

*Case Name:*

**R. v. L.O.**

**Between  
Her Majesty the Queen, Respondent, and  
L.O., Appellant**

[2015] O.J. No. 2956

**2015 ONCA 394**

338 O.A.C. 123

123 W.C.B. (2d) 406

324 C.C.C. (3d) 562

2015 CarswellOnt 8415

Docket: C54459

Ontario Court of Appeal

**D.H. Doherty, E.A. Cronk and C.W. Hourigan JJ.A.**

Heard: March 30, 2015.

Judgment: June 4, 2015.

(81 paras.)

*Criminal law -- Criminal Code offences -- Sexual offences, public morals, disorderly conduct and nuisances -- Sexual offences -- Sexual interference -- Invitation to sexual touching -- Offences against person and reputation -- Assaults -- Sexual assault -- Appeal by the accused from convictions for sexual assault, sexual interference, invitation to sexual touching, and possession of child pornography allowed -- Accused babysat grand-niece, aged five -- Child subsequently detailed sexual abuse to parents, medical personnel and police -- Police executed warrant and discovered child pornography on accused's computer -- Accused convicted by judge and jury -- Trial judge erred in failing to expressly instruct jury that evidence of pornography was inadmissible as proof of occurrence of sexual offences -- Instruction permitted inference of motive that raised possibility of propensity reasoning -- Convictions quashed and new trial ordered.*

*Criminal law -- Procedure -- Trial judge's duties -- Charge or directions -- Inferences of guilt -- Appeal by the accused from convictions for sexual assault, sexual interference, invitation to sexual touching, and possession of child pornography allowed -- Accused babysat grand-niece, aged five -- Child subsequently detailed sexual abuse to parents, medical personnel and police -- Police executed warrant and discovered child pornography on accused's computer -- Accused convicted by judge and jury -- Trial judge erred in failing to expressly instruct jury that evidence of pornography was inadmissible as proof of occurrence of sexual offences -- Instruction permitted inference of motive that raised possibility of propensity reasoning -- Convictions quashed and new trial ordered.*

Appeal by the accused, LO, from the convictions and sentence for sexual assault, sexual interference, invitation to sexual touching, and possession of child pornography. The victim was the accused's great-niece, aged five. The accused babysat the victim, including overnight weekends. After one such weekend, the child's stepfather observed the child touching her genitals. The child indicated she was doing what the accused had done to her. The child revealed further details to her mother. The mother took the child to the hospital and the child conveyed the same details to medical personnel and police. In a subsequent videotaped statement to police, she described various sexual acts including fellatio that resulted in orgasm and penetration with a screwdriver. No physical evidence supported the allegations. Police arrested the accused and executed a pre-authorized search, discovering child pornography on computers and CDs seized from the accused's apartment. The accused was convicted by a judge sitting with a jury. He was sentenced to five years' concurrent for the sexual offences and one-year consecutive for the child pornography charge. The accused received 270 days' credit for time served. The accused appealed the conviction and sentence.

HELD: Appeal allowed. The trial judge erred in failing to expressly instruct the jury that evidence of the accused's possession of child pornography was inadmissible as proof of the sexual offences and could not be considered by the jury in determining its verdicts on those counts. The instruction permitted the inference that the accused's possession of child pornography indicated an interest in sexual activity with children, a motive that supported the allegation the accused had sexually abused his great-niece. A clear, strong caution against the use of that evidence was essential to a fair trial and to safeguard against reasoning prejudice. The convictions for the sexual offences were quashed and a new trial was ordered. The remaining grounds for appeal related to ineffective assistance of trial counsel and the jury instructions on the child's prior inconsistent statements were without merit. The child pornography conviction was sustained. Given the recent jurisprudence regarding enhanced credit for time served between conviction and sentence, the accused's sentence was reduced by a further 128 days. The accused's sentence was accordingly varied to time served.

**Statutes, Regulations and Rules Cited:**

Criminal Code, R.S.C. 1990, c. C-46, s. 715.1

**Appeal From:**

On appeal from the convictions entered on October 29, 2010 and the sentence imposed on March 7, 2011, by Justice Jane A. Milanetti of the Superior Court of Justice, sitting with a jury.

**Counsel:**

Paul J.I. Alexander, for the appellant.

Alex Hrybinsky, for the respondent.

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The judgment of the Court was delivered by

**D.H. DOHERTY J.A.:**--

## I

### OVERVIEW

**1** The appellant was convicted by a jury of sexual assault (count 1), sexual interference (count 2), invitation to touch for a sexual purpose (count 3), and possession of child pornography (count 4). The first three counts alleged that the appellant sexually abused L.F., his five-year old great-niece. The fourth count alleged that the appellant was in possession of child pornography found on two computers and several CDs seized from his apartment.

**2** The trial judge imposed sentences of five years concurrent on counts 1-3. She determined that a one-year consecutive sentence was appropriate on the child pornography charge (count 4) and credited the appellant with 270 days for his presentence custody, resulting in a sentence of 95 days consecutive to the five years imposed on counts 1-3.

**3** The appellant appeals his convictions and sentence.

**4** On the conviction appeal, counsel alleges several errors in the jury instructions. All but one relate to the instructions concerning the use the jury could make of L.F.'s prior consistent statements. In the remaining ground, counsel submits that the trial judge failed to instruct the jury that evidence of the appellant's possession of child pornography could not be used in determining his guilt on the sexual abuse charges. Counsel submits that if any of these grounds succeed, the convictions on counts 1-3 must be quashed and a new trial ordered on those counts. Counsel also advances an ineffective assistance of counsel claim. He submits that if this argument succeeds, all the convictions must be quashed and a new trial ordered. Lastly, counsel argues that even if the convictions should all stand, the rule against multiple convictions in *R. v. Kienapple*, [1975] 1 S.C.R. 729 precludes convictions on counts 1, 2 and 3.

**5** On the sentence appeal, counsel submits that the trial judge did not give the appellant adequate credit for his presentence incarceration.

**6** I would allow the conviction appeal on the ground that the trial judge erred in failing to expressly instruct the jury that evidence of the appellant's possession of child pornography was inadmissible on counts 1-3 and could not be considered by the jury in determining its verdicts on those counts. A clear, strong caution against the use of that evidence was essential to a fair trial on counts 1-3. I would quash the convictions on those counts and order a new trial.

**7** There is no merit to the other grounds raised on the conviction appeal. The failure to caution the jury against the use of the appellant's possession of child pornography on the sexual abuse charges does not affect his conviction on count 4, the charge of possession of child pornography. I

would dismiss the appeal from that conviction. As I would order a new trial on the sexual abuse charges, I need not consider the potential application of the *Kienapple* principle to multiple convictions on those counts.

**8** On the appeal from the sentence imposed on the possession of child pornography conviction, I agree with the Crown's concession that in light of *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, released after the trial judge sentenced the appellant, the trial judge erred in giving the appellant only 1:1 credit for the 128 days he was in custody between conviction and sentence. She should have given 2:1 credit. I would vary the sentence imposed to give the appellant an additional 128 days' credit on the sentence imposed for possession of child pornography. Taking the additional credit into account, I would allow the sentence appeal on that count and vary the sentence to time served.

## II

### THE EVIDENCE

#### (i) The sexual abuse charges (counts 1-3)

**9** L.F. lived with her mother (B.O.) and step-father (R.R.). In the summer of 2007, the appellant babysat L.F. from time to time. She stayed overnight at the appellant's apartment a few times, including on the Labour Day weekend.

**10** On the Monday of the Labour Day weekend, L.F. returned home from the appellant's apartment. She seemed normal and in good spirits. Sometime after L.F. returned home, R.R. went into her bedroom to check on her. He found L.F. touching her genitals. He asked her what she was doing. L.F. replied that she was doing what her uncle L.O. (the appellant) had done to her.

**11** R.R. immediately spoke to her mother, who spoke to L.F. According to her mother, after some hesitation, L.F. confirmed what she had told R.R. and added details about the nature of the abuse. L.F.'s mother checked her vaginal area for signs of injury but found none.

**12** L.F.'s mother and step-father took her to St. Joseph's Health Centre and later that evening to McMaster Children's Hospital. Medical staff at both hospitals examined L.F. She eventually told the doctors what the appellant had done to her. L.F. also spoke to the police while she was at McMaster Children's Hospital and told them about the abuse.

**13** On September 6th, three days after L.F. first reported the abuse, she gave a police statement that was video-recorded. That statement was admitted at trial pursuant to s. 715.1 of the *Criminal Code*, R.S.C. 1990, c. C-46.

**14** In her video statement, L.F. said that the appellant had performed various sexual acts on her and made her perform fellatio. L.F. described "gooey stuff" that came out of the appellant's penis. She said she had spit it into the toilet. L.F. also described an incident in which the appellant had penetrated her vagina with a screwdriver. L.F. ultimately adopted the contents of the video statement she had made on September 6th as true, at trial. She also gave additional evidence concerning the allegations.

**15** There was no physical evidence supporting the sexual abuse allegations. One witness testified that L.F. did not stay at the appellant's apartment on the Labour Day weekend. Her evidence, however, was contradicted by all the other witnesses.

**16** The defence cross-examined L.F. at length on several statements she had made about the allegations to various people. She was cross-examined about statements she made to her mother, step-father, medical staff at both hospitals, the police, on her video-recorded statement, and on her preliminary inquiry testimony. The cross-examination revealed several inconsistencies, including the following:

- \* At the preliminary inquiry, L.F. testified that the appellant's niece, Rachel, was present when L.F. was assaulted with the screwdriver and had come to L.F.'s assistance, taking the screwdriver away from the appellant. In her video statement, she said no one else was present.
- \* L.F. gave various accounts of the number of times that she had been assaulted by the appellant, ranging from "lots of times" to "a couple times".

**17** The appellant did not testify. It was the position of the defence at trial that L.F. was not credible and her evidence was not reliable. Counsel argued to the jury that L.F. had "imagined" the abuse. The defence relied heavily on what counsel claimed were the many material inconsistencies among the various statements made by L.F.

**(ii) The possession of child pornography charge (count 4)**

**18** Shortly after L.F. made her statement to the police, the police executed a search warrant at the appellant's apartment. They seized two computers and 11 CDs found in the living room. Police found images of child pornography and video files containing child pornography on the computers. They also found child pornography on several of the CDs.

**19** The defence did not contest that the material found and seized by the police constituted child pornography. The defence maintained, however, that the appellant had not downloaded the material or viewed it, and was therefore not in possession of that material. The defence called a witness who testified that he saw the appellant's niece downloading child pornography onto the appellant's computer. According to this witness, the appellant angrily told his niece to remove the material from the computer. The appellant's niece, called as a Crown witness, admitted that she and her boyfriend used the computer, but denied downloading child pornography.

### III

## THE CONVICTION APPEAL

**(i) The ineffective assistance of counsel claim**

**20** The material filed by the appellant to support the claim of ineffective assistance of counsel consists entirely of an affidavit from appellate counsel's legal assistant and preliminary inquiry extracts. Various witness statements, presumably provided as part of the trial disclosure, are attached as exhibits to the affidavit. There is nothing else. There is no affidavit from the appellant. There is no affidavit from trial counsel. There is no affidavit from anyone who has firsthand knowledge of any of the relevant events. Nor did appellate counsel seek to cross-examine trial counsel on the allegations he now makes against trial counsel. Based on this record, it is difficult to give any credence to the arguments advanced in support of this ground of appeal.

**21** Counsel submits that trial counsel's decision not to re-call L.F. for further cross-examination at trial amounted to ineffective representation. During the trial, counsel sought a mistrial based on the mid-trial disclosure that L.F. had told her mother that she lied during her testimony. After hearing argument, the trial judge declined to declare a mistrial, but ruled that counsel could re-call L.F. for a limited cross-examination on the statement she made to her mother. Counsel declined to re-call L.F., indicating that he was acting on the instructions of the appellant.

**22** There is nothing in the fresh evidence to contradict trial counsel's statement on the trial record. I cannot accept counsel's allegation of ineffective assistance arising out of a tactical decision made on the express instructions of the client. This submission is undercut by the absence of any evidence from the appellant suggesting that trial counsel misrepresented his instruction, or that there was some reason why the appellant should now be allowed to resile from that instruction.

**23** Counsel's next argument is premised on the assumption that the material attached to the legal assistant's affidavit provides evidence that L.F. was abused by a third party at some time before the alleged abuse by the appellant. There is no such evidence in the attachments to the affidavit. Assertions contained in a witness statement attached to the legal assistant's affidavit are not admissible for the truth of their contents. Nor do the extracts from the preliminary inquiry, which refer to allegations of prior abuse, provide any evidence that L.F. was actually abused.

**24** Counsel further contends that even if there was no evidence of sexual abuse by a third party, trial counsel's failure to investigate that possibility amounted to ineffective representation. Nothing in the material filed by the appellant offers any support for this claim. The extent to which counsel may have investigated the possibility of third party abuse, and his reasons for not advancing that claim at trial, are not addressed in the fresh evidence.

**25** The appellant has the burden of showing facts said to support the ineffective representation claim: *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 48, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 347; *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 119. He does not meet that burden by asserting facts for which there is no evidence, nor by asking the court, in the absence of evidence, to draw inferences against trial counsel's conduct of the defence.

**26** Counsel next submits that trial counsel provided ineffective assistance by failing to pursue the argument that the "adult" language used by L.F. demonstrated that her allegations had been tainted by "suggestive questioning". In support of this argument, counsel refers to extracts from the various statements made by L.F. that were adduced into evidence at the trial.

**27** In almost every trial, there are several possible arguments that could be made. Counsel must decide what arguments to put forward. That decision involves the exercise of professional judgment. Allegations of ineffective assistance are not a forum for second guessing judgment calls made at trial. The argument appellate counsel now says should have been made, was in fact made to some extent by trial counsel. Perhaps it could have been given more emphasis, although the cogency of the argument is debatable. Whatever the merits of this argument, trial counsel's decision to press other arguments does not amount to ineffective assistance.

**28** Counsel's fourth argument in support of the claim of ineffective assistance is not really an argument of ineffective assistance at all, but rather an argument that the trial judge misdirected the jury on the reasonable doubt standard. Counsel submits that in his jury address, trial counsel understated the reasonable doubt standard. He submits that the trial judge failed to correct counsel's misstatement in her instructions.

**29** Trial counsel's explanation of the reasonable doubt standard to the jury may or may not have understated that standard. The trial judge's instruction correctly described the standard in language that has been the accepted reasonable doubt instruction for over 15 years: see *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39. The trial judge told the jury to take their legal instructions from her and defence counsel qualified his description of the law with the same caution. I have no doubt the jury would have acted on the trial judge's explanation of reasonable doubt. That explanation would not have misled the jury.

**30** The appellant has not established ineffective assistance of counsel. I would reject this ground of appeal.

**(ii) The instructions on L.F.'s prior statements**

**31** The evidence at trial was replete with references to prior statements L.F. made to many people, beginning with her initial disclosure and carrying through to her video-recorded statement to the police made about three days later. L.F. was also cross-examined on her preliminary inquiry testimony. The appellant's trial counsel introduced the content of most of the statements during his cross-examination of L.F. and other Crown witnesses. As outlined above, it was the core of the defence that L.F.'s prior statements revealed numerous inconsistencies that rendered her evidence at trial unreliable.

**32** Counsel for the appellant submits that the trial judge should have told the jury that to the extent that L.F.'s prior statements were consistent with her testimony, those prior statements could not be used to "bolster her credibility". An instruction in those absolute terms would have been misleading. The manner in which a child discloses allegations of abuse, including the language used in making that disclosure, may assist a jury in assessing the reliability of the child's testimony. The potential significance of that evidence to the reliability of the child's testimony flows not from the mere consistency between the out-of-court statements and the testimony, but from the manner in which the abuse is revealed by the child: see *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476; *R. v. G.C.*, 2006 CanLII 18984, at paras. 20-22. As explained in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 39:

The complainant's prior consistent statements were not admissible under any of the traditional hearsay exceptions. Thus, the statements could not be used to confirm her in-court testimony. However, in light of the *evidence that the complainant had difficulty situating events in time, was easily confused, and lied on occasion, the spontaneous nature of the initial complaint and the complainant's repetition of the essential elements of the allegations provide important context for assessing her credibility. [Emphasis added.]*

**33** The trial judge instructed the jury in accordance with the authorities referred to above, indicating:

You have also heard details of [L.F.'s] utterances to others, things she said to such as Dr. Hallett, Dr. Chu, her mother [B.O.], her stepfather [R.R.]. The fact that such utterances were made is admissible to assist you as to the sequence of events from the alleged offence to the prosecution, that you understand the conduct of the complainant, [L.F.], and assess her truthfulness or reliability. Howev-

er, I must instruct you not to look to the content of the statements as proof that a crime has been committed.

**34** L.F.'s prior consistent statements were also relevant to the jury's assessment of the reliability of her evidence in a second, less direct way. Consistencies in her statements provided important context to assess the defence attack on L.F.'s reliability based on alleged inconsistencies.

**35** The trial judge correctly told the jury that prior inconsistencies were relevant to the reliability of L.F.'s testimony and to her credibility. She also told the jury, again correctly, that the significance of inconsistencies in the assessment of L.F.'s reliability and credibility could only be determined after an examination of the nature and extent of those inconsistencies. An isolated, minor inconsistency in a sea of otherwise consistent descriptions of the relevant events would have far less impact on L.F.'s credibility and reliability than would several material inconsistencies going to the heart of her allegations.

**36** The jury had to consider the entirety of the evidence relating to L.F.'s various statements, including the consistencies in those statements, in deciding the impact of any inconsistencies in those statements on her credibility and reliability. To the extent that L.F.'s statements were consistent, especially on the central features of the allegations, that consistency could counter, or at least mitigate, the defence claim that L.F. was not credible or reliable because of her many prior inconsistent statements: see D.M. Paciocco, "The Perils and Potential of Prior Consistent Statements: Let's get it Right" (2013) 17 Can. Crim. L. Rev. 188, at p. 199.

**37** The appellant also alleges non-direction amounting to misdirection. Counsel argues that the trial judge erred in law in failing to tell the jury that it could not infer the truth of the allegations from L.F.'s repetition of those allegations, and that it could not use the prior consistent statements to confirm or corroborate her testimony.

**38** The trial judge did not give either instruction in her charge. Neither was requested. Certainly, the instructions could have been given and, in a perfect jury charge, would have been given: e.g. see *R. v. Austin* (2006), 214 C.C.C. (3d) 38 (Ont. C.A.), at paras. 32-34. However, perfection is not the standard: *R. v. Ellard*, 2009 SCC 27, [2009] 2 S.C.R. 19, at paras. 41-42. I am satisfied that the failure to give these instructions in this case did not constitute a legal error.

**39** The Crown did not rely on L.F.'s out-of-court statements (except the video statement admitted under s. 715.1) for the truth of the contents of those statements. It was no part of the Crown's case that the jury should believe L.F. because she had repeated the allegations several times to several different people. It was the defence that introduced the vast majority of L.F.'s prior statements in an effort to show the many inconsistencies among those statements. The defence argued that L.F.'s prior inconsistent statements rendered her trial testimony unreliable. The Crown responded to that argument with the claim that the consistencies were insignificant when placed in the context of the entirety of L.F.'s statements and the central allegations made by her.

**40** The defence, as it was entitled to do, vigorously attacked L.F.'s credibility and reliability using her prior statements. The Crown, as it was equally entitled to do, attempted to rebut those attacks with the contention that the statements were not inconsistent on material matters. The trial judge's instructions on the prior statements reflected the manner in which those statements had been placed before the jury by the parties. Considered in that light, the trial judge's instructions, even absent the alleged non-directions, adequately prepared the jury to properly assess L.F.'s evidence. Counsel's failure to object at trial supports my conclusion that the trial judge's instructions properly

captured the significance of the prior statements to the case put before the jury by the parties: see *R. v. Araya*, 2015 SCC 11, 17 C.R. (7th) 252, at para. 51; *Ellard*, at para. 47.

**41** The appellant's next submission targets L.F.'s video-recorded statement to the police. That statement was admitted under s. 715.1 of the *Criminal Code*. Counsel does not challenge the admissibility of the statement. Rather, he submits that the trial judge erred in instructing the jury that, in assessing the reliability of the video-recorded statement, the jury could consider:

The similarities and differences between the videotape and [L.F.'s] evidence at trial. Were they similar or different, in important or minor details? Is there an explanation?

**42** Counsel acknowledges that the instruction tracks the specimen instruction provided in D. Watt, *Watt's Manual of Criminal Jury Instructions* (2nd ed), Final 29-C (Toronto: Thomson Carswell, 2015), at p. 373. He argues that the instruction invites the jury to infer the truth of the allegations in the video-recorded statement from their consistency with the rest of L.F.'s testimony.

**43** This submission misunderstands the effect of s. 715.1. When a child's video-recorded statement is admitted under s. 715.1, the statement becomes part of the child's in-court testimony "as if the child were giving the statements on the videotape in open court": *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, at para. 45. It falls to the jury to assess the entirety of the child's evidence, which includes the video-recorded statement and her in-court testimony. In making that assessment, the jury will have regard to a variety of factors, including internal consistencies and inconsistencies in the child's testimony.

**44** Juries are routinely told to consider the entirety of a witness's testimony when assessing the reliability of that witness's evidence. Consistencies and inconsistencies in a witness's testimony are relevant to that assessment. In this case, L.F.'s video statement became part of her testimony. Consequently, as with any witness, the jury had to look at the entirety of her testimony, including the video-recorded statement and the in-court testimony, and consider whether any consistencies or inconsistencies within the entirety of her testimony shed light on the reliability of that testimony. To treat the video statement solely as a prior statement distinct from her testimony would defeat the purpose of s. 715.1.

**45** The trial judge's instructions parallel the analysis made by the trial judge in *F. (C.C.)*, [1993] O.J. No. 4241 (C.J.) and approved by the Supreme Court. The instructions in this case, like the trial judge's reasons in *F. (C.C.)*, identify both consistencies and inconsistencies between the video-recorded statement and the trial testimony. Both factored into the assessment of the overall reliability of the child's evidence. The trial judge made no error in her s. 715.1 instruction.

**46** The final submission relating to the prior statements of L.F. arises out of the trial judge's failure, when reviewing the evidence relevant to each count, to repeat for a third time her instruction that the out-of-court statements of L.F. were not admissible for their truth. The trial judge had first told the jury that an out-of-court statement by L.F. was not admissible for its truth during L.F.'s cross-examination, telling the jury:

[T]hose kinds of statements aren't usually admissible and they cannot be used as proof of the offences that are before you. All that extra statement can be used for

is as a tool for you to assess [L.F.'s] credibility. So it's not proof of the offence having occurred, it's merely a tool for you to assess her credibility ultimately.

**47** The trial judge gave a similar direction in her final instructions to the jury. When instructing the jury on prior inconsistent statements generally, the trial judge told the jury that it could use the out-of-court statements as evidence of "what actually happened" only if the witness adopted the out-of-court statement as true during his or her testimony. The trial judge also addressed L.F.'s prior statements and specifically told the jury:

I must instruct you not to look to the content of the statements as proof that a crime has been committed.

**48** The trial judge did not repeat this instruction when reviewing the evidence relevant to each count. No one asked her to do so. I am not satisfied that a further repetition of the instruction was essential to an adequate jury charge. L.F.'s prior statements were repeatedly presented to the jury by counsel and the trial judge as central to the assessment of the reliability of her in-court testimony. No one suggested the statements provided proof of the alleged offences. The two limiting instructions given by the trial judge were sufficient to avoid the risk that the jury would misuse the prior out-of-court statements made by L.F.

**(iii) The instruction on the evidence of the appellant's possession of child pornography**

**49** At trial, the Crown proposed to show the jury the various images and videos found on the appellant's computers and the CDs seized from his apartment that the Crown alleged constituted child pornography. The Crown estimated that viewing the material would take between 1 and 1 1/2 hours. The children shown in some of the material were very young, the material was sexually graphic and, as the Crown acknowledged, disturbing.

**50** The trial Crown contended that the jury should view the material because the nature of the content of that material was an essential element of the charge of possession of child pornography (count 4). The Crown further submitted that the relevance of the evidence was not diminished even if the appellant was prepared to concede through counsel that the material met the definition of child pornography. The Crown argued that the actual content of the material and its close proximity on the CDs to music and other material that the Crown claimed could be shown to have been used by the appellant could assist the jury in deciding who among the people with access to the computer had downloaded and viewed the child pornography. On appeal, the Crown also argued that the amount of the material on the computer and CDs said to constitute child pornography was relevant to whether the appellant was knowingly in possession of that material.

**51** The trial Crown did not suggest that viewing the images could support any aspect of L.F.'s testimony.<sup>1</sup> As to the relevance of the child pornography to counts 1-3, the Crown said:

[J]ust so I'm clear, I'm not seeking to tender the child pornography evidence in regards to counts one, two and three. Actually, let's put it this way. I shouldn't, I shouldn't say that. It is possible. *I'm not determined on the admissibility of the child pornography evidence vis-à-vis counts one, two and three. Potentially, there is an argument that it would demonstrate motive, that if the jury were satisfied that [the appellant] possessed the child pornography, it could be viewed as*

*motive to molest a child in a similar fashion.* But parking that issue for the time being, without question, I mean, there's no severance here and these counts are together so we're left to deal with it as is, clearly, the primary admissibility of the evidence is in respect of count four, which is to prove the offence. [Emphasis added.]

**52** The defence submitted that the jury should not view the material. The defence argued that the actual viewing of the material could not assist the Crown in proving that the appellant had the requisite control and knowledge of the material to establish his possession. The defence indicated that the nature of the material was not in issue and that if a Crown expert opined that the material constituted child pornography, the defence would not challenge that assertion. Defence counsel argued that requiring the jury to look at over an hour of graphic child pornography would irreversibly inflame the jury against the appellant, were the jury to decide that it was his pornography. Defence counsel did not specifically address the relevance of the child pornography to counts 1-3.

**53** In her ruling, the trial judge acknowledged the relevance of the content of the material to count 4. She also referred to the Crown's argument of the potential relevance of the evidence to counts 1 to 3. She then observed:

I do not think that the prejudice of viewing such inflammatory material does outweigh the probative value. I am concerned that the jury will improperly use this evidence as evidence of [the appellant's] guilt on the first three counts.

**54** The trial judge, in an effort to mitigate the prejudice she had identified, ruled that the jury would not be allowed to see the material, but that the investigating officer could testify and describe the contents of the material containing the child pornography. The investigating officer described the material in considerable detail. She referred to the titles, some very graphic, and described the physical activities, some of which involved sexual acts, including intercourse and fellatio between adults and very young children. The investigating officer also described the reactions of the children who were being subjected to the sexual abuse.

**55** The officer's description of the explicit sexual activities involving adults and very young children could well upset even the most reasonable and dispassionate of people. Her description of the reaction of one of the children who was being subjected to sexual abuse can only be described as heartbreaking.

**56** Neither the Crown nor the defence offered any submissions as to the relevance of the child pornography to counts 1-3 before the trial judge's charge. The Crown did not argue in its closing submissions that the evidence of the appellant's possession of child pornography was relevant to counts 1-3.

**57** In her instructions, the trial judge told the jury:

You must not use the evidence that relates only to one charge in making your decision on any other charge. You must not use evidence from one charge that the accused was the sort of person who would commit the offences and the other charges and on that basis infer that [the appellant] is in fact guilty.

**58** The trial judge told the jury that she would go through each of the four counts individually and explain the law and the issues arising on each count. She also told the jury she would summarize some of the evidence as she went through each count.

**59** The trial judge began her instructions with the essential elements of count 1 (sexual assault). She reviewed at length the evidence relevant to count 1. The trial judge made no reference to the appellant's alleged possession of the child pornography in this part of her summary of the evidence. The trial judge repeated the process in respect of counts 2 and 3, although she did not review any of the evidence as it was the same evidence that she had reviewed on count 1.

**60** The trial judge next turned to count 4, the charge of possession of child pornography. As with counts 1-3, she set out the essential elements of the offence and then reviewed the evidence that, "pertained particularly to this count". The trial judge summarized the evidence relating to the seizure of the material, but did not repeat the detailed description of the contents of the material. She reminded the jury of the defence evidence that the appellant's niece had downloaded the child pornography onto the computer.

**61** The trial judge did not expressly instruct the jury that evidence that the appellant was in possession of child pornography could not be used by the jury in considering their verdicts on counts 1-3. She was not asked to give any limiting instruction beyond the instruction described above.

**62** As I read the trial record, the trial judge intended that the evidence of the appellant's possession of child pornography should be considered by the jury only in respect of count 4, the possession charge. The crucial question is whether her instructions achieved that intended purpose. However, before addressing that question, I will consider the Crown's contention on appeal, that the evidence of the appellant's possession of child pornography was in fact admissible on the sexual abuse charges in counts 1-3.

**63** The Crown contends that evidence that the appellant was in possession of child pornography at the same time as he was allegedly abusing L.F. provided evidence of motive. The Crown uses the word "motive" in the Wigmorean sense, as evidence of a prior emotion that precipitates the conduct which is the subject of the allegation: J.H. Wigmore, *Evidence in Trials at Common Law*, vol. IA (Boston: Little, Brown & Co., 1983), at paras. 117-18; *R. v. Malone* (1984), 11 C.C.C. (3d) 34 (Ont. C.A.), at p. 43, leave to appeal to SCC refused, [1984] S.C.C.A. No. 272; *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373, at paras. 64-66.

**64** On the Crown's argument, proof of the appellant's conduct -- his possession of child pornography -- permits the inference that the appellant had an interest in sexual activity with children -- a motive. The existence of the motive is a piece of circumstantial evidence which, taken with the rest of the evidence, can support the contention that the appellant sexually abused L.F.

**65** Motive is a kind of circumstantial evidence. Motive is relevant if, considered in the context of the rest of the evidence, the alleged motive has "a logical tendency to contribute to a finding about the material fact": D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law Inc., 2015), at p. 32. The Crown's argument that the appellant's possession of child pornography is relevant and therefore *prima facie* admissible on counts 1-3 can succeed only if three inferences are reasonably available on the totality of the evidence.

#### Inference #1:

It can be inferred from the appellant's possession of child pornography that the appellant had an interest in watching sexual activity involving adults and young children.

Inference #2:

It can be inferred from the appellant's interest in watching sexual activity involving children and adults that he had an interest in engaging in sexual activity with young children.

Inference #3:

It can be inferred from the appellant's interest in engaging in sexual activity with young children that he sexually abused L.F., as alleged in counts 1-3.

**66** The first inference does not present any difficulty. While possession of child pornography may not conclusively establish that the possessor has an interest in watching sexual activity involving children, it provides a reasonable basis for the inference that he has that interest.

**67** The second inference assumes a correlation between sexual activities that a person is interested in watching and sexual activities that the same person is interested in doing. It may be that the correlation exists. However, I think the existence of the correlation, and its nature, if one exists, is beyond the experience and knowledge of the normal judge or juror. Evidence of the relationship between an interest in watching sexual activity with children and an interest in engaging in that activity falls within the expertise of the social scientists. The second inference is the kind of inference that can only be drawn with the assistance of a qualified expert. If the Crown wanted to rely on that inference, it was incumbent on the Crown to lead proper expert evidence to support the availability of the inference: see *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-25; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] S.C.J. No. 23, at paras. 19-23.

**68** My conclusion that the second of the three inferences outlined above cannot be drawn renders the evidence of the appellant's possession of child pornography inadmissible on counts 1-3. However, for the sake of completeness, I will consider the availability of the third inference, assuming the second inference can be drawn.

**69** When one speaks of motive in the sense of an emotion that compels an act, one can use the word to refer to a very specific emotion, e.g. the anger a person feels towards a spouse at the moment he learns of the spouse's infidelity, or to a much more general emotion, e.g. a person's dislike of persons in authority. The former kind of motive can be very probative of the accused's conduct toward the target of his anger at the point in time close to the event giving rise to the anger. The latter kind of motive, because of its generality, says little about the conduct of an accused toward a specific person at a specific time. Motive used in this latter sense is essentially indistinguishable from evidence of disposition and should, for the purpose of admissibility, be analyzed as evidence of disposition: see *Morris v. The Queen*, [1983] 2 S.C.R. 190, per Lamer J. (dissenting in the result, but for the court on this issue), at pp. 202-204; *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, at pp. 735-36; see also *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 87-89.

**70** Evidence of an accused's disposition, particularly if that evidence consists, as it usually does, of discreditable conduct, is generally inadmissible against an accused. Its exclusion is justified

either because it is irrelevant to a fact in issue, or even if relevant, its potential prejudicial effect outweighs the potential probative value: *Handy*, at paras. 31-40; *R. v. Johnson*, 2010 ONCA 646, 262 C.C.C. (3d) 404, at paras. 81-89.

**71** In *Handy*, the accused was charged with sexual assault causing bodily harm. The Crown sought to lead evidence from the accused's former wife of seven incidents in which he had allegedly physically and sexually abused her. The Crown argued that the evidence was admissible to show that the accused took pleasure from sex that was painful to his partner and would not take no for an answer from that partner. The Crown in this case would describe this sexual proclivity as the accused's "motive".

**72** With his customary clarity, Binnie J. explained why the assaults on the ex-wife were not relevant to the charge before the court, at para. 86:

At a more specific level, it is alleged here that the propensity to violence emerges in this respondent in a desire for hurtful sex. *This formulation provides more context, but the definition of so general a propensity is still of little real use, particularly when it is sought to use "propensity" not to predict future conduct in a general way, but to conclude that the respondent is guilty of acting in a specific way under the specific circumstances on December 6, 1996 alleged by this complainant.* [Emphasis added.]

**73** Justice Binnie has put his finger directly on the reason the evidence of the appellant's possession of child pornography is not relevant to the charges in counts 1-3. Even if that evidence shows a general propensity to engage in sexual activity with children such that one could say that it supports the inference that the appellant has at some time, or will at some time, engage in sexual activity with children, the evidence of his possession of the child pornography does not say anything about what the appellant did on the specific occasions referred to by L.F. Indeed, the argument for admissibility was stronger in *Handy*, given that the evidence was based on actual prior assaultive behaviour, as opposed to the evidence of the appellant's possession of child pornography which potentially shows only an interest in engaging in sexually assaultive behaviour: see also *R. v. W.B.* (2000), 145 C.C.C. (3d) 449 (C.A.), at paras. 97-101; *R. v. C.J.*, 2011 NSCA 77, 276 C.C.C. (3d) 454, at paras. 35-39.

**74** In coming to the conclusion that evidence of the appellant's possession of child pornography was not relevant on counts 1-3, I stress the absence of any evidence linking that possession to the allegations in those counts. For example, unlike the evidence in *C.J.*, there was no suggestion that the appellant showed L.F. child pornography or somehow used it as a prelude to the assaults: see also *R. v. Thompson*, [1918] A.C. 221 (H.L), per Lord Sumner, at pp. 233-35. I would add that even if there was evidence connecting the appellant's possession of child pornography to the alleged abuse of L.F. that connection would establish relevance, but would not necessarily make the evidence admissible. A trial judge would still have to decide whether the probative value of that evidence outweighed its obvious prejudicial effect: see *C.J.*, at paras. 32-46.

**75** The admission of the evidence of the child pornography through the detailed descriptions provided by the investigating officer posed two significant dangers to the appellant's right to a fair trial on counts 1-3. First is moral prejudice. If the jury was satisfied the appellant was in possession of the material described by the officer, the jury would no doubt infer that the appellant watched the material and enjoyed watching it. Those inferences would inevitably lead the jury to view the ap-

pellant as a despicable and potentially dangerous person. Viewing the appellant through this moral and emotional lens, a jury might not be inclined to vigorously apply concepts like the presumption of innocence that are intended to protect the appellant.

**76** On top of the moral prejudice flowing from the nature of the material, there was a real risk of reasoning prejudice. Specifically, that the jury would use evidence of the appellant's possession of child pornography as evidence that he had committed the acts alleged in counts 1-3. Disposition based reasoning, while generally not permitted to establish criminal liability, is hardly foreign to the reasoning processes that jurors use in their day-to-day lives. Again, I borrow the words of Binnie J. from *Handy*, at para. 39:

It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence [the disposition evidence] would have been of great interest. Perhaps too great...

**77** The potential prejudice to the appellant on counts 1-3 of the evidence of his possession of child pornography was, in my view, very real and potentially insurmountable. It probably would have been better had count 4 been severed from counts 1-3. There was no severance application and the trial judge cannot be criticized for failing to sever on her own initiative.

**78** The trial judge was faced with a single trial on all four counts. The appellant's possession of child pornography was central to the verdict on count 4. In that circumstance, only a clear, sharp and emphatic instruction to the jury that it could not use the evidence of the appellant's possession of child pornography in any way in determining culpability on counts 1-3 could have overcome the potential prejudice of that evidence to the appellant on counts 1-3. The trial judge had to expressly tell the jury that if they found that the appellant was in possession of the child pornography, that finding was not evidence in relation to counts 1-3 and could play no role of any kind in the jury's determination whether the Crown had established the appellant's guilt on counts 1-3. The trial judge's instruction to the jury to consider each count separately, and her subsequent instructions that followed that approach did not provide an adequate safeguard against the potential misuse on counts 1-3 of the evidence that the appellant was in possession of child pornography. The convictions on counts 1-3 cannot stand.

#### IV

#### THE SENTENCE APPEAL

**79** The trial judge gave the appellant 2:1 credit for 71 days served after his arrest and before his release on bail (142 days' credit). The trial judge, however, only gave 1:1 credit for the 128 days the appellant served between his conviction and sentence. The reasons for sentence do not address the different treatment of these two time periods.

**80** Counsel for the Crown and the appellant agree that based on *R. v. Summers*, the appellant should have been given 2:1 credit for the entire period of presentence custody. He is entitled to a

further 128 days' credit. Giving him that credit, I would reduce his sentence on the possession of child pornography charge to time served.

**V**

**CONCLUSION**

**81** I would allow the conviction appeal on counts 1-3, quash those convictions and order a new trial. I would dismiss the conviction appeal on count 4. I would allow the sentence appeal on count 4 and vary the sentence to time served.

D.H. DOHERTY J.A.

E.A. CRONK J.A.:-- I agree.

C.W. HOURIGAN J.A.:-- I agree.

1 In out-of-court statements, L.F. had referred to the appellant watching adult pornography in her presence. She did not give that evidence in her trial testimony.

---- End of Request ----

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