

*Court of Appeal for British Columbia*

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Lambert  
The Honourable Mr. Justice Goldie  
The Honourable Madam Justice Prowse

December 13, 1994  
Vancouver, B.C.

BETWEEN:

R E G I N A

RESPONDENT

AND:

HOI KIU LEE

APPELLANT

F.G. Potts and  
T. Delaney

appearing for the Appellant

E.D. Crossin and  
S. Coristine

appearing for the (Crown) Respondent

1 LAMBERT, J.A.: The appellant was charged with three counts of offences said to have been committed against his eldest daughter. The counts were in these terms:

Count 1: THAT he, between the 23rd day of September, A.D. 1981 and the 4th day of

January, A.D. 1983, at or near the District of Burnaby and the City of New Westminister, Province of British Columbia, did indecently assault Elaine Joy Lee, a female person, contrary to Section 149 of the Criminal Code of Canada and against the peace of Our Lady the Queen, Her Crown and Dignity.

**Count 2:** THAT he, between the 4th day of January, A.D. 1983 and the 13th day of December, A.D. 1991, at or near the District of Burnaby, the City of New Westminister and the District of Coquitlam, Province of British Columbia, did commit sexual assault of another person, Elaine Joy Lee, contrary to Section 271 of the Criminal Code of Canada and against the peace of Our Lady the Queen, Her Crown and Dignity.

**Count 3:** THAT he, between the 1st day of September, A.D. 1988 and the 13th day of December, A.D. 1991, at or near the District of Coquitlam and the District of Burnaby, Province of British Columbia, did commit incest with Elaine Joy Lee, contrary to Section 155(2) of the Criminal Code of Canada and against the peace of our Lady the Queen, Her Crown and Dignity.

2                   The reason for having counts one and two is because the offence of indecent assault was changed to sexual assault on the 4th of January, 1983.

3                   The only significant evidence against the appellant was the evidence of the complainant. The appellant denied that any of the many incidents that were alleged had occurred. So the

credibility of the complainant and the credibility of the appellant were the central issues at the trial.

4           In the course of the trial evidence was given by the investigating police officer. She was an experienced officer and had investigated many other cases of sexual assault. She interviewed the complainant when the complainant first reported these matters. She also went to the appellant's house and with permission took sheets from the complainant's bed and some of the complainant's clothes. In the course of her testimony the police officer said this:

Q       When you were taking the statement from Miss Lee could you comment on her demeanour?

A       Miss Lee was very quiet, my lord. She was obviously upset by what had occurred in regards coming to the police station. She was somewhat reluctant at first to get involved with the police investigation. She was very credible in my opinion.

(my emphasis)

5           In a recent decision of this Court *The Queen v. Ay* (CA014095; 13 September 1994), a decision that had not been made when this trial took place, Mr. Justice Wood with whom Mr. Justice Goldie concurred on this point suggested how such an incident in the course of testimony as occurred here should be dealt with if it arises in the course of a jury trial in a criminal case. At p.11 Mr. Justice Wood said this:

Constable Logan's opinion as to the credibility of the complainant was clearly inadmissible and should never have been

offered in evidence. It was, in fact, a gratuitous remark and unresponsive to the question asked, although there can be no doubt that the question invited at least the risk that such an answer would be given.

What was required by way of a remedial response was an immediate instruction to the jury to disregard the answer together with an explanation to the effect that no opinion on the credibility of the complainant was of any consequence to their deliberations except that which they themselves formed after a consideration of the evidence as a whole.

No such instruction was given. In the result inadmissible evidence on the critical issue in the case was left for the jury's consideration.

6           The trial judge in this case did not have the benefit of that suggestion. The trial judge gave no instruction to the jury at the time that the police officer commented on the credibility of the complainant. Whether or not such an instruction is given right away there is always an opportunity to give such an instruction in the final jury instructions though there is a risk that it might be considered insufficiently effective at that time. The trial judge in this case did say in general terms that only the jury's opinion on credibility was relevant but he did so only in the context of commenting on the testimony of an expert doctor and not in relation to the police officer.

7           After the jury had been deliberating for about four hours they asked for further instructions and then they asked to have the police officer's testimony read to them. At that crucial stage the testimony was read to the jury including, of course, the comment

about the credibility of the complainant. Again, no warning instruction was given. In my opinion, the police officer was a significant witness whose comments might have been carefully heeded by the jury.

8 I cannot say that the comment made by the police officer on which no specific direction was given by the trial judge could not have effected the outcome of this trial.

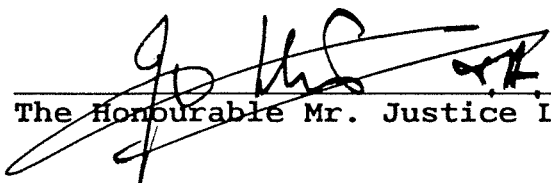
9 Accordingly, I would allow the appeal on this point and order a new trial. Other points were argued and addressed in the factums and the fresh evidence motion. It is not necessary to consider them.

10 I would allow the appeal and order a new trial.

GOLDIE, J.A.: I agree.

PROWSE, J.A.: I agree.

LAMBERT, J.A.: The appeal is allowed and a new trial is ordered.

  
The Honourable Mr. Justice Lambert