1996 St. J. No. 3869

IN THE SUPREME COURT OF NEWFOUNDLAND
TRIAL DIVISION

BETWEEN:

RICHARD HARDING **APPELLANT**

AND:

SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (NEWFOUNDLAND AND LABRADOR) **RESPONDENT**

Heard: **September 7 & 22, 2000**
Decided: **November 7, 2000**

DECISION OF BARRY, J.

[1] Remington the basset hound was an unruly veterinary patient. His struggles on the operating table, while being anaesthetized on June 8, 1995, led to his veterinarian being charged with causing unnecessary pain and suffering to an animal, contrary to Section 446(1)(a) of the **Criminal Code of Canada**, for allegedly stabbing Remington in the nose with a needle and punching him in the ribs.

BACKGROUND

[2] The initial Information, laid by an animal protection officer with the SPCA, dealt with both alleged incidents in one count. After the close of Harding's case, the Trial Judge amended the Information to set out two separate counts, one relating to stabbing the dog with the needle and the other to punching it in the ribs.

[3] The Trial Judge acquitted Harding on the charge of stabbing the dog with a needle. He convicted on the second count of punching the dog in the ribs and imposed a sentence of a conditional discharge, six months probation and a $200.00 victim fine surcharge. Harding now appeals the conviction. The SPCA cross appeals on sentence and seeks a new trial on the acquittal.

JURISDICTION OF SUMMARY CONVICTION APPEAL COURT

[4] A summary conviction appeal court has the jurisdiction to consider the record and to reverse a trial judge on issues of fact. However, a verdict should only be set aside where it is unreasonable or cannot be supported by the evidence. In **R.** v. **Higgins** (1996), 144 Nfld. & P.E.I.R. 295 (Nfld. T.D.), Green J. reviewed authorities and stated:

> Those cases establish that although s. 81(3) permits an appeal by the prosecutor on the question of fact, the scope of such an appeal is a limited one. In [**R.** v. **Sall** (1999), 81 Nfld. & P.E.I.R. 10 (Nfld. C.A.)] it was held that if there is evidence to support the express conclusion of the trial judge, the appeal judge is powerless to interfere. Where the trial judge has chosen to accept the testimony of some witnesses over others, it is generally impossible for the appeal judge to reverse that finding since the trial judge has had the benefit of observing the demeanour of the witnesses in assessing their credibility in the witness box.

[5] Green J. also referred to **R.** v. **Harper** (1982), 65 C.C.C. (2d) 193 (S.C.C.), at p. 210, where Estey J. said:

> An appellate tribunal has neither the duty nor the right to re-assess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

[6] In **R.** v. **W. (R.)** (1992), 74 C.C.C. (3d) 134 (S.C.C.), at p. 141, McLachlin J. noted the following words of Sopinka J. in **R.** v. **S.(P.L.)** (1991), 64 C.C.C. (3d) 193 (S.C.C.), at p. 197:

> The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after

> re-examining and to some extent, re-weighing the evidence, determines whether it meets the test.

McLachlin J. went on to conclude:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence.

[7] Our Court of Appeal in **Hoyles** v. **The Queen**, [1998] N.F.C.A. No. 82, reviewed authorities dealing with the right of an appellate court to intervene in cases where the alleged "unreasonableness" of the trial judge's findings is based on credibility. Wells C.J.N. referred to **R.** v. **Burke** (1996), 105 C.C.C. (3d) 205 (S.C.C.), where Sopinka J. concluded "the obvious inconsistencies and falsehoods" in the testimony of the complainant rendered the trial judge's finding of credibility unreasonable. Wells C.J.N. also referred to **R.** v. **C.D.G.** (1995), 128 Nfld. & P.E.I.R. 312 (Nfld. C.A.), where Marshall J.A. noted an appellant tribunal has the right to interfere with a trial judge's findings of credibility "at the point where the circumstances lead to a conclusion that the interest of justice so outweighs reliance upon the acknowledged advantage of the trial judge in hearing and observing the witnesses as to make judicial review imperative".

[8] Wells C.J.N. went on in **Hoyles** to consider the approach an appellate court should use in assessing credibility. Noting that the credibility of witnesses cannot be gauged solely by the test of whether the personal demeanour of a particular witness carried

conviction of the truth, Wells C.J.N. concluded an appellate tribunal must consider the consistency or lack of it in witnesses' testimony. He noted "it is critically important therefore that a trial judge deal with indicated inconsistencies when assessing credibility of an only, or a critical, witness testifying against an accused". Wells C.J.N. noted that demeanour alone could not suffice to found a conviction where there are sufficient inconsistencies and conflicting evidence on the record. The Chief Justice then proceeded to review the whole record in the case to determine whether the trial judge had reasonably subjected the complainant's story to "an examination of its consistency with the probabilities" that surrounded the then existing conditions.

[9] In **R.** v. **Burns**, [1994] 1 S.C.R. 656, at p. 664, McLachlin J. gave direction to appellate tribunals involved in a review of the record:

> The Court of Appeal's main concern was not that there was insufficient evidence to support the verdicts of guilty, nor that those verdicts were unreasonable, but that the trial judge's reasons failed to indicate that he had considered certain frailties in the complainant's evidence. Given the brevity of the trial judge's reasons, they could not be sure that he had properly considered all relevant matters.
>
> *Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a).* This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see *R. v. Smith*, [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and *Macdonald v. The Queen*, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered

> all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case. [Emphasis added.]

In reconciling these lines of authority, I conclude the task of this summary conviction appellate tribunal is to determine whether a failure by the trial judge to address an inconsistency in a witness's testimony or conflicting evidence amounts to merely a failure to discuss collateral aspects of the case or a failure to consider and expressly deal with something fundamental to the credibility or reliability of a critical witness so as to result in an unsafe conviction.

THE TRIAL DECISION

[10] In the present case, the Trial Judge, after considering s. 446 of the **Criminal Code**, decided as follows:

> It is a fact that the dog known as Remington was stabbed in the nose or snout area with a needle being held by Dr.

Harding. Ms. Murphy, an employee who was assisting Dr. Harding, perceived the stabbing as an intentional act. Dr. Harding acknowledges the stabbing, but states that it was accidental, and that Ms. Murphy's perception of the incident is coloured by personal bias, and that she and others are on a personal vendetta conspiracy against him. The Crown submits that it is Dr. Harding's credibility which is questionable. I can find no basis in the evidence to conclude that Ms. Murphy's evidence is coloured by any personal reason. In fact, the evidence supports an opposite conclusion, that is that there was no conspiracy or collusion by, or between Ms. Murphy and others, to cause trouble for Dr. Harding. Generally speaking, witnesses' evidence is always coloured or biased somewhat, regardless of whether they are Crown witnesses or defence witnesses, and it is the task of the judge to be ever mindful of this and assess all the evidence in a proper and legal manner without any bias whatsoever. I have done so in this case. There's also no doubt that the dog known as Remington had considerable force applied to its rib cage or stomach area while the dog was being anaesthetized by use of a mask to induce the gas. Ms. Murphy states it was a forceful punching with the fist, accompanied by words of frustration by Dr. Harding relating to how this particular animal was putting him off his schedule. Dr. Harding states that the method he was using, while different from the accepted methods as described by other evidence, was one developed by himself for the use of the same purpose, that being to help the inducement of gas and to prevent hyperventilation.

I'll speak now to the two incidents. I reiterate that my role is to weigh all of relevant evidence to decide whether or not the accused can be found guilty of the charges. I have assessed the evidence and come to the following conclusions. I am satisfied that Dr. Harding's personal and working relationship with his co-workers was often inappropriate, strained and undesirable to say the least. I'm also satisfied that his methods of handling animals was on many occasions questionable. However, incidents of undesirable and inappropriate interpersonal working relationships and questionable handling of animals in itself, or by themselves,

will not--or are in most cases highly subjective and may or may not result in criminal charges, or may or may not be criminal in nature. For the most part, I find the evidence relating to the interpersonal working relationships and questionable handling of other animals to be of little, if any benefit, in deciding the issues in this matter. Regarding incident number one, I refer to the needle incident. I find it difficult to understand how or why an overweight 65-pound sedated dog, lying on its side on a steel examination table, could or would suddenly lunge or move its head in such a way that it would accidentally stick itself on a needle being held by an experienced doctor. I believe Ms. Murphy's version of the incident over the explanation given by Dr. Harding. However, upon a careful review of the evidence I find that Dr. Harding's evidence is capable of belief, even if I do not believe it, and it does raise a reasonable doubt, and it raises the doubt in law as to whether or not the stabbing was intentional or accidental, and I apply the doctrine of reasonable doubt to that incident and find Dr. Harding not guilty of count number one. Concerning count number two. It is a fact that Dr. Harding was applying considerable force to the rib area of the dog, Remington. His explanation is that it was for the purpose of preventing hyperventilation and the induction of the anaesthetizing gas--if that's the correct terminology. He described the method used as one developed by himself, and it differs somewhat from the methods described by other witnesses, including two other registered veterinarians. I am unable to attach any credibility whatsoever to Dr. Harding's explanation. The evidence clearly indicates that the pressures applied to the rib cage of the animal in such circumstances is to compress the rib cage in such a manner as to prevent hyperventilation and to assist the induction of the gas. The method used and described by Dr. Harding has not been shown to have any therapeutic value whatsoever over and above the procedures described by the other veterinarians, and it is my conclusion that the methods and procedures being used by Dr. Harding were, in fact, no procedures at all, but rather an intentional punching to this animal being done in frustration and anger, and could not result in anything other than unnecessary pain to this animal.

> This evidence does not raise a reasonable doubt in my mind and I find him guilty as charged on count number two.

GROUNDS OF APPEAL

[11] Harding raises four issues on appeal:

1. Did the trial judge err in fact and in law by dividing the single count originally made against Harding into two separate counts at the conclusion of Harding's evidence?
2. Did the trial judge err in fact and in law in arriving at an unreasonable verdict by failing to give due consideration to the evidence presented at trial, when making findings of credibility of the witnesses, and failing to give any or sufficient weight to evidence favourable to Harding?
3. Did the trial judge err in fact and in law by admitting similar fact evidence against Harding?
4. Did the trial judge exceed his jurisdiction by convicting the accused after evidence at trial had disclosed that the Information against Harding was sworn more than six months after the time the offence had allegedly being committed.?

[12] The SPCA raises the following issues by way of cross appeal:

5. Did the Trial Judge err by acquitting Harding on count 1 where he concluded he did not believe Harding and believed a Crown witness but found that Harding's evidence with respect to count 1 was capable of belief even though the trial judge did not believe it?

6. Did the Trial Judge err in granting a conditional discharge in a situation where there was a breach of trust by Harding in that he acted contrary to his purpose as a veterinarian, to the tenets of his profession, and to the reason the animal was entrusted to his care?

AMENDMENT OF INFORMATION

[13] While the Trial Judge erred in concluding he did not need to hear comments from counsel before amending the Information because amendment was within his discretion, this error would not justify quashing a conviction, if it did not result in a substantial wrong or miscarriage of justice because no prejudice to the accused resulted.

[14] Section 590(3) of the **Criminal Code** states:

> The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

[15] The “ends of justice” refers to notions of fairness and justice and requires that the judge weigh the interests of the accused along with the interests of society: **R.** v. **Cross** (1996), 112 C.C.C. (3d) 410 (Que. C.A.), at p. 419.

[16] Harding submits he was prejudiced because, had the count not been divided, a finding of not guilty of the subject matter of count 1 would have resulted in a complete acquittal of Harding. In other words, Harding submits, because the original indictment referred to both the stabbing and punching incident, the Crown would have had to prove that each of these incidents occurred in order to obtain a conviction.

[17] I disagree. I believe that, had the original Information not been amended, the Trial Judge could still have convicted Harding upon proof beyond a reasonable doubt of the punching incident, even though a reasonable doubt arose concerning the stabbing incident. This follows from **R.** v. **Giguere** (1983), 8 C.C.C. (3d) 1 (S.C.C.), at p. 15, where the Court noted an accused is liable for conviction on any part of an Indictment that constitutes an offence even though the elements are stated conjunctively.

[18] It is permissible for several incidents to form the basis of a single count where they involve a similar course of conduct. See, **R.** v. **M.(G.L.)** (1999), 138 C.C.C. (3d) 383 (B.C.C.A.). But the Trial Judge acted properly after noting that from all of the evidence the defences would be different regarding each incident. See, **Lilly** v. **The Queen**, [1983]

1 S.C.R. 794. I am satisfied the Trial Judge properly exercised his discretion in amending the Information in the circumstances.

CREDIBILITY OF WITNESSES

[19] Presentation of evidence at trial required eight days over five months. The prosecution called seven witnesses and the defence called Harding and six others. Harding submits the Trial Judge gave no consideration or insufficient consideration to the following matters relating to the credibility and reliability of witnesses:

(i) Roxanne Powers' Evidence

[20] Another veterinary assistant, Roxanne Power, present at the time of the alleged punching of Remington, testified she did not see Harding do this. As well, this witness did not confirm Julie Murphy's evidence that they had both being warned to say nothing negative in the weekly communication reports required by the employer. Roxanne Power also contradicted Julie Murphy's testimony regarding alleged abuse by Harding of another dog, Willie Oldford, and regarding an alleged attempt by Harding to stab a cat.

(ii) Weekly Communication Report

[21] Julie Murphy was required to fill out weekly communication reports concerning her job. In the weekly communication report for the week in which the Remington incidents allegedly occurred, she wrote: “no problems”.

(iii) Inconsistency in Statement

[22] At trial Julie Murphy said Harding had beaten Remington on the ribs. Previously she had told a veterinarian that Harding had beaten Remington on the stomach.

(iv) Inconsistency with Elaine Barton

[23] Julie Murphy testified she had contacted Elaine Barton to seek her support concerning making a complaint against Harding. Elaine Barton indicated she had not spoken to Julie Murphy before coming to Court.

(v) Speed of Alleged Punching

[24] Julie Murphy indicated Harding's beating to Remington's ribs was a controlled rather than a rapid motion. Harding explained that, in applying force to Remington's ribs, he was employing a professional technique designed to stimulate the dog's breathing and reduce the risk of hyperventilation.

(vi) Timing of Remington Incident

[25] Julie Murphy testified the beating on Remington's ribs went on for approximately forty-five minutes. The operating record shows the entire anaesthesia and surgery took only one hour. The evidence indicated the dental procedures alone would have taken between one-half hour and one hour. Also, from Julie Murphy's writing in the medical record, it appears the anaesthetic procedure took no more than twenty minutes.

(vii) Julie Murphy's Restraint Problem

[26] There was evidence Julie Murphy had problems with the restraint of animals. Harding testified her difficulty in restraining Remington led to the difficulty in anaesthetizing him.

(viii) Relative Experience

[27] Julie Murphy was a veterinary assistant with less experience than Harding, yet her testimony was preferred to that of Harding concerning the procedure he undertook to anaesthetize Remington.

(ix) Harding's allegation that Julie Murphy had made sexual advances towards him, which he rebuffed after the alleged Remington incident and before her allegations

[28] To allegedly corroborate this testimony regarding sexual advances, there was evidence Harding and Roxanne Power had been given sexually suggestive gifts by Julie Murphy following her return from vacation. As well there was evidence from Harding and Roxanne Power that Julie Murphy had brought a pornographic video to the workplace.

(x) Subsequent Events

[29] Harding testified Julie Murphy had, upon resigning from her employment in June of 1995, testified she was going to get even. Julie Murphy failed to report the allegations to the SPCA for several months.

(xi) Interpersonal relations

[30] The Trial Judge, in mentioning the interpersonal working relationships of Harding, did not comment upon the positive evidence of certain witnesses in this regard.

[31] I believe the Trial Judge dealt adequately with items (v), (viii) and (ix) in his reasons. Items (iii), (iv), (vi), (vii), (x) and (xi) I regard as collateral aspects of the case, to which the Trial Judge need not refer in his reasons for decision. But I do not view items (i) and (ii) as collateral aspects.

[32] Item (i), the testimony of Roxanne Power, goes directly and fundamentally to the credibility of Julie Murphy. If Harding had been hitting the dog on the ribs as Julie Murphy described, why did not Roxanne Power, who was present during the incident, confirm this?

[33] Defence counsel suggests the Trial Judge did not need to address this point, since Harding admitted to having forcefully applied pressure to the animal for therapeutic reasons. But one would expect Roxanne Power to have noticed, if anything other than a therapeutic procedure had occurred.

[34] Defence counsel submits the Trial Judge was entitled to dismiss Roxanne Power's testimony because of the closeness of her relationship with Harding. Perhaps so. But, with respect, the Trial Judge should have expressly noted how he resolved the significant

differences between the testimony of Julie Murphy and that of Roxanne Power, differences which went to the heart of Julie Murphy's credibility and reliability. One should note in this regard that there was at least some suggestions in Julie Murphy's testimony that Harding's application of force to Remington was to some degree controlled and not a frenzied lashing out in anger.

[35] Item (ii), Julie Murphy's report of "no problems" to her employer, concerning events during the week when the incidents allegedly occurred, also goes directly to her credibility in a fundamental way. With respect, I conclude the Trial Judge's reasons should have indicated how he resolved this apparent contradiction.

[36] Without a clear indication of how the Trial Judge resolved the inconsistency between the evidence of Julie Murphy and that of Roxanne Power and the contradiction of Julie Murphy's testimony by her weekly communication report of "no problem", it is impossible to conclude this is a safe conviction, which gives proper application to the principle of reasonable doubt. This would warrant setting the conviction aside and ordering a new trial on count 2, provided the Information was laid within the six month limitation period for summary convictions, a matter dealt with below.

SIMILAR FACT EVIDENCE

[37] The Trial Judge admitted similar fact evidence concerning questionable handling of other animals by Harding. One incident alleged by Julie Murphy, involved Harding slamming another dog, Willie Oldford, against a door and a counter top. A second allegation by her was that he had attempted to stab a cat with a needle before being restrained by Roxanne Power. Elaine Barton alleged Harding had pounded a cat's head on a counter top and hit another cat over the head with steel scissors. Candace King alleged Harding hit a cat's head on a counter. She said he had hit other cats on the head with his hand.

[38] The Trial Judge admitted the similar fact evidence of Julie Murphy, after citing **R.** v. **B.(C.R.)** (1990), 55 C.C.C. (3d) 1 (S.C.C.), which notes that evidence of mere propensity, while generally inadmissible, may exceptionally be admitted where it has substantial probative value on some issue and the probative value outweighs the potential prejudice. The Trial Judge went on to conclude the evidence sought to be tendered was of such probative value as to be admissible under the rules set out in **B.(C.R.)**.

[39] Defence counsel submits the failure by the Trial Judge to expressly refer to the prejudicial effect of Julie Murphy's similar fact evidence was an error of law. I do not accept this. The Trial Judge in the sentence immediately preceding his decision to admit the evidence had noted the need to balance probative value against prejudicial effect.

[40] Defence counsel submits the similar fact evidence of Julie Murphy had no relevance other than character and disposition. I do not agree. The evidence was properly admitted as it tended to establish a pattern of conduct by Harding in improperly applying unnecessary force to animals under his care, when he became frustrated with their behaviours, and goes to negate the defence of accident. This is more than evidence aimed merely at showing the accused is a bad person. See, **R.** v. **Oldford** (1999), 180 Nfld. & P.E.I.R. 114 (Nfld. C.A.) and the authorities there reviewed.

[41] The same applies to the admission of the evidence by Elaine Barton and Candace King. In the latter two cases the Trial Judge referred to the "striking similarity" of the previous alleged abuse with the allegations made in the present case against Harding.

[42] It is obvious from the evidence that the evidence of prior abuse could have had significant probative value, due to its tendency to make it more probable than not that Harding's conduct towards Remington, in striking him on the ribs, was not therapeutic but a lashing out to vent frustration, as had occurred with other animals on similar occasions. As it happened, the Trial Judge in his reasons indicated he found the evidence relating to the questionable handling of other animals to be of "little, if any benefit, in deciding the issues". He arrived at this conclusion after hearing testimony on voir dires, which included Harding's explanations as to what had occurred in the incidents with

other animals. I find no basis for interfering with the Trial Judge's approach to the similar fact evidence and no basis on this ground for interfering with his decision.

THE LIMITATION PERIOD

[43] The evidence established the alleged incidents occurred on June 8, 1995, before 12:00 noon. The Information against Harding was not sworn until after 3:00 p.m. on December 8, 1995. Defence counsel submitted the Information, therefore, fell at least three hours outside the six month limitation period set by s. 786(2) of the **Criminal Code**, which reads:

> 786(2) No proceeding shall be instituted more than six months after the time when the subject matter of the proceedings arose, unless the prosecutor and the defendant so agree.

[44] Defence counsel refers to **Black's Law Dictionary** (5th ed.), which defines "time" as:

> **Time.** The measure of duration. The word is expressive both of a precise *point* or *terminus* and of an *interval* between two points.

Defence counsel submits that s. 786(2) refers to the "time" when the subject matter arose, and Harding is entitled to the benefit of the most favourable interpretation of this word, since we are dealing with a penal statute.

[45] Counsel for the SPCA refers to **Webster's Ninth New Collegiate Dictionary** which sets out a number of definitions of "time", including "a day". Counsel relies upon s. 28 of the **Interpretation Act**, R.S.C. 1985, c. I-21, which states:

> 28. Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by
>
> (a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;
>
> (b) excluding the specified day; and
>
> (c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month.

Counsel submits this permits the laying of the Information at any time during the last day of the six month period.

[46] I interpret s. 28 as merely clarifying that the six month count commences on June 9th, rather than June 8th, and ends on December 8th, rather than December 7th. It does not assist on the question of whether an information laid any time on the last day is valid.

[47] **Driedger on the Construction of Statutes** (3rd Edition by Ruth Sullivan, 1994), at pp. 357-362, notes that the strict construction rule for penal statutes on many occasions

has not been adopted by courts, even where one of several plausible interpretations favoured the accused. In **R.** v. **Hasselwander**, [1993] 2 S.C.R. 398, the majority rejected the accused's appeal to the strict construction rule, holding that the most appropriate meaning of penal statutes should be sought in the usual way, having regard to all relevant factors, including the purpose of the legislation. **Driedger** questions another suggestion in **Hasselwander** that the strict construction rule should be involved only as a last resort.

[48] I need not invoke the strict construction rule in the present case. I agree with Defence counsel that if Parliament intended to set the limitation period to the end of the last day, then it would have substituted the word 'day" for "time" in s. 786(2) of the **Criminal Code**. There being only one reasonable interpretation of the language of s. 786(2), Harding is entitled to the benefit of this. The Information in this case was a nullity because it was laid at least three hours after the six month limitation period for summary conviction offences had expired. Accordingly, Harding's conviction on count 2 must be overturned and the charge dismissed.

CROSS APPEAL OF COUNT 1 ACQUITTAL

[49] Counsel for the SPCA submits the Trial Judge erred in his approach to determining credibility, when he concluded he did not believe Harding and believed a Crown witness

but still found Harding's evidence with respect to count 1 was capable of belief and raised a reasonable doubt. I do not accept this submission.

[50] The Trial Judge's approach complies with the direction set out by Cory J. for the Court in **R.** v. **W.(D.)** (1991), 63 C.C.C. (3d) 397 (S.C.C.), at p. 409, as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
> Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The Trial Judge in the present case correctly applied the second of the above instructions on the issue of credibility. There is no reason to interfere with his acquittal on count 1.

CROSS-APPEAL ON SENTENCE

[51] Because of my conclusion that the conviction on count 2 should be overturned, and the charge dismissed due to the invalidity of the Information, I need not consider the matter of sentence.

SUMMARY AND DISPOSITION

[52] 1. The Trial Judge did not err by dividing the original single count into two separate counts.

2. The Trial Judge erred in failing to indicate how he had resolved two inconsistencies in the evidence, which dealt with something fundamental to the credibility and reliability of a critical prosecution witness.

3. The Trial Judge did not err in admitting similar fact evidence which tended to show a pattern of conduct and to negate the defence of accident.

4. The Trial Judge had no jurisdiction to convict because the Information was sworn at least three hours after the expiry of the six month limitation period and, therefore, was invalid.

5. The Trial Judge did not err in acquitting on count 1.

6. Because of my conclusions on issues 2, 4 and 5, I need not consider the issue of sentence.

7. The cross appeal is dismissed. Harding's appeal is allowed and the charges against him dismissed.

L. BARRY, J.

TO: D. Bradford Wicks - solicitor for Richard Harding.
TO: David Buffett - solicitor for the SPCA.