DATE: **20021217**
DOCKET: **C36592**

COURT OF APPEAL FOR ONTARIO

DOHERTY, AUSTIN and ARMSTRONG JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN	)	
	)	
Appellant	)	Laura Hodgson, for the appellant
	)	
- and -	)	S.J. Von Achten, for the respondent
	)	
N.A.P.	)	
	)	
Respondent	)	
	)	Heard: October 2, 2002

On appeal from acquittals entered by a jury presided over by Justice Moira L. Caswell on June 5, 2001.*

DOHERTY J.A.:

I

[1] The respondent was charged in a ten count indictment with various offences against his wife (M.P.) and his fifteen year old daughter (N.P.). The trial judge severed count 7, a charge of mischief, at the end of the Crown's case. The remaining nine counts went to the jury after a two week trial. The jury convicted on count 6, a charge of assault involving N.P., and acquitted on the remaining eight charges. The Crown appeals from the acquittals. I would dismiss the appeal.

[2] Counts 1 to 5 arose out of events which occurred in the family home on August 19, 2000. It was the Crown's position that the respondent became very angry when he learned that N.P. had told her mother, M.P., that she was sexually assaulted by the respondent several years earlier. The Crown alleged that on the morning of August 19th, the respondent assaulted N.P. (count 1). Later that day, he assaulted M.P. by threatening her with a pipe (count 2), confined M.P. for some time in the family home (count 3), and

* A s. 486 publication ban on the identification of the complainants and any information that could disclose their identity

threatened to kill both M.P. and N.P. (counts 4 and 5). The respondent was arrested on the evening of August 19th after N.P. had gone to the police who then went to the family home. They found the respondent and M.P. in the home. According to the arresting officers, M.P. was terrified.

[3] In his testimony, the respondent indicated that when he learned from M.P. that N.P. had falsely accused him of sexually assaulting her several years earlier, he became very angry and decided to confront N.P. about her false accusations. The respondent did not know what to do but wanted the matter resolved. He told his daughter to go to the police believing that their intervention could resolve the false allegation. The respondent thought that if he went to the police himself they would not respond. He denied assaulting, threatening or confining either N.P. or M.P. on August 19th. He acknowledged a confrontation with N.P. on the morning of August 19th, but denied any assault. He said that he and his wife were at home on August 19th and that nothing untoward was happening when the police arrived.

[4] Count 6 of the indictment, the only count on which the respondent was convicted, alleged an assault against N.P. in the spring of 2000. She testified that the respondent was following her around the family home for no reason and that she became aggravated and told him to stop. When he refused to do so, N.P. threw a cup at him. The respondent reacted by jumping on N.P., placing her in a headlock and punching her "a couple of times". The respondent recalled N.P. throwing a cup at him. He denied hitting his daughter or putting her in a headlock, indicating that he merely stood in her way so that she could not go where she wanted to go.

[5] In count 7, the Crown alleged that the respondent committed mischief by killing a cat owned by N.P. some time in the fall of 1999. N.P. described the circumstances surrounding the killing of the cat and said that it frightened her and caused her to leave the family home for some time. The Crown relied on the evidence concerning the killing of the cat not only to prove the mischief charge, but as evidence of the respondent's ongoing abuse of, and animus towards, N.P. The Crown's theory was that this conduct eventually led to the events of August 19th. The trial judge severed this count on her own motion at the end of the Crown's case. It remains outstanding. The trial judge also told the jury to disregard the evidence led on this count when considering the other charges.

[6] In count 8, the Crown alleged that the respondent assaulted M.P. in 1998 while the family was living in Oakville. M.P. testified that she and the respondent argued about his treatment of N.P. The respondent became very angry, threatened her with a knife and held a gasoline can over her head, letting gasoline drip on her while he threatened to light her on fire. The respondent said that there was one "vicious physical altercation" while they were living in Oakville. Both he and M.P. were involved in the altercation, although it was precipitated by M.P. The respondent denied that it involved a knife or a gasoline

can. On his version, the dispute arose over the maintenance of the garden at the home in Oakville. The respondent indicated that he was so angry that he tore a telephone from the wall in the course of this argument.

[7] In counts 9 and 10, the Crown alleged a sexual assault on N.P. by the respondent some time in 1991 or 1992. N.P. testified that on one occasion when she was seven or eight years old the respondent put his hands down her pyjamas and touched her vagina. He told her not to tell anyone. She first disclosed the assault in about 1999. She told her mother M.P. about the assault about two weeks before August 19, 2000. The respondent denied that he sexually assaulted N.P. It was the defence position that N.P. made up the allegation against the respondent in August 2000 to get him in trouble and free herself from his discipline.

[8] In addition to evidence which pertained directly to the incidents alleged in the various counts in the indictment, the Crown was allowed to lead evidence of other discreditable conduct allegedly committed by the respondent against either M.P. or N.P. The Crown led evidence of three other alleged assaults on M.P. by the respondent, the first in 1988, the second in 1994, and the third in January 2000. The Crown led evidence of two additional alleged assaults on N.P. by the respondent in 1999 or 2000. The Crown also led evidence of two other events in 1999 and 2000 involving sexually inappropriate conduct by the respondent towards N.P.

[9] M.P. was also allowed to describe at some length the nature of her relationship with the respondent from the time they were married in 1982. She described the marriage as "rocky" from the outset and worse as time went on. M.P. said that the respondent controlled and terrorized her. He assaulted her hundreds of times and on many occasions destroyed her clothing as well as the family furniture and housewares. She did not report the vast majority of the assaults. When M.P. did report some of the assaults, she later retracted those allegations after the respondent apologized and assured her that it would not happen again. M.P. left the respondent about eight times because of the abusive conduct but she returned to him on each occasion. The marriage ended with the respondent's arrest in August 2000. M.P. said she finally left permanently because the respondent was becoming increasingly erratic and more prone to violent outbursts.

[10] M.P. also described the relationship between the respondent and N.P. She said that while the respondent had occasionally been physically abusive towards N.P. prior to the fall of 1999, he began to physically abuse her on a regular basis after that time. He was also constantly verbally abusive towards N.P. calling her a "slut" and "fat". He also "trashed" N.P.'s room on several occasions. N.P. gave similar evidence.

[11] The respondent's position, advanced through cross-examination of M.P., N.P. and other Crown witnesses and through his own evidence, was that N.P. and M.P. were liars.

It was the respondent's position that although he had his faults and did become angry and verbally abusive on occasion, he had done his best to maintain the marriage and hold the family together while dealing with an increasingly rebellious and dishonest daughter and a drunken and abusive wife.

II

[12] The Crown raises three issues on this appeal.

1) Did the trial judge err in law in granting the appellant's *Corbett* application and ruling that the respondent could not be cross-examined on his criminal record pursuant to s. 12 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5?
2) Did the trial judge err in law in holding that the respondent had not put his character in issue during his examination-in-chief, thereby precluding the Crown from adducing evidence of his criminal record pursuant to s. 666 of the *Criminal Code*, R.S.C. 1985, c. C-46?
3) Did the trial judge err in law in severing the mischief charge on her own motion and in instructing the jury that they should disregard the evidence adduced on that charge in considering the remaining charges?

[13] The first two grounds of appeal involve the contention that the Crown should have been allowed to put the respondent's criminal record to him on cross-examination. The issue first arose at the end of the Crown's case. Following the procedure set down in *R. v. Underwood* (1998), 121 C.C.C. (3d) 117 (S.C.C.), counsel for the respondent brought a *Corbett* application asking the trial judge to foreclose cross-examination on the respondent's criminal record should the respondent testify. The respondent's criminal record is as follows:

- In February 1975, the respondent was convicted of taking an auto without consent and theft. He received a sentence of thirty days and a one year suspended sentence with probation.
- In December 1975, the respondent was convicted of three break and enters for which he received a total of six months plus probation.
- In December 1975, the respondent was convicted of dangerous driving and received a sentence of thirty days concurrent.
- In August 1978, the respondent was convicted of escape lawful custody and received a sentence of one month.
- In October 1978, the respondent was convicted in Alberta of attempted murder and received a sentence of life imprisonment which was reduced to twelve years on appeal.

[14] The respondent was sixteen or seventeen years old when he was convicted of various offences in 1975. He was nineteen when he was convicted of attempted murder

in 1978. He was forty-two at the time of trial and had not been convicted of any crimes since his release on parole in 1983.

[15] The trial judge ruled in the respondent's favour on the *Corbett* application. She indicated that depending on the tenor of the respondent's examination-in-chief she could revisit her ruling at the conclusion of his examination-in-chief.

[16] The respondent testified. At the conclusion of his examination-in-chief, Crown counsel argued that the respondent had put his character in issue by answers he had provided to several questions posed by his counsel. The Crown contended that under s. 666 of the *Criminal Code* she was now entitled to prove the respondent's criminal record. She proposed to do so by putting it to him in his cross-examination. The trial judge did not formally rule on the Crown's motion. She did not, however, allow the Crown to cross-examine the respondent on his criminal record and the jury never heard that the respondent had a number of previous convictions.

III

The *Corbett* Ruling

[17] Section 12 of the *Canada Evidence Act* allows a witness to be cross-examined on his or her criminal record. Since the decision in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 (S.C.C.), it is clear that a trial judge has the discretion to prohibit cross-examination of an accused on his or her criminal record where in the trial judge's view the potential prejudice of such cross-examination outweighs the potential probative value: *R. v. Corbett*, *supra*, per Dickson C.J.C. at 404-405, per LaForest J. (in dissent in the result) at 440-41; *R. v. Saroya* (1994), 36 C.R. (4th) 253 (Ont. C.A.). Absent an error in principle or a material misapprehension of the relevant facts, an appellate court will not interfere with the exercise of that discretion by the trial judge: *R. v. P.(G.F.)* (1994), 89 C.C.C. (3d) 176 at 180-81 (Ont. C.A.); *R. v. Halliday* (1992), 77 C.C.C. (3d) 481 at 488 (Man. C.A.).

[18] In her ruling,[1] the trial judge described the evidence of the respondent's criminal record as "highly probative" in that all of the prior convictions "are relevant to his truthfulness or creditworthiness". She ultimately excluded the evidence, however, after concluding that the probative value did not outweigh the prejudicial effect. She identified

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[1] The trial judge gave brief oral reasons at the end of the *Corbett* application at trial. She gave written reasons at some subsequent time. I see no significant difference in the two sets of reasons and refer to them together as the trial judge's reasons.

the prejudicial effect as the risk that the jury would "infer guilt based solely on the accused's criminal record".

[19] In reaching her conclusion, the trial judge applied the assessment of probative value and prejudicial effect described by Charron J. in *R. v. B.(L.)* (1997), 116 C.C.C. (3d) 481 (Ont. C.A.). With respect, I think the trial judge erred in using the approach described in *R. v. B.(L.)*, *supra*, when exercising her discretion to prohibit cross-examination of an accused on his criminal record. In *R. v. B.(L.)*, *supra*, the Crown sought to adduce evidence of discreditable conduct by the accused other than that with which he was charged as part of the Crown's case. That kind of evidence is presumptively inadmissible and will be received only if the Crown can demonstrate that the probative value outweighs the potential prejudicial effect: *R. v. B.(L.)*, *supra*, at 489-90; *R. v. Handy* (2002), 164 C.C.C. (3d) 481 at 495 (S.C.C.).

[20] On a *Corbett* application, however, the accused seeks to testify while at the same time withholding information from the jury that would be relevant to its assessment of the accused's credibility as a witness. There is no presumption against the admissibility of the accused's criminal record where he or she chooses to testify. To the contrary, as indicated by the majority in *R. v. Corbett*, *supra*, cross-examination on a criminal record of an accused who chooses to testify will be the usual course. Dickson C.J.C., for the majority said at pp. 399-401:

> There is perhaps a risk that if told of the fact that the accused has a criminal record, the jury will make more than it should of that fact. <u>But concealing the prior criminal record of an accused who testifies deprives the jury of information relevant to credibility, and creates a serious risk that the jury will be presented with a misleading picture.</u>
>
> In my view, the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to a limited use they are to make of such information. <u>Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort.</u> It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value. …
>
> … <u>One can now add on the accused's side of the balance the discretion in the trial judge to exclude evidence of prior convictions in those unusual circumstances where a mechanical application of s. 12 would undermine the right to a fair trial.</u>

> In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue in the dark [emphasis added].

[21] The trial judge's erroneous application of the approach designed for determining the admissibility of similar fact evidence to the *Corbett* application amounts to an error in principle. That error opens the door to a review of the merits of the decision on the *Corbett* application by this court.

[22] I do not share the trial judge's view that the entirety of the respondent's criminal record was "highly probative" of his credibility. The 1975 convictions, although most involved acts of dishonesty, occurred when the respondent was a young man more than twenty-five years before the trial. I do not think that those convictions, particularly when there are no subsequent crimes of dishonesty, shed much light on the respondent's credibility as a forty-two year old when testifying in 2001. I also do not see much potential prejudice from admitting the evidence of the 1975 convictions. Properly instructed, I have no doubt that a jury would limit its consideration of the 1975 convictions to the impact, if any, those convictions might have on the appellant's credibility.

[23] The difficult issue on the *Corbett* application arises out of the conviction for attempted murder in 1978. As this court indicated in *R. v. Saroya*, *supra*, at p. 257, a conviction for attempted murder can have a significant effect on credibility. The court observed:

> A conviction for attempted murder cannot be dismissed as having little probative value on the credibility of a witness. Although it is not a so called offence of dishonesty, which may be probative of deception, attempted murder is such a serious offence that, in itself, it may be taken to indicate that the prospect of a conviction for perjury is unlikely to keep the witness in line. More significantly, it would be open to a jury to find, on all the relevant evidence, that the witness is unlikely to have more respect for the truth than he has shown for human life.

[24] The respondent's prior conviction for attempted murder could have had a significant impact on the jury's assessment of his credibility. Its admission into evidence, however, also posed a real risk that the jury could improperly infer guilt on at least some of the charges against the respondent either by reasoning that his prior conviction showed him to be a bad person who was prone to criminal conduct or by reasoning that his prior conviction for attempted murder was proof that he committed the offences alleged against him at this trial: *R. v. Handy*, *supra*, at pp. 519-21.

[25] The charges against the respondent included various assaults and two charges of uttering death threats. There was a real risk, despite the prophylactic effect of a proper limiting instruction, that a jury would conclude that someone who had actually tried to kill another person was dangerous and would certainly not hesitate to threaten and assault others. In my view, the potential probative value and the potential prejudicial effect of the evidence of the prior conviction for attempted murder were both relatively high. The determination of whether the Crown should have been allowed to cross- examine the respondent on that prior conviction was a close call.

[26] In cases, like this one, where credibility is central to the outcome at trial, the balance may tip in favour of permitting cross-examination on an accused's criminal record if the accused mounts an all-out attack on the credibility and character of the Crown witnesses. Where that tactic is employed, cross-examination of the accused on his or her criminal record permits a more informed assessment of the credibility of the competing versions of events: *R. v. Corbett*, *supra*, per Dickson C.J.C. at p. 405, per LaForest J. at pp. 437-38; *R. v. Peterpaul* (2001), 151 C.C.C. (3d) 193 at 198 (Ont. C.A.).

[27] The respondent made an all-out attack on the credibility and character of the Crown witnesses, particularly M.P. and N.P. He attempted to portray N.P. as a thief, liar and drug abuser who was sexually promiscuous and had no regard for family rules or the difficult economic straits of her family. The respondent also suggested during the cross-

examination of N.P. that she had threatened to harm an acquaintance and had damaged that person's property. The attack on M.P. was no less forceful. She was portrayed as a lazy drunk, an irresponsible and ineffective mother and the instigator and main combatant in the numerous physical altercations involving herself and the respondent.

[28] Despite the nature of this cross-examination, I cannot agree with the Crown's contention that without evidence of the respondent's prior conviction for attempted murder, there was a real danger that the jury would assume that the respondent had "an unblemished record": *R. v. Corbett*, *supra*, at p. 405. This assertion ignores the thrust of the Crown's case. The Crown presented a great deal of evidence from several witnesses indicating that throughout the eighteen year marriage the respondent physically, verbally and emotionally abused his wife and children. I do not think that it lies in the mouth of the Crown, having chosen to present its case in that fashion, to suggest that without the evidence of the prior conviction for attempted murder some twenty years earlier, the respondent could have presented himself as a person without fault. By the end of the Crown's case, the jury had a very clear picture of a dysfunctional family mired in poverty, alcoholism and physical and emotional abuse. The jury had a great deal of information about the respondent's background and the role he played in the difficulties within the family. The jury knew a lot about the respondent and most of it was very unfavourable.

[29] Although, as I said above, this was a close case, I think the proper exercise of the discretion on the *Corbett* application favoured an order prohibiting cross-examination on the prior conviction for attempted murder. In so far as cross-examination on the rest of the criminal record is concerned, I need not come to any final conclusion on the admissibility of the rest of the respondent's record as, in my view, there is no real likelihood that cross-examination on the rest of the criminal record could have had any effect on the verdict.

IV

The s. 666 Application

[30] Section 666 of the *Criminal Code* provides:

> Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences …

[31] An accused may put his or her character in issue during examination-in-chief by answers which expressly or by implication indicate that he or she is not the sort of person

who would have committed the offences alleged: *R. v. Farrant* (1983), 4 C.C.C. (3d) 354 at 368-69 (S.C.C.); *R. v. Morris* (1978), 43 C.C.C. (2d) 129 at 156-58 (S.C.C.); *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 at 348 (Ont. C.A.), leave to appeal to S.C.C. on this point refused (1981), 56 C.C.C. (2d) 576.

[32] If an accused puts his or her character in issue during examination-in-chief, the scope of cross-examination on the criminal record permitted by s. 666 goes beyond that allowed under s. 12 of the *Canada Evidence Act*. Since the cross-examination under s. 666 is predicated on the accused having put his or her character in issue, the accused may also be questioned about the specifics underlying the criminal convictions: *R. v. W.(L.K.)* (1999), 138 C.C.C. (3d) 449 at 465 (Ont. C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 383; *R. v. Deyardin* (1997), 119 C.C.C. (3d) 365 at 375-77 (Qc. C.A.). The wide ambit of cross-examination contemplated by s. 666 could have been significant in this case. If cross-examination had been allowed, the jury would have heard not only about the respondent's conviction for attempted murder but also that it involved a brutal beating administered in the course of a robbery.

[33] The vexing question of when an accused can be said to put his or her character in issue through his answers during examination-in-chief was considered by this court in *R. v. McNamara (No. 1)*, *supra*, at p. 346:

> Manifestly, an accused does not put his character in issue by denying his guilt and repudiating the allegations made against him, nor by giving an explanation of matters which are essential to his defence. An accused is not entitled, however, under the guise of repudiating the allegations against him to assert expressly or impliedly that he would not have done the things alleged against him because he is a person of good character; if he does, he puts his character in issue.
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> The difficult question is whether the appellant crossed over the line of permissible repudiation of the charge and asserted that he was an honest man.

[34] The line between permissible repudiation of the Crown's case and putting one's character in issue can be particularly difficult to draw in cases where the prosecution is allowed to lead evidence of a lengthy marital and family relationship so as to provide a proper context in which the jury can assess the specific allegations made against an accused. The importance of context and background in this kind of case is beyond doubt: *R. v. F.(D.S.)* (1999), 132 C.C.C. (3d) 97 at 106-107 (Ont. C.A.). In my view, however, the accused must be able to repudiate the charges by presenting his or her version of that context without suffering the disadvantage of putting character in issue. For example, where the Crown is allowed to lead evidence to demonstrate that an accused was a

controlling and dominating spouse in order to give context to the allegations, I do not think that an accused should be said to have put his character in issue when he describes himself as a loving and caring spouse.

[35] That is not to say that where the Crown is allowed to introduce evidence of the dynamics within a family to provide context or narrative, an accused has free rein and can never be said to put his character in issue during examination-in-chief. In *R. v. W.(L.(K.)*, *supra*, the accused was charged with having assaulted five of his children on many occasions over many years. The Crown led evidence that throughout those many years, the accused systematically abused and intimidated his wife and children. After reviewing the substance of the accused's examination-in-chief, Moldaver J.A. said at p. 465:

> Having reviewed the appellant's examination-in-chief, I have no doubt that he placed his character in issue, thereby opening the door to being questioned about prior acts of discreditable conduct, including the details surrounding the 1956 assault upon his sister. Throughout his examination-in-chief, the appellant availed himself of every opportunity to extol his moral and ethical virtues in an effort to portray himself as the kind of person who would not abuse anyone physically or sexually, let alone those people, such as his immediate family members, whom he cared for and loved. Having adopted that posture, he placed his character in issue.
>
> …
>
> Once the appellant placed his character in issue, the Crown was entitled to lead evidence designed to level the playing field and provide the jury with a yardstick against which to measure the clear and unmistakable impression that the appellant sought to convey, namely, that he was not the type of person to commit the offences in question [emphasis added].

[36] Drawing the line between repudiation of the Crown's case and putting character in issue requires that an evaluation of the accused's evidence-in-chief be informed by the nature of the case he or she had to meet. For example, the respondent described his relationship with his oldest son, Danny, in terms that included the following:

> About the only relationship as far as the father and son goes, I tried to instill strength in him, confidence, no need to be intimidated. No need to back down when you are right. I

> tried to play with him, got him a lot of bikes, the best bikes.
> …

[37] None of the allegations involved Danny. Viewed in isolation from the Crown's case, the respondent's description of his relationship with Danny might be said to have put his character in issue in that it suggested that he was a person of integrity who raised his son according to a high moral standard. However, the respondent's evidence concerning his relationship with his son was in direct response to the evidence adduced by the Crown during its case. The Crown led evidence that the appellant had a bad relationship with his oldest son. In addition to the specific evidence describing the relationship between the respondent and Danny, the Crown led general evidence concerning the moral standards which the respondent tried to instill in his children. M.P. was asked about the respondent's attitude towards the police. She replied:

> He can't - - he has no regard for any authority whatsoever. He's taught the children the same thing basically. They don't have to respect police or pretty much anybody else.

[38] When the respondent's evidence is viewed in the light of the Crown's case, I think his references to raising his son are in direct response to allegations made against him during the case for the Crown.

[39] I take the same view of the respondent's evidence about his relationship with his three younger children, none of whom was the subject of any of the charges. He testified that he had a good relationship with these children, prayed every night with his two younger daughters, did not believe in hitting small children and had never hit any of his three younger children. As with the evidence about his relationship with his older son, this evidence, considered in isolation, implied that the respondent was a caring, non-violent parent who would not commit the crimes alleged against him. Once again, however, the evidence led by the Crown was such that the respondent's evidence was merely an attempt to answer allegations made against him in the case for the Crown. Witnesses called for the Crown testified that the respondent was not a good father to these three younger children. According to these witnesses, the respondent beat his wife in front of the younger children, destroyed their Christmas presents in a fit of anger, and taught his youngest daughter to ridicule and taunt N.P. by calling her obscene names. M.P. was also allowed to testify that the Children's Aid workers told her that she could not get her younger children back if she was going to live with the respondent. The implication of this evidence is clear; the respondent was not regarded by the authorities as a proper father to these children. M.P. also testified that the respondent never attempted to gain permanent or temporary custody of any of the children after divorce proceedings were commenced. This evidence suggested that he had no interest in his children.

[40] The respondent's description of his relationship with his three younger children was a response to the attack made on that relationship during the case for the Crown. It did not put the respondent's character in issue.

[41] The Crown also contends that the respondent put his character in issue in the course of describing his relationship with M.P. He depicted himself as a hardworking husband who was doing his very best to hold together a family in difficult circumstances. He testified that he reduced his working hours and stopped drinking in an attempt to keep the family together. It was also his evidence that he went to great lengths to look after M.P. when she was drunk, despite her tendency to become physically abusive.

[42] The part of the respondent's evidence where he addressed his relationship with M.P. gives less concern than the parts of his evidence where he addressed his relationship with their oldest son, Danny, and their three younger children. The Crown made the respondent's relationship with M.P. the crux of its case. M.P. described in detail the many assaults and indignities perpetrated upon her by the respondent over an eighteen year period. On her evidence, the respondent was always abusive but got worse and worse as time went on. She testified that he was critical and controlling and often struck her in front of the children. According to M.P., it was the respondent who spent money that was supposed to be used for household matters and it was the respondent who acted erratically while under the influence of drugs. On her evidence, he was a violent and manipulative person. The extent to which M.P.'s evidence attacked the disposition of the respondent is most evident in an exchange near the end of her examination-in-chief. M.P. was asked whether she had ever questioned N.P. about being sexually assaulted by the respondent. M.P. said that she "asked her a few times over the years". When asked why she would question her daughter about being sexually assaulted by her father, M.P. gave this answer:

> I was concerned, I guess, because of [the respondent's] nature, and I just wanted to make sure that he was never sexually abusive.

[43] In effect, M.P. was allowed to testify that the respondent was the kind of person who could sexually assault his own daughter.

[44] A review of the Crown's evidence demonstrates that a large part of the Crown's case consisted of a detailed description of the relationship between M.P. and the respondent. He was entitled to give his version of that relationship during his examination-in-chief without being said to have put his character in issue.

[45] The overall tenor of the respondent's evidence is also of some significance when deciding whether he put his character in issue. Unlike the accused in *R. v. W.(L.K.)*, *supra*, the respondent did not go so far as to describe himself as a paragon of virtue who consistently operated on the highest moral plain during his marriage. While he was quick to blame M.P. and N.P. for problems in the marriage and family and equally quick to deny the specific allegations in the indictment, the respondent did admit that his behaviour was far from ideal. In describing his relationship with M.P. as of August 2000, he indicated that both of them were "out of control", although he denied any physical assault. He acknowledged that he often yelled at M.P. and had on occasion destroyed her property. He insisted that in most cases he acted under provocation. The respondent also admitted that he became verbally abusive towards M.P. during their arguments. He conceded that when they were arguing, he had on occasion done things that were bizarre, if not frightening (e.g. ripping the telephone off the wall). Lastly, the respondent also conceded that on occasion he had acted in an improper way towards neighbours and friends of his children. For example, he admitted that he had threatened his son's girlfriend when he wrongly believed that she was hiding M.P.

[46] The Crown chose to make the entire family history and the relationships within the family the focal point of its case against the respondent. In so commenting, I do not suggest any criticism of Crown counsel. The Crown, quite properly, took the position that the charges could only be properly understood in the context of the marital and family relationships involving the respondent, M.P., N.P., and the rest of her family. On the Crown's evidence, the family picture was not a pretty one. In that picture, the respondent was painted as a terrible husband and father. To repudiate this part of the Crown's case, the respondent had to put forward his version of those relationships. Given the scope of the evidence led by the Crown, repudiation of that case extended to a description of the respondent's relationship with M.P., N.P. and his other children. To the extent that the respondent's evidence adopted a moral tone, it was directly responsive to the many allegations of immorality made against him during the Crown's case.[2]

[47] I do not think that the respondent put his character in issue. Section 666 was not engaged.

[2] The Crown also relied on the evidence concerning his relationship with the young son of a neighbour. While the evidence was irrelevant and somewhat self-promoting, it did not, in the context of the entire case, put the respondent's character in issue.

V

The Severance Order

[48] At the conclusion of the Crown's case, the respondent moved for a directed verdict on count 7, which alleged mischief arising out of the alleged killing of N.P.'s cat. The trial judge, on her own motion and without hearing argument, severed count 7 from the rest of the indictment. In her view, there was no connection between count 7 and the other allegations in the indictment.

[49] The Crown has no freestanding right of appeal from an order severing a count in an indictment. The Crown can, however, on an appeal from an acquittal, argue that a severance was wrong in law and led to an injustice, as for example where it resulted in the improper exclusion of evidence: *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.).

[50] I cannot agree with the trial judge that the evidence led on count 7 was irrelevant to the other counts. That evidence was part of the narrative of events leading up to August 19, 2000. Even if count 7 was not in the indictment, the evidence concerning the killing of the cat was properly admissible. Nor did its potential prejudicial effect outweigh its probative value. The potential for this evidence to inflame or mislead the jury was minimal compared to the potential of other evidence that was properly before the jury in this sad case. Since the evidence was admissible on the other counts, there was no justification for a severance order, particularly one that was not even requested by the defence.

[51] Although the Crown has demonstrated an error in law in the making of the severance order, I do not think that error warrants the setting aside of the acquittals. Where the Crown demonstrates an error in law, it will be entitled to a new trial only if it can demonstrate that, but for the error, the verdict would not necessarily have been the same: *R. v. Vezeau* (1976), 28 C.C.C. (2d) 81 (S.C.C.). As the court said in *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at 221 (S.C.C.):

> An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that <u>there is a reasonable degree of certainty that the outcome may well have been affected by it</u> [emphasis added].

[52] The Crown and the respondent agree that this case turned on credibility. The evidence concerning the killing of the cat was confusing and far from the most cogent part of the Crown's case. I do not think that evidence could reasonably be expected to

have had any effect on the credibility assessments required to return verdicts on the other counts.

VI

[53] I would dismiss the appeal.

RELEASED: "DEC 17 2002"
"DD"

"Doherty J.A."
"I agree Austin J.A."
"I agree Armstrong J.A."