C14358

COURT OF APPEAL FOR ONTARIO

OSBORNE, AUSTIN and MOLDAVER JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	**Irwin Koziebrocki for the appellant**
Respondent	)	
	)	**Gary Trotter for the respondent**
- and -	)	
	)	
S.A.S.R.	)	
	)	
Appellant	)	**Heard: September 10, 1996**
	)	

MOLDAVER J.A. :

This is a case where the court is required to order a new trial because of inappropriate questioning by Crown counsel which undermined the appellant's right to a fair trial.

The appellant was tried by judge and jury on an indictment alleging six counts of incest, six counts of sexual assault, five counts of uttering death threats and one count of anal intercourse. The charges arose out of six separate incidents occurring from September to November, 1989. Each of the incidents involved allegations of sexual misconduct by the appellant towards his younger sister R.R.1, then age 17.

On December 21, 1990, the jury returned verdicts of guilty on all 18 counts. The Crown then applied to have the appellant declared a dangerous offender pursuant to s. 753 of the *Criminal Code*. On December 2, 1991, Taliano J. found the appellant to be a dangerous offender and sentenced him to an indeterminate period of incarceration.

The appellant appeals against both conviction and sentence.

BRIEF SUMMARY OF FACTS

Since I have concluded that there must be a new trial, I do not intend to dwell on the facts. What follows is a bare outline of the various incidents as described by the complainant, the charges arising out of each and a brief review of some of the more pertinent evidence.

Incident 1: The M...Street Incident (Incest, Threatening Death, Sexual Assault)

The complainant stayed overnight at an apartment on M...Street in Gravenhurst occupied by the appellant and his girlfriend, D.L. The following morning, after D.L. had gone to work, R.R.1 claimed that she was awakened by the appellant and he proceeded to have sexual intercourse with her against her

will. She complied because she was afraid. When the appellant finished, he told R.R.1 that she was not to say anything.

Incident 2: The First Reay Road Incident (Incest, Threatening Death, Sexual Assault)

The complainant testified that on the day in question, she was driving with the appellant in her father's car. The appellant drove to a rural area and stopped the car on Reay Road. He then ordered the complainant into the back seat where he proceeded to have intercourse with her. He also demanded that she perform fellatio upon him. Upon completion, the appellant warned R.R.1 that if she told anyone, he would hurt her and other members of her family.

Incident 3: The Second Reay Road Incident (Incest, Threatening Death, Sexual Assault)

R.R.1 claimed that she was sexually assaulted again at the Reay Road location. According to her testimony, the appellant had intercourse with her and may have ejaculated into her vagina.

Incident 4: The Car Wash Incident (Incest, Threatening Death and Sexual Assault)

On this occasion, the complainant testified that the appellant drove her to a car wash located at the end of a dead end street in Gravenhurst. After

backing the car into one of the car wash bays, the appellant ordered her to sit on the trunk of the car. He then proceeded to fondle her breasts and have sexual intercourse with her.

Incident 5: The Garbage Room Incident (Incest, Sexual Assault)

For a period of time in the Fall of 1989, R.R.1 and the appellant lived at their parents' apartment in Gravenhurst. On the day in question, according to R.R.1, the appellant said that he had to make a phone call, which required him to leave the apartment since his parents did not have a phone. He asked R.R.1 to join him, which she did. Instead of making a phone call, the appellant took R.R.1 to the garbage room of the apartment building and ordered her to lie down on the cement floor. He then had sexual intercourse with her. When she and the appellant heard someone coming down the hall, they both got dressed and returned to their parent's apartment.

Incident 6: The Final Incident (Incest, Anal Intercourse, Threatening Death and Sexual Assault

On November 16, 1989, the appellant and R.R.1 were at their parents' apartment in the company of their father, A.R. and R.R.1's boyfriend E.W. The appellant sought permission to borrow his father's car to go to the store and he asked R.R.1 to accompany him. After purchasing some gas for the car, the complainant testified that the appellant drove to a remote road, stopped the car and

ordered her to masturbate and fellate him. He also engaged in vaginal and anal intercourse with her. The activity ended when the two heard the sound of an approaching vehicle.

The appellant and R.R.1 then drove to a variety store where they were met by A.R. and E.W. It seems that when Mr. A.R. realized that R.R.1 had left the apartment, he became concerned for her well-being and he and E.W. set out to look for her. I will have more to say about the nature of Mr. A R.'s concern later in these reasons.

THE VARIOUS COMPLAINTS MADE BY R.R.1

On the evening of November 16th, R.R.1 disclosed to her friend S.M. that her brother had sexually assaulted her earlier that day. She stated that the appellant had entered her anally and that she was bleeding profusely. R.R.1 nonetheless declined Ms. S.M.'s offer to take her to the hospital.

Later that night, R.R.1 and S.M. met two of S.M.'sf., R.P. and R.M. According to R.M., while he and R.R.1 were alone in Ms. S.M.'s truck, R.R.1 complained of abuse at the hands of her brother, although she did not specify the nature of the abuse. R.M. also testified that at R.R.1's instigation, he and R.R.1 engaged in sexual intercourse in the front seat of the truck. R.R.1 admitted to meeting with R.M. but denied having intercourse with him.

A day or so later, R.R.1 told her boyfriend E.W. about the November 16th incident. As a result, E.W. joined R.R.1 in Gravenhurst and they attended Dr. Brand's office on November 21st, 1989. Dr. Brand diagnosed R.R.1 as having a sexually transmitted disease. His rectal examination of her revealed no visible injuries.

One day later, on November 22nd, 1989, R.R.1 was interviewed by the police. At that time she disclosed only the November 16th incident. However, approximately one week later, she advised the police of the five earlier incidents. The appellant was arrested shortly thereafter.

EVIDENCE CONCERNING THE COMPLAINANT

(a) Limited Intellectual Capacity

The evidence revealed that R.R.1's intellectual capacity was somewhat limited. R.R.1 herself admitted to being a slow learner and conceded that her reading and writing skills were limited. Cross-examination revealed that R.R.1 did not know her right hand from her left, that she could not remember all of the months of the year and that she could not count past 100. She also agreed that she had difficulty remembering events in the past. Anne-Marie Wicksted, an expert in the field of sexual abuse, testified that based upon her several interviews

with R.R.1 in December 1989, she believed that R.R.1 functioned at a pre-teen or teenage level emotionally and socially but at an 8 or 9 year old level intellectually.

(b) False Allegation of Rape

R.R.1 admitted to having made a false allegation of rape in 1988. She stated that one night, when she was attending a party at her boyfriend E.W.'s house, she met a man and the two went outside and engaged in consensual intercourse. When R.R.1 returned to the party, E.W. was suspicious. R.R.1 became frightened and claimed that she had been raped. The police were called, she repeated her story and the man was arrested. Several days later, R.R.1 attended at the police station and volunteered the truth. She was charged with public mischief and pleaded guilty to that offence.

THE EXPERT EVIDENCE

In addition to commenting on R.R.1's intellectual capacity, Ms. Wicksted also testified about the rape trauma syndrome, including the various stages that victims go through after being raped and the behavioural and emotional patterns exhibited during those stages. According to Ms. Wicksted, when she interviewed R.R.1 in December 1989, R.R.1 had passed through the initial acute stage and was entering the pseudo-resolution stage, when rape victims often recant due to their desire to forget about the past traumatic event. Ms. Wicksted also

testified about certain common denominators found to exist in cases of intra-family sexual assault and the reasons for late disclosure in such cases.

POSITION OF THE APPELLANT AT TRIAL

The appellant testified at trial and denied committing any of the offences. In support of his position that R.R.1 had falsely accused him, he relied upon her limited intellectual capacity and its effect on the reliability of her testimony; her previous false allegation of rape; significant inconsistencies in her testimony and the lack of confirmatory evidence.

GROUNDS OF APPEAL AGAINST CONVICTION

Although the appellant raised additional grounds of appeal, we required Crown counsel to respond to the following grounds:

(1) That the trial judge erred in admitting opinion evidence from Ms. Wicksted which served only to bolster the complainant's credibility and that he further erred in failing to caution the jury on the limited use to be made of Ms. Wicksted's evidence.

(2) That the trial judge erred in admitting R.M.'s testimony as evidence of recent complaint and that he further erred in directing the jury that evidence of recent complaint could be used to support the credibility of the complainant.

(3) That the trial judge erred in failing to provide a special caution to the jury in respect of the complainant's evidence.

(4) That the trial judge erred in permitting Crown counsel to adduce from the appellant's father his belief that R.R.1 was telling the truth.

(5) That the trial judge erred in permitting Crown counsel to lead evidence from the appellant's father that he was concerned about R.R.1 being alone with the appellant.

(6) That the appellant was deprived of his right to a fair trial when Crown counsel exposed the fact that the appellant had previously been convicted of raping his other sister R.R.2

ANALYSIS

In my view, it is only necessary to consider the fifth and sixth grounds in order to resolve this appeal. I propose to begin with ground 6.

Ground 6: That the appellant was deprived of his right to a fair trial when Crown counsel exposed the fact that the appellant had previously been convicted of raping his other sister R.R.2

The appellant testified on his own behalf. In doing so, he realized that his prior criminal record would most likely be revealed to the jury. That record consisted of the following convictions:

Date	Location	Offence	Disposition
1978	Toronto	Possession of stolen property	Suspended sentence and probation
1981	Brampton	Uttering forged documents (12 counts)	6 months on each count concurrent and 2 years probation
1982	Mississauga	Rape (2 counts) Possession of a weapon for a purpose dangerous to the public peace	10 years 6 months consecutive

The convictions for rape in 1982 arose out of a single transaction involving two complainants, one of whom was the appellant's sister R.R.2. As one would expect, Crown counsel at trial, not Mr. Trotter, was fully aware of the facts and circumstances surrounding the rape convictions. Having assessed his position, he realized that he could not lead the evidence of the prior rapes as similar fact evidence. (See Crown counsel's response to defence counsel's objections to the charge, volume 7, page 1220.) Accordingly, he made no attempt to lead this evidence as part of the Crown's case in-chief.

Having determined that he could not lead the evidence of the appellant's rape of his sister R.R.2 as similar fact evidence, Crown counsel surely realized that unless the defence were to open the door, that evidence was inadmissible. It had no probative value and could only serve to prejudice the

appellant by showing that he was the type of person likely to engage in sexual misconduct with his sisters.

Bearing in mind the charges which the appellant was facing, evidence that the appellant had raped another sister, (not admissible as similar fact evidence), was, to say the least, prejudicial to the appellant. The magnitude of the prejudice may be tested this way: If, in her examination-in-chief, R.R.1 had blurted out that her brother had previously been convicted of raping R.R.2, would the trial judge have had any choice but to declare a mistrial? I think not. It is against this backdrop that the prejudice occasioned by the manner in which Crown counsel questioned the appellant about his criminal record must be considered.

Near the beginning of his cross-examination of the appellant, Crown counsel asked the following series of questions designed to reveal the names and ages of the appellant's brothers and sisters:

Q. Now you're how old?
A. 28.
Q. And who's next in line, in terms of the children?
A. My brother.
Q. F.R. And how old is he?
A. 26.
Q. Two years between the two of you. Who's next? R.R.2?
A. Be R.R.2.
Q. And R.R.2's how old? Or how much of a spread between her and F.R?

A. I think there's a couple years there too. Maybe two, maybe even three.
Q. And then how much between R.R.2 and R.R.1?
A. Five, six years. Somewhere around there.

Having just established that the appellant had two sisters, one named "R.R.2", Crown counsel moved immediately to the appellant's criminal record, which he adduced in the following manner:

Q. And you have a criminal record.
A. Yeah, I do.
Q. Correct, sir? And you were convicted September the 1st of 1978 in Toronto of possession of stolen property under a value of $200.00?
A. Yes, I was.
Q. And you received a suspended sentence and probation for a year. Correct?
A. That's right.
Q. And that is an offence which involves dishonesty. Would you agree with that?
A. That's right.
Q. In 1981, January the 20th, in Brampton, you were convicted of 12 counts of uttering forged documents. You got six months on each charge, concurrent, and probation for two years. Would you agree with that, sir?
A. Yes, I would.
Q. Would you agree that the offences of uttering a forged document are offences that involve dishonesty?
A. That's right.
Q. February the 26th of 1982, in Brampton, you were convicted upon an indictment in the Supreme Court of Ontario, against yourself and David Esterbrooke. Is that correct?
A. That's right.
Q. And that was a joint indictment against the two of you and you were convicted of the following offences: An offence that the two of you on or about the 24th day of May, 1981, at the City of Mississauga, in the Judicial District of Peel, unlawfully did rape R.B., contrary to s. 144 of the Criminal Code of Canada. Correct?

A. That's right.
Q. That the two of you on or about the 24th day of May, 1981, at the City of Mississauga, in the Judicial District of Peel, unlawfully did rape R.R.2, contrary to s. 144 of the Criminal Code of Canada. Correct?
A. I was charged with it.
Q. You were convicted of it, sir.
A. And I was convicted of it.
Q. Further that you and Mr. Esterbrookes, you, on or about the same day, the 24th of May, 1981, at the City of Mississauga, in the Judicial District of Peel, did have in his possession a weapon, to wit: a knife, for a purpose dangerous to the public peace, contrary to s. 85 of the Criminal Code of Canada, correct?
A. Correct.
Q. You were convicted on all of those.
A. That's right.
Q. You received, sir, on the two counts of rape, five years imprisonment on each charge. Correct?
A. That's correct.
Q. A total of ten years.
A. That's right.

As is apparent from this excerpt, Crown counsel used a very different tack in adducing the appellant's record for rape than he used in relation to the property offences. It is equally apparent that Crown counsel engaged in this strategy by design as opposed to accident. As I have already observed, Crown counsel knew that he could not lead the evidence of the appellant's rape of R.R.2 as part of the Crown's case in-chief. And yet, in his questioning of the appellant, it seems to me that he did just that, establishing in one breath that the appellant had a sister named R.R.2 and in the next, that he had been convicted of raping someone with the very same name.

In fairness to Crown counsel, he may have received permission from the trial judge to lead the appellant's prior rape convictions in the manner that he did. Although the record contains no such ruling, subsequent to the hearing of the appeal, the parties requested and received permission from the court to provide further information on this subject. That information is now before the court in the form of a letter dated October 16, 1996 from Crown counsel Mr. Trotter.

In the letter, Mr. Trotter advises that according to Crown counsel at trial, the trial judge made a ruling in Chambers permitting the Crown to cross-examine the appellant on his previous rape convictions by reading the indictment to him. Defence counsel at trial recalls no such Chamber's discussion. Instead, she believes that the matter was argued on the record in open court and that the trial judge permitted the Crown to lead the appellant's previous rape convictions as he did over her strenuous objections. However, her efforts to locate any such argument or ruling have proved unsuccessful.

In order to resolve this appeal, I find it unnecessary to determine whether or under what circumstances the trial judge permitted Crown counsel to lead the appellant's previous rape convictions in the manner that he did. I would, however, point out that if Crown counsel at trial is correct that the ruling

was made in Chambers in the absence of the appellant, that procedure itself could amount to reversible error. (See *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35 (Ont. C.A.)) I am also of the view that it is unnecessary to decide whether the link between the appellant's rape conviction of his other sister was left with the jury by design or by accident. The fact remains that the link was there for the jury and, in my view, the inference was inescapable. Certainly the trial judge thought that the link had been made and he instructed the jury accordingly. At page 1193 of his charge, in his review of the appellant's testimony, the trial judge said:

> He acknowledged that R.R.2 was his sister, that she is 23, and he acknowledges a criminal record that consists of a conviction in September, 1978, of possession of stolen goods; a conviction in January 1981 of 12 counts of forged documents, and a conviction in February of 1982 of raping R.B. and his sister, R.R.2 He is also convicted of possession of a dangerous weapon. [Emphasis added.]

And later at pp. 1205-06, when summarizing the position of the Crown, the trial judge again drew the link:

> The Crown urges you to also find that S.A.S.R. [the appellant] had the opportunity to perform these acts and the propensity to perform those acts, because of the father's evidence that he did not wish S.A.S.R. to be alone with R.R.1. The father acknowledged that R.R.1 would not have known where the garbage room was and would not have gone there alone. The parents stated that they believed R.R.1.
> The Crown also asks you to look with some degree of criticism and scepticism at the evidence of the parents, who state that they are trying to stay neutral in this matter, and ask you to consider that evidence in light of the evidence that you have heard that notes have been destroyed; that Mrs. R. testified that she was not

> concerned with R.R.1 being in the company of S.A.S.R., notwithstanding S.A.S.R.'s past involvement with the other daughter, R.R.2. And you have to look at that evidence in that light. [Emphasis added.]

In her objections to the charge, defence counsel submitted that the trial judge had irreparably prejudiced the appellant as a result of his having directly alerted the jury to the connection between the 'R.R.2' who had been raped and the 'R.R.2' who was the appellant's sister. Defence counsel further submitted that the error could not be corrected and later, after Crown counsel had replied to her initial objection, she requested a mistrial.

By way of response, Crown counsel agreed with defence counsel that the trial judge had erred in drawing the link. He nonetheless contended that the error could be corrected by bringing the mistake to the jury's attention and by reinforcing the limited use which could be made of the appellant's criminal record.

The trial judge acceded to the Crown's request. He recalled the jury and provided the following instructions:

> The other thing, and this is more fundamental and I apologize for this, but both counsel have pointed out to me that there is no evidence before this court that the conviction in February of 1982 of Mr. S.A.S.R. of rape of R.B. and R.R.2, there is no evidence that the R.R.2 referred to, and that he was convicted of raping, is his

> sister. There is no evidence of that. You have no evidence who that R.R.2 is. I wanted to make that clear to you, because I did say it was his sister. I should explain to you that I heard evidence of R.R.2 and perhaps assumed that that was one and the same person as his sister. But you have no evidence of that fact. That has not been established in evidence. All you know is that there was a prior conviction of rape of R.B. and R.R.2 The relationship of those parties to this accused has never been put into evidence.
>
> Again I repeat to you that the fact of that prior criminal conviction and those criminal convictions cannot be used for any other purpose other than to weigh the credibility of this accused person. Those prior convictions do not entitle you to assume that because he was guilty of those offences that he is guilty of these offences.
>
> Okay, that is all I have to say to you. You may resume your deliberations.

In order to determine whether the limiting instruction was sufficient to overcome the prejudice which had been occasioned to the appellant, it is first necessary to consider the fifth ground of appeal. Before doing so, however, I feel bound to comment on the approach taken by Crown counsel in adducing the appellant's prior rape convictions. In my opinion, the approach was improper. The rape convictions were admissible pursuant to s. 12(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 only in relation to the appellant's credibility. (*R. v. Laurier* (1984), 1 O.A.C. 128 at p. 131 (Ont. C.A.)) How the names of the victims could possibly be relevant to that assessment escapes me. While different considerations might apply under s. 12(2) of the *Canada Evidence Act* where an

accused denies a prior conviction, that is not this case. Here, the appellant was prepared to admit his rape convictions. It follows that no mention should have been made of R.R.2's name since that information was both irrelevant to the credibility assessment and, in the circumstances of this case, highly prejudicial.

Ground 5 - That the trial judge erred in permitting Crown counsel to lead evidence from the appellant's father that he was concerned about R.R.1 being alone with the appellant

The appellant's father A.R. was called as a witness for the defence. Part of his testimony related to the November 16 incident when, according to R.R.1, the appellant borrowed her father's car and drove her to a remote location where he sexually assaulted her. R.R.1 testified that the sexual activity ended when she and the appellant heard the sound of an approaching car. They then drove to a variety store where they were met by her father and her boyfriend E.W.

According to A.R., on the morning of the 16th, within 20 minutes of the appellant having borrowed his car, he realized that R.R.1 was missing from the apartment and he became concerned. As a result, he and E.W. set out to find her and they drove to the Queen Street variety store which was only about a mile from the R. apartment. Upon their arrival, they noticed R.R.1 standing on the steps outside of the variety store waiting for the appellant. According to Mr. A.R., only about 30 minutes elapsed from the time that the

appellant borrowed his car to the time that he and E.W. found R.R.1 standing outside the variety store. Clearly, the inference to be drawn from his testimony was that the appellant did not have time to drive R.R.1 to a remote location, sexually assault her and return to the variety store as she had claimed.

In examination-in-chief, defence counsel asked Mr. A.R. why it was that he became concerned when he realized that R.R.1 was missing from the apartment. Mr. A.R. responded by saying that R.R.1 had left the apartment without telling him, something which he had cautioned her against in the past.

In cross-examination, Mr. A.R. was again asked to state the reason for his concern, and he replied that his main idea was to find out where R.R.1 was because she had left without telling him. Crown counsel then asked whether there was a secondary reason, and Mr. A.R. replied: "I wanted to get my car and go looking for her, but I did not know that she was with S.A.S.R. [the appellant]."

At a later point in the cross-examination, Crown counsel returned to this subject and confronted Mr. A.R. with a statement that he had given to the police on December 2, 1989 as follows:

> Q. Right. and then, sir, this is the statement, isn't it, 2nd of December, 1989. Right?
> A. Right.

Q. Your initial first page, second page, signature on the bottom?
A. Right.
Q. What's the last thing that you said, sir, reading from where my finger is.
A. I'll put my glasses ...
Q. Can you read that?
A. Yes.
Q. All right, let me read it to you.
A. I've been so scared for R.R.1, I told her don't go anywheres without my knowledge, with S.A.S.R. Ah, we didn't want to be anywheres alone.

Q. We didn't want her to be anywhere alone with S.A.S.R. So what you said, sir, at that time to the police, on the 2nd of December, having spoken to your daughter, having heard certain things, you said, "I've been so scared for R.R.1. I told her don't go anywhere without my knowledge, with S.A.S.R. We didn't want her to be anywhere alone with S.A.S.R." That's what you said.

A. Well I ...
Q. That's what you said, wasn't it.
A. That's what's in that one.

Although Mr. A.R. did not adopt his statement to the police as truthful, the jury was now aware of the reason for his concern — he was frightened for his daughter R.R.1 and he did not want her to be alone with the appellant, his son, without his knowledge. The inference arising from Mr. A.R.'s concern would have been obvious to the jury — he did not want R.R.1 to be with the appellant because he knew that the appellant had previously raped her sister R.R.2.

I find it unnecessary to determine whether the Crown's cross-examination of Mr. A.R. on his prior inconsistent statement to the police was in and of itself improper. Viewed in isolation, this line of questioning might well have been permissible as a means of impeaching Mr. A.R.'s credibility. But the impugned cross-examination cannot be viewed in isolation. Rather it must be assessed in conjunction with the link that the Crown had earlier drawn between the appellant and the rape of his other sister R.R.2. In that regard, the cross-examination of Mr. A.R. served to exacerbate and reinforce the fact that the appellant had previously raped his other sister R.R.2. In light of that conclusion, the question remains whether the trial judge's limiting instruction to the jury was sufficient to overcome the prejudice occasioned by the link having been made.

In my opinion, the limiting instruction fell short of its intended purpose, not because it was too little but because it did not and could not eliminate the prejudice. While I am confident that the jurors paid close attention to the trial judge's instruction, it is too much to expect that they could somehow disabuse their minds of that which had become so obvious. Regardless of the limiting instruction, these jurors knew that the appellant had raped his other sister R.R.2. That evidence should never have been before the jury. It served no other purpose than to show that the appellant was the type of person likely to engage in sexual misconduct with his sisters. Apprised of that information, it was but a short step for the jury to conclude that the appellant had sexually assaulted R.R.1 as

alleged. The resulting prejudice was too great to overcome and it deprived the appellant of his right to a fair trial. It follows that defence counsel's application for a mistrial was sound and the trial judge should have given effect to it.

THE REMAINING GROUNDS OF APPEAL

In view of my conclusion that there must be a new trial, I find it unnecessary to resolve the remaining grounds. Broadly speaking, the issues arising from those grounds are best reserved to the trial judge at the new trial.

The first ground concerns the expert evidence of Ms. Wicksted. Since 1990, when the appellant was tried, there have been significant developments in the law of expert evidence which should provide the necessary guidance to counsel and the trial judge in the event that Ms. Wicksted is called to give evidence at the new trial. Accordingly, it is best left to the trial judge to make the appropriate rulings concerning the admissibility of Ms. Wicksted's evidence should the need arise. The same holds true in respect of any limiting instructions that might be called for.

With respect to the second ground — the admissibility of R.M.'s testimony as evidence of recent complaint — once again I think it best left to the trial judge to determine the admissibility of this evidence if Mr. R.M. is recalled. That assessment will largely depend upon the tactical decisions made by

defence counsel at the new trial, and in particular, whether the issue of recent fabrication is raised.

Ground 3 raises the trial judge's failure to provide a special caution to the jury in respect of the complainant's evidence. In my view, this matter should be reserved to the new trial judge who will be in the best position to assess whether such a caution should be given.

The fourth and final ground relates to the admissibility of A.R.'s testimony to the effect that he believed R.R.1's allegations. In my view, the admissibility of this testimony at the new trial will depend largely upon the tactical decisions made by defence counsel. I would simply note that at the first trial, defence counsel cross-examined R.R.1 about this very subject, namely, whether her parents believed her. Having opened the door, I fail to see how the trial judge erred in permitting Crown counsel to pursue this line of questioning with Mr. A.R.

CONCLUSION

The jury should never have learned about the appellant's rape of his sister R.R.2. That evidence was so highly prejudicial to the appellant that it deprived him of his right to a fair trial. I would accordingly allow the appeal, set aside the convictions and order a new trial. In view of this disposition, it is unnecessary to consider the appeal against sentence.

C14358

COURT OF APPEAL FOR ONTARIO

OSBORNE, AUSTIN and MOLDAVER JJ.A.

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

S.A.S.R.

Appellant

J U D G M E N T

Released: October , 1996