the

evidence of C.W. and O.C. to make each's admissible as similar fact evidence on the counts relating to the other.

[13] The appellant's concerns are first that there is not the same level of connectedness between the evidence of C.W. and O.C. and the evidence of D.T. and C.B.; and second that the prejudicial effect of using the evidence of C.W. and O.C. on the counts pertaining to D.T. and T.B. is very high. The appellant points out that the assaults on D.T. and T.B. were less serious and that, unlike the assaults on C.W. and O.C., they occurred mainly after these two boys had left the foster home.

[14] I do not agree with the appellant's position. In my view, although the assaults on D.T. and T.B. did not escalate to anal intercourse, as they did with C.W. and O.C., there remained a high degree of "connectedness" (*Handy, supra,* at 505) or, to use the trial judge's word, "similarity" among all the acts in question. The trial judge dealt with these similarities in his ruling. As I largely agree with his analysis I will review the similarities briefly.

[15] In each case the appellant first engaged in sexually abusive conduct when the complainant was especially vulnerable, be it from injury, illness or inebriation; in each case he engaged in his first act of sexual abuse under the guise of assisting the complainant; in each case the appellant's first sexual assault amounted to genital fondling; in each case the sexual assaults began in the appellant's home; in each case the complainant came to view the appellant as a father figure.

[16] These considerations show a high degree of connectedness. The number of complaints and the absence of any material gap in time when the appellant was not allegedly engaged in this abusive conduct adds to the connectedness. That the assaults on D.T. and T.B. occurred after they had left the appellant's home is not a difference that materially diminishes the level of connectedness. The appellant was able to commit these offences on D.T. and T.B. because he had developed a relationship of trust with each of them while each was under his care at the home. For example, T.B. went to the foster home when inebriated because he knew from his previous experience there that the appellant would be home and would care for him.

[17] I accept that the potential prejudicial effect of using the evidence of C.W. and O.C. on the counts relating to T.B. and especially to D.T. is a concern. The acts of anal intercourse were somewhat more serious than the assault on T.B. and considerably more serious than the assaults on D.T.. These acts could arouse in the jury "sentiments of revulsion and condemnation" that might arguably risk a fair trial for the appellant on the charges relating to D.T. and T.B. (See *R. v. Thomas* (2004), 190 C.C.C. (3d) 31 (Ont. C.A.) at paras. 35-36.) Balanced against this potential prejudicial effect, however, is the strong probative value of this evidence both because of its high degree of connectedness and, as the trial judge found, because of the absence of collusion among the complainants.

[18] The trial judge was aware of the possible prejudicial effect of admitting the evidence of each complainant as similar fact evidence on the other counts. He undertook the balancing exercise that the law requires. I cannot say he was wrong in concluding that the probative value of the evidence outweighed its prejudicial effect. I would therefore not give effect to this ground of appeal.

Second issue: Did the trial judge err in instructing the jury on how to use the similar fact evidence?

[19] The appellant also challenges the trial judge's jury instruction on the use of the similar fact evidence. The appellant contends that the trial judge erred by failing to explain to the jury how a "pattern of similar behavior" supported the credibility of each complainant's allegations. The absence of such an instruction, according to the appellant, would have caused the jury to convict the appellant by reasoning improperly that he had a general propensity to commit the crimes. The appellant complains about the following two passages in the trial judge's charge:

> However, you may but do not have to find that there is a pattern of similar behaviour that confirms each complainant's testimony that the offences took place. It is for you to say.
>
> In considering this evidence, bear in mind the relationship between Mr. Burke and the complainants as well as the circumstances of each of the situations. In deciding whether such a pattern of similar behavior exists, you should consider the similarities and differences of each of the circumstances pertaining to each of the complainants.

and,

> It is for you to decide whether there are sufficient similar features to the context of each of the allegations such that they would enhance the credibility of each complainant. If you are not satisfied that the evidence demonstrates a pattern of similar behavior, then evidence on each count must be considered without regard to the evidence of the other complainants.

[20] I do not accept the appellant's contention. Indeed the trial judge began his instruction on similar fact evidence by cautioning the jury in words that answer the appellant's concern.

> Each count requires its own proof. The real issue for you to decide in this case is whether the offences alleged by each complainant or any of them ever actually took place. Be careful not to jump to the conclusion that if you believe that one complainant is telling the truth, the others must be telling the truth as well. Nor should you jump to the conclusion that because the complainants allege similar conduct they all must have occurred if any one of them is proved. It is up to the Crown to prove each charge independently of the others. I caution you that you are not to use the evidence on one count to generally infer that Mr. Burke is of such a bad character or disposition that he is likely to have committed the offences charged in any of the other counts.

[21] In other words, the trial judge warned the jury not to use general propensity reasoning to convict the appellant. The balance of the trial judge's charge on similar fact evidence steered the jury toward how it might properly use this evidence. He told the jury it could, but need not find that the evidence disclosed a pattern of similar behavior, which would confirm each complainant's testimony about the allegations. He instructed the jury that in deciding whether a pattern existed it should consider both the similarities and the differences in the circumstances pertaining to each complainant, which he then outlined. He specifically described the pattern alleged by the Crown.

> The Crown submits that there is such a pattern of similar behaviour in the way Mr. Burke acted towards each complainant that would support the credibility of the particular allegation of the other complainants, namely, first, that he would wait to initiate sexual touching until a time when each of the complainants was ill or incapacitated in some way. O.C. and C.W. were ill with colds. D.T. had an injured leg. T.B. was in an intoxicated condition. Secondly, that Mr. Burke would engage in the first incident of sexual abuse under the guise of trying to help or assist the complainant in some fashion. And thirdly, that the first incident of sexual abuse on each of the complainants began with limited sexual conduct such as the touching of the genital area.

[22] The trial judge cautioned the jury on the need for "sufficient similar features" to use each complainant's evidence to enhance the credibility of the other complainants.

And finally he cautioned the jury that, regardless of its finding on whether a pattern of similar behavior existed, it could convict the appellant of an offence only if the Crown had met its burden on all elements of that offence.

[23] In the light of these instructions, I am not persuaded that there existed any real risk that the jury would have used the similar fact evidence improperly, that is to convict because of the appellant's general bad disposition (*Thomas*, *supra*, at paras 38-44). Defence counsel apparently did not think so either for he neither sought an additional instruction during the pre-charge conference nor objected to this portion of the charge once it had been given. I would not give effect to this ground of appeal.

Other issues

[24] The appellant also submitted that the trial judge failed to instruct the jury properly on the use of good character evidence and on the complainants' delay in reporting the sexual abuse. We found no merit in these submissions and did not call on the Crown to respond to them.

a. The good character instruction

[25] The appellant called witnesses to testify to his good character. Courts have accepted that an accused may lead good character evidence for two purposes: to support the accused's credibility, and to support an inference that the accused is unlikely to have committed an offence.

[26] The appellant submitted that the trial judge failed to make the first purpose clear. We disagree. The trial judge instructed the jury:

> From this [character] evidence you are asked by the defence to draw the inference that [the appellant] is not the type of person who would have committed the offences and who is the type of person who would be a truthful witness. You should consider the good character evidence along with and the same way as the rest of the evidence in deciding whether [the appellant] is more worthy of belief…[emphasis added].

[27] The trial judge went on to tell the jury – in accordance with *R. v. Profit* (1993), 85 C.C.C. (3d) 232 (S.C.C.) at 248 – "because sexual offences primarily take place in private, they are often not reflected in a person's reputation in the community".

[28] The appellant's real complaint is that the trial judge did not also tell the jury that, though the propensity value of character evidence may be diminished in sexual misconduct cases, the credibility value of character evidence is not so diminished. I am not persuaded that this instruction was called for. Defence counsel did not ask for it. There were no credibility issues in this case apart from the central sexual assault

allegations. Thus, the two purposes for which good character evidence is admissible were largely inseparable. Regardless, the trial judge's charge was adequate.

b. The delayed reporting instruction

[29] D.T. did not complain about the appellant's sexual abuse for ten years; C.W. did not complain from the late 1980's until 1998, and in 1992 denied that any abuse took place; T.B. did not complain to the police until 1999, and in 1992 denied that any abuse took place; and O.C. waited 16 years, until 1999, to make a complaint. The trial judge instructed the jury on the complainants' delays in reporting. However, the appellant submitted that he did so in an unbalanced way because he did not tell the jury a possible reason for the complainants' late reporting was the falsity of their allegations. Again, we disagree.

[30] The trial judge began his instructions on late reporting by identifying the defence position: "[t]he defence has submitted that the delay in disclosing the incidents by the four complainants affects their credibility". He then summarized the evidence on delay and on the previous denials of sexual abuse. He concluded his instructions on delayed reporting with the following:

> You may take into account these delays of disclosure and the explanations for them in assessing the credibility of each complainant. Please keep in mind that there is no absolutely certain rule on how people who are victims of trauma like sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of each complainant, the timing of the complaint is just one factor among many for you to consider.

[31] This passage reproduces almost verbatim the instruction on delayed reporting recommended by the Supreme Court of Canada in *R. v. D.(D.)*(2000), 148 C.C.C. (3d) 41 at para. 65.

D. THE SENTENCE APPEAL

[32] In his forceful reasons in *D.(D.)*, Moldaver J.A. suggested these sentencing ranges in cases where adults in a position of trust sexually abuse young children: where the abuse is regular and persistent and occurs over a substantial period of time, a mid to upper single digit penitentiary term; where the sexual abuse includes full intercourse and is accompanied by other physical violence, threats of physical violence or extortion, an upper single digit to low double digit penitentiary term; and where these elements are

accompanied by severe psychological, emotional and physical brutality, an even higher penitentiary term (*D.(D.)*, *supra*, at pp. 480-481, 484). Moldaver J.A. properly recognized that, in sentencing adults who sexually abuse children, denunciation, general and specific deterrence, and the need to separate offenders from society should take precedence over the other recognized objectives of sentencing. In *D.(D.)* itself this court upheld an effective sentence of nine years and one month, after taking into account pre-sentence custody.

[33] In this case, the trial judge applied *D.(D.)*'s guidelines and concluded that "a global, low double digit pentitentiary term of ten years" was required. He broke down the ten years as follows: four years for the sexual assaults on C.W., four years for the sexual assaults on O.C., one year for the sexual assaults on D.T. and one year for the sexual assault on T.B.

[34] The appellant submits that the trial judge misapplied *D.(D.)*, that his conduct differed significantly from the conduct justifying the sentence in *D.(D.)*, and that ten years is excessive.

[35] The trial judge gave thorough and careful reasons for sentence. He canvassed the mitigating and aggravating considerations bearing on a fit sentence. He identified the principal aggravating consideration that called for a lengthy penitentiary sentence: the appellant exploited his position of trust and authority to prey on these vulnerable boys, and as a result irretrievably damaged them. That said, while I agree that the appellant's misconduct justified a severe sentence, I agree with his submission that it warranted a lesser sentence than that imposed in *D.(D.)* or by the trial judge in this case. Although the appellant's sexual abuse was similar to that of the accused in *D.(D.)*, it was not accompanied by the numerous aggravating factors present in *D.(D.)*.

[36] The following considerations suggest that the appropriate *D.(D.)* range is a mid to upper single digit penitentiary term, not the range applied by the trial judge, an upper single digit to low double digit pentitentiary term.

> i. Most important, the accused in *D.(D.)* used violence during sex and threatened his victims to keep them silent. For example, he dangled a child over a balcony thirty stories high because he feared that the child might report him. He also extorted his victims with pictures.
>
> The appellant did not engage in any similar conduct. He did not use physical violence, threats of physical violence or extortion – the principle considerations Moldaver J.A. suggested warrant a high single digit to low double digit penitentiary term.
>
> ii. The accused in *D.(D.)* gave his victims liquor and cigarettes, and introduced them to pornography.
>
> Apart from his sexual abuse, the appellant ran a good household. He and his wife treated the boys well and took good care of them.
>
> iii. The accused in *D.(D.)* bribed his victims with video games and money.

> Although the appellant did give each complainant an allowance, all four boys testified that the money they received was not tied to the sexual encounters.
> iv. The accused in *D.(D.)* had a minor criminal record.
> The appellant had no record and an unblemished reputation in the community.
> v. In both *D.(D.)* and this case there were four victims. Both the accused in *D.(D.)* and the appellant abused positions of trust, and the appellant's breach was particularly serious because he took advantage of adolescent youths who were looking for a safe haven from their troubled upbringing.
> However, compared to this case, the victims in *D.(D.)* were much younger (five to eight years old) when the sexual abuse occurred, and the abuse to which they were subjected was more frequent and more pervasive.

[37] At the time of trial the appellant was fifty seven years old. He and his wife had been foster parents for nearly twenty years. He had a strong marriage of twenty seven years. He was a leader in his church. He had a sterling reputation in the community. And he did considerable volunteer work for which he received numerous awards. Taking into account these mitigating considerations, together with the features that I have outlined distinguishing this case from *D.(D.)*, I consider a fit sentence is seven and a half years in the penitentiary.

E. CONCLUSION

[38] I would dismiss the conviction appeal. In my view the trial judge did not err in admitting the evidence of each complainant as similar fact evidence, and he did not err in his instruction to the jury on how to use that evidence.

[39] I would, however, grant leave to appeal sentence, and reduce the appellant's global sentence from ten years to seven and a half years in the penitentiary. I would give effect to this sentence by reducing the sentences on count one (sexual assault on O.C.) and count six (sexual assault on C.W.) from four years to three years, and the sentence on count three (sexual assault on D.T.) from one year to six months.

RELEASED: August 29, 2005

"J.I. Laskin J.A."
"I agree: M. Rosenberg J.A."
"I agree: H.S. LaForme J.A."