R. *v.* P. (M.B.), [1994] 1 S.C.R. 555

Her Majesty The Queen *Appellant*

v.

M.B.P. *Respondent*

Indexed as: R. *v.* P. (M.B.)

File No.: 23088.

1993: November 12; 1994: April 14.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Criminal law -- Sexual offences -- Time of offence -- Reopening of Crown's case -- Complainant and her mother testifying that alleged assaults occurred in 1982 -- Crown closing its case -- Defence announcing intention to call alibi witness -- Crown recalling complainant's mother to establish that alleged assaults occurred in 1983 -- Whether trial judge erred in permitting Crown to reopen case -- Whether trial judge erred in permitting Crown to amend indictment.

The accused was charged with indecent assault of his niece and with having sexual intercourse with her when she was under the age of 14. The

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complainant had initially reported that the sexual assaults occurred in 1980. An information was drafted and the accused was arrested. He was informed that the incidents of which he was being accused had occurred when he was living at the complainant's house. After being cautioned and given his right to counsel, he made several inculpatory statements to the arresting officers. Following the preliminary inquiry, the information was amended to allege that the incidents had occurred between January 1, 1982 and January 1, 1983. The complainant, who was 16 at the time of the trial, testified that the accused had lived at her parents' house for a month or two in the summer of 1982 when she was eight and that while her parents were away for a weekend, he sexually assaulted her. She stated that she and her mother had gone through old photographs which had helped them determine the relevant time frame. Her mother testified that the accused had lived with the family for two months in the summer of 1982, and that he had baby-sat her daughter during a van trip in July of that year. The Crown closed its case and the trial was adjourned. Prior to adjourning, defence counsel stated in open court that he would be calling three witnesses, including an alibi witness. When the trial resumed the Crown successfully applied to reopen its case and recall the complainant's mother. She testified that she had been mistaken and that she now realized that the accused had stayed with the family in the summer of 1983, not the summer of 1982. The Crown was then granted leave to amend the indictment to extend the time frame to include 1983. The accused testified that he had lived with the complainant's family during the summer of 1983. He was convicted of both counts. The Court of Appeal found that the Crown should not have been permitted to reopen its case or amend the indictment. It quashed the convictions. The Crown appeals to this Court only in respect of the acquittal on the sexual intercourse

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charge, the amendment to the indictment having resulted in a time frame extending beyond the repeal of the offence of indecent assault.

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: The trial judge committed a reversible error in allowing the Crown's case to be reopened after the accused had begun to answer the case against him by revealing that he would be calling three witnesses. The keystone principle in determining whether the Crown should be allowed to reopen its case has always been whether the accused will be prejudiced in his or her defence. A trial judge's discretion in this regard must be exercised judicially and with a view to ensuring that the interests of justice are served. Traditionally, the stage reached in a proceeding has been treated as correlative to prejudice and injustice to the accused. Before the Crown has closed its case, a trial judge has considerable latitude in exercising his or her discretion to allow the Crown to recall a witness so that his or her earlier testimony can be corrected. Once the Crown actually closes its case but before the defence elects whether or not to call evidence, the test to be applied by the trial judge is generally understood to be that reopening is to be permitted to correct some oversight or inadvertent omission by the Crown in the presentation of its case, provided of course that justice requires it and there will be no prejudice to the defence. After the Crown has closed its case and the defence has started to answer the case against it, a court's discretion is very restricted, and it is only in the narrowest of circumstances that the Crown will be permitted to reopen its case. Allowing the Crown's case to be reopened after the defence has started to meet that

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case would undermine the guiding principle against self-incrimination. This Court's decision in *Robillard*, with its more generous approach to a trial judge's discretion over reopening, even after the defence has closed its case, must be narrowly construed as applying only to situations where the Crown is seeking to reopen in order to correct a matter of form.

This is an appropriate case in which to interfere with the trial judge's exercise of discretion to allow the Crown to reopen its case. Not only had the defence started to meet the Crown's case by declaring its intention to call evidence, but the mother's fresh evidence had the effect of changing the case which the accused had committed himself to answering. Reopening in this case was contrary to the interests of justice and prejudicial to the accused because it violated, indirectly, the fundamental tenet of our criminal justice system that an accused must not be conscripted against himself. It is unnecessary to consider whether the trial judge erred in allowing the amendment to the indictment.

Per L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting): The reopening of the case was properly allowed by the trial judge, as was the amendment to the indictment. Neither of these procedural incidents altered the case which the accused had to answer, since he had been made aware at the time of his arrest that the relevant period during which he was alleged to have sexually assaulted the complainant was when he was living at her parents' house, and the accused thus could not have suffered any prejudice of any kind. A trial judge has wide discretion to allow the reopening of the case and such discretion, as long as it is exercised in a manner which does not result in injustice or prejudice to the parties, should not be interfered with. Although in certain circumstances it may

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be more likely that prejudice will arise if the case is reopened later rather than earlier in the trial, this Court's decision in *Robillard* definitely eliminated the distinction between cases where the reopening is sought prior to and those where it is sought after the defence has started to answer the case against it, where no prejudice is demonstrated. Here there was no prejudice or denial of full answer and defence in depriving the defence of the opportunity of relying on an irrelevant detail, the dates of the offences, by allowing the Crown to submit fresh evidence which did not change the essential features of the case which the defence had to meet. The key to this flexibility is rooted in *B. (G.)*, where this Court recognized the difficulties of pinpointing the exact date of sexual assaults against children and the need to accommodate this difficulty in our criminal justice system. In light of the context of child sexual abuse and the difficulty that children have in determining exact dates and times of occurrences, courts must not unduly limit and complicate the trial judge's discretion to reopen the case with inordinate technicalities. Here there was no actual prejudice to the defence. While there must be great value placed on the right of an accused to silence and the presumption against self-incrimination, these rights have not been violated in this case.

Section 601 of the *Criminal Code* specifically confers on a trial judge the discretion to permit an amendment to the indictment in the absence of prejudice and codifies the common law rule that the date of an offence need not be proven unless it is an essential element of the offence. There is no vested right to a given alibi, and the availability of a particular defence is no bar to the application of s. 601, which was enacted to avoid having technicalities impair the truth-seeking function of the courts. The amendment sought by the Crown here was precisely for those reasons and fell squarely within the discretion of the trial judge, who was

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in the best position to assess whether or not the accused was or could be prejudiced by the amendment.

Per La Forest and McLachlin JJ. (dissenting): The trial judge did not err in allowing the Crown to reopen its case and amend the indictment. While the later the stage at which an application to amend an indictment is made, the greater the chance for injustice to the accused, the discretion of the trial judge is to be exercised in the interests of justice -- which would comprise consideration of both the interests of the accused and those of the public, including in the latter those of the victim. Here the interests of the accused were not prejudiced. The accused knew before the reopening of the case that the incident had taken place when he resided with his niece, and thus knew exactly the case he had to meet from the beginning. The difficulty of children pinpointing the exact time of incidents which have occurred several years before, but which they are able to define in terms of other contemporaneous matters, should be underlined.

Cases Cited

By Lamer C.J.

Considered: *Robillard v. The Queen*, [1978] 2 S.C.R. 728; **referred to:** *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399; *R. v. Kishen Singh* (1941), 76 C.C.C. 248; *R. v. Cachia* (1974), 17 C.C.C. (2d) 173; *R. v. Dunn*, [1970] 3 C.C.C. 424; *R. v. Champagne*, [1970] 2 C.C.C. 273; *Crawford v. The Queen* (1984), 43 C.R. (3d) 80; *Kissick v. The King*, [1952] 1 S.C.R. 343; *R. v. Huluszkiw* (1962), 37 C.R. 386; *R.*

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v. Assu (1981), 64 C.C.C. (2d) 94; *R. v. Day* (1940), 27 Cr. App. R. 168; *R. v. Pilcher* (1974), 60 Cr. App. R. 1; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Nelson*, [1993] O.J. No. 1899 (QL).

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By L'Heureux-Dubé J. (dissenting)

Vézina v. The Queen, [1986] 1 S.C.R. 2; *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Robillard v. The Queen*, [1978] 2 S.C.R. 728; *R. v. Kishen Singh* (1941), 76 C.C.C. 248; *R. v. Huluszkiw* (1962), 37 C.R. 386; *R. v. Assu* (1981), 64 C.C.C. (2d) 94; *R. v. Champagne*, [1970] 2 C.C.C. 273; *Thatcher v. The Queen*, [1986] 2 W.W.R. 97, aff'd on other grounds, [1987] 1 S.C.R. 652; *R. v. Karens*, [1986] B.C.J. No. 2165 (QL); *Protection de la jeunesse -- 449*, [1990] R.J.Q. 2367; *R. v. Scott* (1984), 79 Cr. App. R. 49; *R. v. Pilcher* (1974), 60 Cr. App. R. 1; *R. v. Dossi* (1918), 13 Cr. App. R. 158.

By La Forest J. (dissenting)

R. v. B. (G.), [1990] 2 S.C.R. 30; *R. v. Tremblay*, [1993] 2 S.C.R. 932.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(*c*), (*d*), 13.

Criminal Code, R.S.C. 1970, c. C-34, ss. 146(1), 149(1) [rep. 1980-81-82-83, c. 125, s. 8], 529(4).

Criminal Code, R.S.C., 1985, c. C-46, ss. 153(1), 601(2) [rep. & sub. c. 27 (1st Supp.), s. 123(1)], (4), (4.1) [ad. *idem*, s. 123(3)].

Authors Cited

Bala, Nicholas, and Martha Bailey. "Canada: Recognizing the Interests of Children" (1992-93), 31 *J. Fam. L.* 283.

Canada. Committee on Sexual Offences Against Children and Youths. *Sexual Offences Against Children*, vol. 1. Ottawa: Minister of Supply and Services Canada, 1984.

Canada. Department of Justice, Research Section. *Sexual Assault Legislation in Canada: An Evaluation* (Report No. 5). Ottawa: Department of Justice Canada, 1990.

Ewaschuk, E. G. *Criminal Pleadings & Practice in Canada*, 2nd ed. Aurora, Ont.: Canada Law Book, 1987 (loose-leaf).

Hor, Michael. "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] *Singapore J. Legal Stud.* 35.

McWilliams, Peter K. *Canadian Criminal Evidence*, 3rd ed. Aurora, Ont.: Canada Law Book, 1988 (loose-leaf).

Paciocco, David M. *Charter Principles and Proof in Criminal Cases*. Toronto: Carswell, 1987.

APPEAL from a judgment of the Ontario Court of Appeal (1992), 9 O.R. (3d) 424, 72 C.C.C. (3d) 121, 13 C.R. (4th) 302, 54 O.A.C. 62, allowing the accused's appeal from his convictions for indecent assault and sexual intercourse with a female under the age of 14. Appeal dismissed, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting.

Gary T. Trotter, for the appellant.

Julian N. Falconer and *Richard Macklin*, for the respondent.

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The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

LAMER C.J. -- This case raises the question of whether, in circumstances where the defence has started to answer the case against it by announcing that it will be calling evidence, it is an appropriate exercise of a trial judge's discretion to allow the Crown's case to be reopened in order to recall a witness so she can correct her earlier testimony.

I. Facts

The respondent was charged with indecent assault of his niece contrary to s. 149(1) (now repealed) and with having sexual intercourse with her when she was under the age of 14 years contrary to s. 146(1) (now s. 153(1)) of the *Criminal Code*, R.S.C. 1970, c. C-34.

The complainant was 16 years old at the time of the trial. She testified that the respondent had resided at her parents' home in the summer of 1982 for one or two months when she was eight years old and that, on one occasion, while her parents were away for a weekend with their van club, she was left alone in the care of the respondent. On both nights during the absence of her parents, the respondent sexually assaulted her while she was in bed. The complainant further testified that about one week before the "van club weekend", the respondent had sexually assaulted her while her mother was asleep. She described the last assault as having taken place a few months later, when the respondent was no longer staying at her parents' house and her aunt came to baby-sit.

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The complainant, who first spoke of these sexual assaults in 1989 when she was 15 years old, initially reported that the sexual assaults had occurred in 1980. An information was drafted and the respondent was arrested on August 11, 1989. After being cautioned and given his right to counsel, the respondent made several inculpatory statements to the arresting officers. At the time of his arrest, the respondent was informed by the police that the incidents of which he was being accused had occurred when he was living at the complainant's house.

The information sworn on the day of the respondent's arrest described the period of the alleged assaults as being between January 1, 1980 and January 1, 1981. However, after the preliminary inquiry, the information was amended, on consent, to allege that the incidents had occurred between January 1, 1982 and January 1, 1983. At trial, the complainant testified that all the incidents had occurred in 1982, stating that she and her mother had gone through old photographs which had helped them determine the relevant time frame. The complainant's mother was also called by the Crown and she testified that the respondent had lived with the family for two months in the summer of 1982, and that the respondent had baby-sat her daughter during a van trip to Rochester, New York, in July of 1982.

The Crown closed its case and the trial was adjourned to accommodate the defence, which had not received disclosure of oral inculpatory statements made by the respondent to the police. Prior to adjourning, defence counsel stated in open court that he would be calling three witnesses, including an alibi witness, and the Crown indicated the defence's undertaking to provide him with the particulars of the alibi evidence.

When the trial resumed approximately five weeks later, the Crown applied to reopen its case and recall the complainant's mother with respect to new evidence pertaining to the dates of the offences. Over the defence's objection, he was permitted to do so. The mother testified that she had been mistaken as to the year in which the respondent stayed with the family, and that she now realized the proper time frame was the summer of 1983, not the summer of 1982. The alibi evidence was to have been that the respondent had been confined to a hospital during the relevant time period in the summer of 1982.

The Crown then moved to have the indictment amended to extend the period during which the sexual assaults were alleged to have occurred to include the year 1983. Over the defence's objection, leave to amend was granted and the time frame described in the indictment became January 1, 1982 to January 1, 1984. After a further adjournment, the respondent was called and he testified that he had lived with the complainant's family during the summer of 1983.

The respondent was found guilty of indecent assault and of having sexual intercourse with his niece when she was under the age of 14. The Court of Appeal, however, allowed the respondent's appeal, quashed the convictions and entered an acquittal: (1992), 9 O.R. (3d) 424, 72 C.C.C. (3d) 121, 13 C.R. (4th) 302, 54 O.A.C. 62. The Crown appeals to this Court only in respect of the acquittal entered on count two (the charge of sexual intercourse contrary to s. 146(1)), and not with respect to count one (the charge of indecent assault contrary to s. 149(1)). This is because the amendment to the indictment resulted in a time frame which extended beyond the point when s. 149(1) was still in force.

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II. Judicial History

Ontario Court, General Division (DiSalle J.)

After hearing argument from both sides, the trial judge allowed the Crown to reopen its case in order to recall the complainant's mother with respect to new evidence pertaining to the dates in the indictment.

With respect to the Crown's subsequent application for amending the indictment, the trial judge relied on the principles established in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, and stated that "there is always difficulty of pinpointing the exact date because of the age of these complainants in trying to remember the time", and that

> . . . the incidences are not changed, we are talking here of people trying to recall a certain date by certain events and the young complainant related it to the van trip. Somebody has made a mistake in the summer of the van trip. I do not believe that this will prejudice the accused in amending that date.

In finding the respondent guilty of the offences charged, the trial judge concluded that:

> Although the evidence of the complainant was confusing as to the actual dates, I find that her evidence related to the time and place that the accused lived there. . . .
>
> I accept the complainant's evidence as to the time and place and I accept Mrs. P.'s evidence as to the time and place and her method of recalling it as she thought about it and found pictures and related to that time period.

> I further accept Constable Rollin's evidence that she related to the accused that the alleged offences took place at 26 Bay Road and during the time the accused lived there.

Court of Appeal for Ontario (1992), 9 O.R. (3d) 424 (Finlayson J.A. for the court)

Although the appeal before the Court of Appeal concerned only the trial judge's ruling permitting the Crown to amend the indictment, Finlayson J.A. also considered the propriety of allowing the Crown to reopen its case in the circumstances. He observed that it was only in view of the evidence of alibi that it became necessary for the Crown to reopen its case so that it could adduce fresh evidence which made the alibi irrelevant. He held that the Crown should not have been permitted to reopen its case. The trial judge should have heard the alibi evidence and decided the case as the Crown had defined it. Finlayson J.A. explained (at pp. 431-32):

> I do not wish to place this opinion on too narrow a basis. My objections are to the reopening of the Crown's case and to the amendment of the indictment. My reasons in both cases relate to prejudice. I do not see how the Crown can be permitted to recast its case when faced with an alibi, the accuracy of which it was not prepared to dispute. The defence went into a trial where the Crown had originally alleged offences in the year 1980. The year was changed to 1982. The [respondent's] defence was a denial bolstered by an alibi which the defence could establish independently of the [respondent's] evidence. Consequently, once the time frame was changed to include the year 1983, an adjournment could not have assisted the [respondent]. He had lost the ability to put forward an independent assertion of his innocence to the charge as contained in the indictment. In charges of sexual assault against very young children, the accused is often reduced to his own denial as a defence. The loss of an independent alibi is, therefore, a very serious loss indeed.

On the amendment issue, Finlayson J.A. noted that prejudice to the accused is provided for in s. 529(4) (now s. 601(4)) of the *Criminal Code*. He

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stated that in *B. (G.)*, *supra*, the Supreme Court of Canada recognized that the availability of an alibi is a significant consideration in assessing prejudice to an accused. He relied on the conclusion in *B. (G.)* (at p. 53) that, " [i]f the time of the offence cannot be determined and time is an essential element of the offence or crucial to the defence, a conviction cannot be sustained", to find the year in which the offences were alleged to have occurred as being crucial to the defence. He stated (at p. 433) that "[t]he defence was positioned to respond to the case as pleaded and led by the Crown. Accordingly, in my opinion, the prejudice to the [respondent] arising from the amendment to the indictment was total, and the learned trial judge was in error in granting the amendment".

Finlayson J.A was of the view that the respondent was denied a significant procedural safeguard in that the case against him was materially changed to an altogether different case after he had announced his defence and the Crown had closed its case. He suggested that amendments during a trial should not be encouraged because they usually work to the prejudice of the accused. He concluded that the conviction could not stand, and accordingly allowed the appeal, quashed the conviction and entered an acquittal.

III. Points in Issue

1. Did the Court of Appeal for Ontario err in determining that the trial judge had erred in permitting the Crown to reopen its case?

2. Did the Court of Appeal for Ontario err in concluding that the trial judge had erred in permitting the Crown to amend the indictment?

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IV. Analysis

Introduction

This case is, fundamentally, about the reopening of the Crown's case and not about the amendment to the indictment. I am not convinced that the respondent suffered any irreparable prejudice by the mere fact of the amendment to the dates specified in the indictment. However, the respondent was prejudiced by the trial judge's decision to allow the Crown's case to be reopened after the respondent had begun to answer the case against him by revealing that he would be calling three witnesses. Therefore, I am satisfied that the trial judge committed a reversible error at the reopening stage, before the Crown moved to amend the indictment.

The reason it was not the amendment in itself but the reopening which created the injustice is that, on the facts as found by the trial judge, the respondent knew what was alleged against him from the outset. He had been made aware at the time of his arrest that the relevant period during which he was alleged to have sexually assaulted the complainant was when he was living at her parents' house. I am inclined to think that, up until the point when the Crown closed its case, the dates in the indictment could have been amended so as to make them conform with the period during which the respondent was living with the complainant's family. In this regard, I would simply note that courts, including this one, have accepted that, in cases involving offences and particularly sexual offences against young children, absolute precision with respect to the timing of an alleged offence will often be unrealistic and unnecessary: *B. (G.)*, *supra*, at p. 53; also see *R. v. W. (R.)*,

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[1992] 2 S.C.R. 122, at pp. 132-34, and *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399 (Ont. C.A.), at p. 403.

The fact that an accused may have an alibi for the period (or part of the period) described in an indictment does not necessarily or automatically "freeze" the dates specified in that indictment. That is to say, there is no vested right to a given alibi. Alibi evidence must respond to the case as presented by the Crown, and not the other way around. Section 601(4) of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly s. 529(4)), directs a trial judge to consider certain factors in deciding whether to allow an indictment to be amended, including whether an accused has been misled or prejudiced and whether an injustice might result. It reads as follows:

> **601.** . . .
>
> (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count thereof under subsection (3), consider
>
> (*a*) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> (*b*) the evidence taken on the trial, if any;
>
> (*c*) the circumstances of the case;
>
> (*d*) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
>
> (*e*) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Nowhere does s. 601(4) say that inability to rely on a particular defence is co-extensive with irreparable "prejudice" or "injustice", and nor can this be inferred

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from the language of the provision. Rather, such matters are properly left to the trial judge to consider in the particular circumstances of a case.

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In any event, this appeal can be disposed of on the basis that the reopening of the Crown's case was in error, without considering the issue of amendment. At the point when the Crown moved to reopen its case, there was no basis in the evidence for the Crown to apply for an amendment. The indictment conformed with the evidence which, up to that point, had been that the alleged sexual assaults had occurred in July of 1982. The reopening of the Crown's case to recall the complainant's mother and have her correct her earlier testimony as to dates was, therefore, a condition precedent to the amendment which the Crown subsequently sought. I have concluded that, given the advanced stage reached in the proceedings, the Crown should not have been allowed to reopen its case in order to justify the subsequent amendment to the indictment.

The Principles Governing Reopening

The keystone principle in determining whether the Crown should be allowed to reopen its case has always been whether the accused will suffer prejudice in the legal sense -- that is, will be prejudiced in his or her defence. A trial judge's exercise of discretion to permit the Crown's case to be reopened must be exercised judicially and should be based on ensuring that the interests of justice are served.

Traditionally, courts in Canada and in England have treated the stage reached in a proceeding as correlative to prejudice and injustice to the accused.

That is, a court's discretion with respect to reopening will be exercised less readily as the trial proceeds. The point is illustrated by taking the following three stages in a trial:

(1) before the Crown closes its case,

(2) immediately after the Crown closes its case but before the defence elects whether or not to call evidence (most commonly, this is where the defence has moved for a directed verdict of acquittal for failure by the Crown to prove some essential ingredient of its case), and

(3) after the defence has started to answer the case against it by disclosing whether or not it will be calling evidence.

In the first phase, before the Crown has closed its case, a trial judge has considerable latitude in exercising his or her discretion to allow the Crown to recall a witness so that his or her earlier testimony can be corrected. Any prejudice to the accused can generally be cured at this early stage by an adjournment, cross-examination of the recalled witness and other Crown witnesses and/or a review by the trial judge of the record in order to determine whether certain portions should be struck.

Once the Crown actually closes its case and the second phase in the proceeding is reached, the trial judge's discretion to allow a reopening will narrow and the corresponding burden on the Crown to satisfy the court that there are no unfair consequences will heighten. The test to be applied by the trial judge is

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generally understood to be that reopening is to be permitted to correct some oversight or inadvertent omission by the Crown in the presentation of its case, provided of course that justice requires it and there will be no prejudice to the defence.

Lastly, in the third phase after the Crown has closed its case and the defence has started to answer the case against it (or, as in much of the case law, the defence has actually closed its case), a court's discretion is very restricted and is far less likely to be exercised in favour of the Crown. It will only be in the narrowest of circumstances that the Crown will be permitted to reopen its case. Traditionally, an *ex improviso* limitation was said to apply to this stage of the proceeding; that is, the Crown was only allowed to reopen if some matter arose which no human ingenuity could have foreseen. At this late stage, the question of what "justice" requires will be directed much more to protecting the interests of the accused than to serving the often wider societal interests represented by the Crown, the latter being a more pressing consideration at the first and, to a lesser extent, the second phase.

The classic Canadian authority which drew this temporal distinction in the principles which were to govern reopening was *R. v. Kishen Singh* (1941), 76 C.C.C. 248 (B.C.C.A.). There, the Crown inadvertently omitted to prove a proclamation bringing into force the statute constituting the offence. At the close of the Crown's case, the defence moved for a directed verdict. The trial judge dismissed the motion and allowed the Crown to reopen its case to allow the proclamation to be proved. No evidence was called by the defence and the jury found the accused guilty.

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The majority of the Court of Appeal in *Kishen Singh* refused to interfere with the trial judge's exercise of discretion and dismissed the appeal on the ground that the accused had suffered no prejudice. Macdonald C.J.B.C., however, insisted that the decision should be confined to the facts before the court, noting that the case did not deal with an application to reopen after the conclusion of the whole case or after the defence was closed. In his concurring judgment, Sloan J.A. explained at p. 251:

> That discretion [to reopen] when exercised before the accused has entered upon his defence is subject to the limitation that its exercise must be in the interests of justice and the accused be not prejudiced thereby. When at a later stage of the case, that is to say, after the defence has given its evidence, then as was held by this Court in *R.* v. *Marsh*, [1941] 1 D.L.R. 431 . . ., following *R.* v. *Day* (1940), 27 Cr. App. R. 168, the discretion ought not to be exercised except in a case where some matter arises *ex improviso* which no human ingenuity could have foreseen.

While the strict *ex improviso* limitation imposed on reopening after the defence had closed its case may, as such, no longer apply (see *Robillard v. The Queen*, [1978] 2 S.C.R. 728), I view it to be self-evident that a court's discretion to permit the Crown's case to be reopened where an accused has started to meet the case against him or her must be severely curtailed.

While I do not propose to provide an exhaustive review of the jurisprudence in the area, I believe that the authorities on reopening show clearly that courts have always attached great significance to the stage reached in the proceeding, drawing a particularly sharp distinction between the point at which the Crown has closed its case and the defence has simply moved for a directed verdict

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(the second phase described above), and the point at which the defence has closed its case (the third phase). A few examples serve to illustrate this point.

In *R. v. Cachia* (1974), 17 C.C.C. (2d) 173 (Ont. H.C.), the accused was charged with resisting a peace officer on July 24. In giving their evidence in chief, the Crown witnesses related the incident to July 23. After the Crown closed its case, the defence moved for dismissal. The trial judge allowed the Crown witnesses to be recalled and to correct their error as to the date. The accused was convicted. In dismissing the appeal, Grant J. applied the rule that, when the Crown at the conclusion of its case has inadvertently failed to prove a necessary ingredient of the offence charged, a court has the discretion, so long as justice requires it, to permit the case to be reopened to enable the Crown to supply the necessary proof. In *obiter*, however, Grant J. twice underlined the fact that his conclusion would be different if the defence had elected to call no evidence, closed its case and then moved for a dismissal of the charge (at p. 175).

The significance of the *caveat* in *Cachia* becomes clearer when one considers *R. v. Dunn*, [1970] 3 C.C.C. 424 (B.C.S.C.), which also involved a mistake as to dates. In that case, the information alleged that the offence of failing to remain at the scene of an accident had occurred "on or about the 16th day of March". However, the Crown asked two of its witnesses to relay what had happened on the "16th of May", and the witnesses, not noticing the Crown's mistake, related the events of March 16. After the Crown closed its case, the accused elected not to call any evidence and moved for a dismissal of the charge on the ground of insufficient evidence to support a conviction for the offence alleged. The magistrate, however, granted leave to the Crown to reopen its case

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and recall the two witnesses (both of whom had been in the courtroom and heard the argument as to dates) to correct the mistake. The defendant was convicted. In quashing the conviction on the basis that the magistrate had erred in law in permitting the Crown to reopen, Munroe J. stated (at pp. 425-26):

> It is settled law . . . that a Court has a discretion -- which must be exercised judicially -- to allow the Crown to reopen its case in appropriate circumstances and that such discretion ought to be exercised in favour of the Crown where, through inadvertence, the Crown has failed to prove an essential ingredient of the crime charged, provided that justice requires it and that there will be no prejudice to the defence . . ., but no authority was cited to me, and I know of none, which supports the proposition that after the Crown has called evidence to prove that the crime alleged in the information occurred on a certain date, it should be allowed, after the defence has closed its case and made a submission, to reopen its case for the purpose of recalling a witness to change his testimony upon a vital point. [Emphasis added.]

Notwithstanding the importance which has historically attached to the stage reached in the trial proceeding and the fact that a court's discretion to permit the Crown's case to be reopened is highly restricted once the defence starts to answer the case against it, it is true that the strict *ex improviso* rule is no longer applied in Canada. However, the circumstances in which the Crown may be allowed to reopen at this stage are very narrow. The two most common examples are where

(1) the conduct of the defence has either directly or indirectly contributed to the Crown's failure to adduce certain evidence before closing its case: *R. v. Champagne*, [1970] 2 C.C.C. 273 (B.C.C.A.); *Crawford v. The Queen* (1984), 43 C.R. (3d) 80 (Ont. Co. Ct.); and

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(2) the Crown's omission or mistake was over a non-controversial issue to do with purely formal procedural or technical matters, having nothing to do with the substance or merits of a case: *Kissick v. The King*, [1952] 1 S.C.R. 343; *Robillard*, *supra*; *Champagne*, *supra*; *R. v. Huluszkiw* (1962), 37 C.R. 386 (Ont. C.A.); *R. v. Assu* (1981), 64 C.C.C. (2d) 94 (B.C.C.A.).

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While I do not propose to review each one of the cases cited in support of the above two propositions, a few of the cases are worth considering.

For instance, *R. v. Huluszkiw*, *supra*, is helpful in illustrating the distinction between a matter of form and substance. There, the accused was charged with a prostitution-related offence for which the *Criminal Code* imposed a corroboration requirement. A witness gave corroborating evidence at the preliminary inquiry, but died before the trial. The Crown, which sought to adduce at the trial the depositions taken at the preliminary inquiry, neglected to prove that the evidence of the deceased witness had been taken in the presence of the accused. The Crown's application to reopen its case was dismissed by the trial judge on the basis that the defence had closed its case. The Court of Appeal, however, reversed the trial judge's ruling and allowed the Crown to reopen its case before it in order to adduce the necessary evidence. McLennan J.A. justified the court's decision on the ground that (at p. 390):

> It would be unfortunate if the ends of justice were defeated by the inadvertence of counsel in failing to prove what is essentially a matter of form in relation to procedure and provided always that the calling of further evidence, whatever its character, is for an honest purpose and

> that there are no unfair consequences to the opposite party so far as the presentation of that case is concerned. [Emphasis added.]

He distinguished the case before him from that of *R. v. Day* (1940), 27 Cr. App. R. 168, where the English Court of Appeal found the trial judge erred in permitting the Crown in a forgery case to call evidence of handwriting experts after the defence had closed its case. McLennan J.A. observed at pp. 389-90 that, in *Day*, the evidence "went to the very justice of the case":

> . . . the defence might have been presented in a different manner by calling more witnesses or fewer witnesses than were actually called or none at all, had the evidence given after the defence had closed its case been put in, as it ought to have been, as part of the Crown's case in chief.

McLennan J.A. concluded that the defence was not and could not be prejudiced by allowing the Crown to reopen its case to provide the formal proof that the accused was indeed present at the preliminary inquiry when the deceased witness testified.

In *Robillard*, *supra*, a decision by this Court, there was a similar absence of formal proof in the Crown's case. An accomplice to an armed robbery identified the accused at the preliminary inquiry as one of the robbers, but refused to testify at trial. After being permitted to read to the jury the evidence previously given by the accomplice, the Crown closed its case. The defence then declared that it had no witnesses to offer and, after the Crown had addressed the jury, argued that the accused had not been properly identified at the trial as the same person referred to in the accomplice's testimony. The trial judge's decision to allow the Crown to

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reopen its case at this late stage was upheld by a majority of the Quebec Court of Appeal.

In dismissing the appeal, Pigeon J. rejected for this Court the strict *ex improviso* rule that had previously been applied in cases where the Crown applied to reopen after the defence closed its case. He suggested that a trial judge has a wide discretion to allow a reopening in order to rectify an inadvertent omission, and that an appeal court should only interfere in a trial judge's exercise of discretion if it is shown that an injustice has resulted or there was some prejudice to the accused.

In my opinion, *Robillard* should be limited to its facts. That is, I do not view *Robillard* as having eliminated, in all cases, the traditional and sound distinction made by courts between the broad discretion which exists before and immediately after the Crown closes its case and the very narrow discretion available after the defence begins to answer the case against it. Rather, *Robillard* should be construed narrowly, as a case dealing with a mistake as to form rather than substance. Given the underlying reasons for making this differentiation based on the phase reached in a trial, which I believe are grounded in the principle that an accused must not be conscripted against him- or herself, the temporal distinction is an important one which must be retained.

The Rationale Behind Limiting Reopening of the Crown's Case Once the Defence Starts to "Meet the Case" Against It

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While courts have often been at pains to distinguish between the reopening principles which should govern a trial judge's exercise of discretion in earlier versus later phases of a trial, clearly viewing reopening after the defence has made an election and/or closed its case as more prone to creating injustice than reopening at the earlier directed verdict stage, few have been explicit about the reasons for the difference.

The closest a court seems to have come to providing a justification for the distinction is in the English Court of Appeal decision in *R. v. Pilcher* (1974), 60 Cr. App. R. 1. The Crown in that case applied for leave to reopen not at the close of the defence's case but midway through it (a situation more closely analogous to the one in the case at bar). The Crown wished to call an additional witness who had been available to the prosecution from the outset, but whose importance had been overlooked in a long and complicated case. The Lord Chief Justice held that the trial judge had erred in allowing the Crown to reopen its case. He stated at pp. 5-6:

> The rule that the prosecution must finish their case once and for all before the defence starts is a very important and salutary rule. It means that the defence does not have to meet the case until it has seen the whole case. . . . We do not say that in cases like the present where the matter has not arisen *ex improviso* the judge had no kind of discretion at all, but we are firmly of [the] opinion that in cases where the matter does not arise *ex improviso* the judge's discretion should not be exercised to allow the late introduction of an additional witness called for the prosecution whose evidence was available before the case for the prosecution closed. One must have sympathy with overworked prosecution solicitors in long cases of this kind, but it seems to me in the interests of finality and in the interests of fairness to the defence one must take a strict line not to let in prosecution evidence coming in late in the proceedings if it is outside the *ex improviso* rule. [Emphasis added.]

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What I propose to do in this section is elaborate on the points touched on in this passage by the Lord Chief Justice.

Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution: M. Hor, "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] *Singapore J. Legal Stud.* 35, at p. 35; P. K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1988), at para. 1:10100. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.

The broad protection afforded to accused persons is perhaps best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. As a majority of this Court suggested in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and the procedural and evidentiary protections to which it gives rise.

Before trial, the criminal law seeks to protect an accused from being conscripted against him- or herself by the confession rule, the right to remain silent in the face of state interrogation into suspected criminal conduct, and the absence

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of a duty of disclosure on the defence: *R. v. Hebert*, [1990] 2 S.C.R. 151. With respect to disclosure, the defence in Canada is under no legal obligation to cooperate with or assist the Crown by announcing any special defence, such as an alibi, or by producing documentary or physical evidence. In *obiter*, this Court suggested in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 333, that

> The suggestion that the duty [of disclosure] should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. . . .
>
> I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role. [Emphasis added.]

However, it should be borne in mind that this protection against disclosure is not an absolute one. For example, failure to disclose an alibi defence in a timely manner may affect the weight given to the defence: E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. 1987), at para. 16:8070; McWilliams, *Canadian Criminal Evidence*, *supra*, at paras. 28:10711-10712.

At trial, accused persons continue to be protected by a right to silence. Specifically, they cannot be compelled to testify, and they have a right not to have their testimony used against them in future proceedings. These protections against testimonial compulsion of the accused have been constitutionalized in s. 11(*c*) (right of the accused not to be compelled to testify) and s. 13 (right of witness not to have his or her testimony from one proceeding used to incriminate him or her

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in a subsequent proceeding) of the *Charter*. As this Court observed in *Dubois*, *supra*, at p. 357, when combined with s. 11(*d*) (presumption of innocence), ss. 11(*c*) and 13 of the *Charter* protect the basic tenet of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused should respond.

All of these protections, which emanate from the broad principle against self-incrimination, recognize that it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a directed verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him or herself or calling other evidence, and failure to do so may serve as the basis for drawing adverse inferences: *Dubois*, *supra*, at pp. 357-58; D. M. Paciocco, *Charter Principles and Proof in Criminal Cases* (1987), at p. 495. In other words, once there is a "case to meet" which, if believed, would result in conviction, the accused can no longer remain a passive participant in the prosecutorial process and becomes -- in a broad sense -- compellable. That is, the accused must answer the case against him or her, or face the possibility of conviction.

What is so objectionable about allowing the Crown's case to be reopened after the defence has started to meet that case is that it jeopardizes, indirectly, the principle that an accused not be conscripted against him- or herself. In *Dubois*, this Court interpreted the privilege against self-incrimination contained in s. 13 of the *Charter* as preventing the Crown from indirectly conscripting the

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accused to defeat himself by using his previous testimony against him -- something which the Crown is directly prohibited from doing under s. 11(*c*) of the *Charter*. In my opinion, a similar danger is involved when the Crown seeks to reopen its case after the defence has begun to answer the case against it -- that is, there is a real risk that the Crown will, based on what it has heard from the defence once it is compelled to "meet the case" against it, seek to fill in gaps or correct mistakes in the case which it had on closing and to which the defence has started to respond. To ensure that this does not in fact happen, the Crown should not, as a general rule, be permitted to reopen once the defence has started to answer the Crown's case.

In other words, I agree with respondent's counsel in this case that there comes a point when "enough is enough", and a mistake or omission by the Crown must necessarily become fatal. Once the defence starts to "meet the case", thus revealing its own case, the Crown should, except in the narrowest of circumstances, be "locked into" the case which, upon closing, it has said the defence must answer. The Crown must not be allowed in any way to change that case. To hold otherwise would be to undermine the guiding principle against self-incrimination.

It is for this very important reason that *Robillard*, *supra*, with its more generous approach to a trial judge's discretion over reopening, even after the defence has closed its case, must be narrowly construed as applying only to situations where the Crown is seeking to reopen in order to correct a matter of form, and not generally to all situations where the defence has started to answer the case against it. Importantly, the Crown in *Robillard* was merely seeking to introduce non-controversial evidence which it would reasonably have been

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expected to introduce in order to support its case, but which it had omitted as a result of inadvertence. It was not attempting in any way to change the case which it had upon closing. I would also note that *Robillard* was decided in a pre-*Charter* era. With the entrenchment of the principle against self-incrimination in the *Charter*, it becomes necessary to ensure that the rules governing reopening are consistent with constitutional imperatives. Accordingly, any departure from the basic principle that the Crown not be allowed to reopen once an accused starts to reveal his or her defence must be assessed keeping that in mind.

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I have suggested that it will only be in special circumstances that a trial judge should entertain an application by the Crown to reopen after the defence has begun answering the case against it. Two examples of such circumstances have been provided: where conduct of the defence has contributed to an omission by the Crown, or where matters of form rather than substance are involved. There may be other exceptional circumstances in which reopening will be justified. In *R. v. Nelson*, [1993] O.J. No. 1899 (Ont. Ct. (Gen. Div.)), a case involving a charge of second degree murder, the Crown applied to reopen its case in order to have evidence by the only eyewitness to the murder given by commission. The Crown brought its application after the trial had been completed and at the point where the trial judge had reached a decision, but had not yet released his judgment. In dismissing the Crown's application to reopen, Goodearle J. stated as follows (at para. 31):

> An application, brought in these circumstances, at this late date by the Crown should never be allowed unless the effect of such evidence is of such apparent strength as to be likely to convince the trier of fact that the verdict it (or he) has reached, on the evidence

> originally adduced would be wrong and would result in a palpable injustice to the accused.

Clearly, where the interests of the accused warrant reopening the Crown's case, a trial judge should exercise his or her discretion accordingly, no matter how late in the proceeding it may be.

In summary, in order to preserve the principle against self-incrimination and ensure that accused persons are not compelled to assist in their own prosecution, the Crown should not be allowed, except in the narrowest or most exceptional of circumstances, to reopen its case once the defence has started to answer the case against it.

Application to the Case at Bar

In this case, the Crown had closed its case and the defence had been granted an adjournment to deal with non-disclosure by the Crown of certain inculpatory statements made to the police. Before recessing, the defence announced that it would be calling three witnesses, one of whom would be offering alibi evidence. Upon resumption of the trial approximately five weeks later, the Crown sought leave to reopen its case in order to recall the complainant's mother to allow her to correct her testimony as to the dates of the alleged sexual assaults. The trial judge permitted the Crown to reopen its case for the purpose of recalling the mother, and then, subsequently, ruled in favour of the Crown's application to amend the dates in the indictment to make them correspond with the mother's new

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evidence. The cumulative effect of the reopening and the amendment was, as respondent's counsel phrased it, to "obliterate" the respondent's alibi defence.

I am satisfied that this is an appropriate case in which to interfere with the trial judge's exercise of discretion to allow the Crown to reopen its case. Not only had the defence started to "meet" the Crown's case by declaring its intention to call evidence, but also the complainant's mother was recalled in order to justify amending the charge. The mother's fresh evidence had the effect of <u>changing</u> the case which the accused had, by announcing his intention to call evidence and particularly alibi evidence, committed himself to answering.

Reopening in this case was contrary to the interests of justice and prejudicial to the accused because it violated, indirectly, the fundamental tenet of our criminal justice system that an accused must not be conscripted against himself. To reach this conclusion, I find it neither necessary nor appropriate to interfere with the trial judge's findings of credibility as the Court of Appeal did. In addition, it is unnecessary to consider, as the Court of Appeal did, the second ground of appeal, which is the question of whether the trial judge erred in allowing the amendment to the indictment.

V. <u>Disposition</u>

Because the appropriate remedy in the circumstances would be to quash the conviction at trial and replace it with a verdict of acquittal, the appeal is dismissed on the ground that allowing the reopening of the Crown's case was an improper exercise of the trial judge's discretion.

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The reasons of La Forest and McLachlin JJ. were delivered by

LA FOREST J. (dissenting) -- I have had the advantage of reading the reasons of the Chief Justice and Justice L'Heureux-Dubé who set forth the facts and judicial history, which I adopt. The Crown sought to reopen its case for the purpose of amending the indictment. The issue of reopening and the application for amendment are so inextricably interlocked that I do not think they realistically can be dealt with separately. There can be no question that the later the stage at which an application to amend an indictment is made, the greater the chance for injustice to the accused, and consequently an amendment following the closing of the Crown's case must be given very close scrutiny. But it must be remembered that the discretion of the trial judge is to be exercised in the interests of justice -- which I would have thought comprised consideration of both the interests of the accused and of the public, including in the latter those of the victim. This is not a purely technical decision. As Wilson J. put it in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at p. 40, "balance . . . must be maintained between eschewing unnecessary technicalities and the right of an accused to make full answer and defence".

I fail to see how the interests of the accused here could be said to have been prejudiced. This is not a case like *R. v. Tremblay*, [1993] 2 S.C.R. 932, where the amendment related to the nature of the charge. Rather, the whole of the Crown's case here centred on the fact that the offence had occurred at a time when the accused resided with the parents of the complainant, the specific year being the difficult matter to pinpoint. The accused thus knew before the reopening of the case that the incident had taken place when he had resided with his niece. Indeed, he knew this from the beginning; a police officer had so informed him when he

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was arrested. In short, the accused knew exactly the case he had to meet from the beginning. I do not think the accused's right against self-incrimination or to silence were affected in any real sense. The case was reopened before the accused presented any evidence.

I would thus dispose of this case in the manner proposed by L'Heureux-Dubé J. Like her, I would underline the difficulty of children pinpointing the exact time of incidents which have occurred several years before, but which they are able to define in terms of other contemporaneous matters.

The reasons of L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- The respondent in this appeal has been charged with the indecent assault of his niece contrary to s. 149(1) of the *Criminal Code*, R.S.C. 1970, c. C-34, and with having sexual intercourse with her when she was under the age of 14, contrary to s. 146(1), now s. 153(1), of the *Criminal Code*. An important issue at trial concerned the dates when those alleged assaults took place. The original charge read that the accused M.B.P. had on or between January 1, 1980 and January 1, 1981 unlawfully assaulted the complainant. Pursuant to the evidence at the preliminary hearing, the Crown amended the charge to specify that the assaults were alleged to have occurred between January 1, 1982 and January 1, 1983. After the close of the Crown's case at trial, however, before the defence adduced any evidence but after having announced its reliance on an alibi defence for the above period, the Crown sought to reopen its case in order to recall the complainant's mother so she might correct

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her earlier testimony to reflect the actual period where the incidents were alleged to have taken place.

The question before this Court is whether it was an appropriate exercise of the trial judge's discretion to allow the Crown to reopen its case at that stage. A second intimately related question is whether the Crown should, in such circumstances, be allowed to amend the indictment to conform with the evidence entered at trial. This involves consideration of s. 601 of the *Criminal Code*, R.S.C., 1985, c. C-46, the relevant parts of which read as follows:

> **601.** . . .
>
> (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
>
> (*a*) a count in the indictment as preferred; or
>
> (*b*) a count in the indictment
>
> (i) as amended; or
>
> (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.
>
> . . .
>
> (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count thereof under subsection (3), consider
>
> (*a*) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> (*b*) the evidence taken on the trial, if any;
>
> (*c*) the circumstances of the case;

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> (*d*) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
>
> (*e*) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.
>
> (4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to
>
> (*a*) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; . . .

In order to answer these questions, a review of the evidence, as to the period when the offences are alleged to have taken place, is essential.

The Evidence

At trial, the complainant, who was 16 years of age at the time, testified that the occurrences of sexual abuse by her uncle, the respondent, took place eight years earlier, in the summer of 1982. Although the complainant tied her testimony to a fixed year, throughout the trial of this matter the exact date of those events had proven difficult for the complainant to remember with precision. Although the complainant's testimony was consistent with the dates mentioned in the indictment, she pinpointed the timing of the abuse on the fact that the incidents occurred during the summer when the respondent lived with her family and, in particular, on a summer weekend when the complainant's parents went away with their van club, at which time the respondent was responsible for baby-sitting her. Based on these recollections, the complainant and her mother concluded that the incidents occurred in 1982. The complainant explained how this date was arrived at:

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> . . . I could remember that I was little and my mother had showed me pictures of myself from school years and I could remember what I looked like and I showed my mother the picture of what I looked like when it all happened and she had taken the pictures out of her photo album of when she went on the trip with the van club to Niagara Falls and the date is in the bottom of my mother's pictures and it says 1982 and the picture of me was taken in `82.

The complainant's mother testified with regard to the period when the respondent had lived with her and her family, that is, for two months during the summer of 1982. She further testified that she and her husband had taken a van trip to Rochester, New York in July 1982 and that the respondent had baby-sat her daughter. At this point, the Crown closed its case and the respondent indicated that he would be calling three witnesses, one of whom was an alibi. When the trial resumed on April 22, 1991, the Crown sought to reopen its case, which was allowed by the trial judge, and the complainant's mother was recalled. She stated that she had erred in calculating the date when the accused had lived with her family and now recalled that it was the summer of 1983 instead of 1982:

> Racking my brains out trying to figure out, trying to remember when he lived here, when he lived with us. I have no rent receipts, I have nothing to prove when he lived at my house, I had to go by my memory and what my daughter could remember, so going through the pictures and trying to do my homework, I remember the yard sale, his family leaving and that he lived there then.

Following that testimony, the Crown was allowed to amend the indictment in order that the period be changed to read January 1, 1982 to January 1, 1984.

When testifying in his own defence, the respondent confirmed that he had lived with the complainant and her family in their home for a period of one to

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one and a half months during the summer of 1983. He recalled the events described by the complainant's mother which had enabled her to determine the period when the respondent had lived with them. With regard to the specific incidents of abuse, the respondent said that, during that period, he barely saw the family as he worked at two jobs and was out of the house most of the time. Moreover, he did not recall having baby-sat the complainant for a weekend during his stay. However, he also testified that, at that time, he was drinking heavily and, when pressed on cross-examination, made several contradictory statements with regard to the van club weekend. To various questions, he answered that he had no recollection of the weekend because he usually went away on the weekends, that he was not there on that particular weekend and, finally, that he did not remember.

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Prior to the trial, the respondent had also made a number of contradictory statements to the police in response to the accusations. In both oral and written statements, he said:

> It could have happened. I had a problem with alcohol and drinking. I did a lot of stupid things when I was drunk. I'm not sure in my mind that it didn't happen. I was probably more than capable of doing it the way I was drinking back then. Obviously it did occur. I feel pretty upset. That may have been me then but it's not me now.
>
> This happened a long time ago. I remember that period of time. I was drinking quite a bit at the time. At the time I had a problem with alcohol and back then I did a lot of stupid things when I was drunk.
>
> It probably could have happened at that time. I don't have any recollection of it at this time.
>
> I don't feel good about it, obviously something did happen. I was a very heavy drinker at the time.

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Analysis

In answer to the two issues this Court has to decide, which are set out in the Chief Justice's opinion and to which I referred earlier, the Chief Justice would dismiss the appeal "on the ground that allowing the reopening of the Crown's case was an improper exercise of the trial judge's discretion" (p. 589). I disagree. As to the amendment sought by the Crown in order that the indictment reflect the evidence at trial, while the Chief Justice is "not convinced that the respondent suffered any irreparable prejudice by the mere fact of the amendment to the dates specified in the indictment" (p. 566), he does not reach a determinative conclusion on this basis.

I am of the view that the amendment to the indictment was properly allowed by the trial judge, as was the reopening of the case. Neither of these procedural incidents altered the case which the accused had to answer. In the words of the Chief Justice himself, "the respondent knew what was alleged against him from the outset. He had been made aware at the time of his arrest that the relevant period during which he was alleged to have sexually assaulted the complainant was when he was living at her parents' house" (p. 567). Consequently, there could be no prejudice of any kind which the respondent suffered or could have suffered by the amendment and the reopening of the case to that end. Before dealing more specifically with these two points, it may be useful to recall the context in which these motions were sought.

The Context

These accusations relate to sexual offences against a young girl under 14 years of age by her adult uncle. At the time of the trial, the complainant was 16 years of age. The offences having occurred approximately eight years earlier, when the respondent was living in the complainant's parents' home, the complainant had difficulty pinpointing the specific dates. In this regard, as the Chief Justice notes, "courts, including this one, have accepted that, in cases involving offences and particularly sexual offences against young children, absolute precision with respect to the timing of an alleged offence will often be unrealistic and unnecessary" (p. 567). See *Vézina v. The Queen*, [1986] 1 S.C.R. 2; *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. Khan*, [1990] 2 S.C.R. 531, and *R. v. W. (R.)*, [1992] 2 S.C.R. 122.

This Court's reasons in *R. v. B. (G.)*, *supra*, which thoroughly dealt with the issue of amendment, are particularly apposite to the case at hand. In that case, three young offenders were charged with having sexually assaulted a seven-year-old girl between December 2 and 20, 1985. The young complainant, who was eight years old at the time of the trial, testified that the assault had occurred during the winter she was in grade one. Her mother supported her testimony and attested that the complainant had experienced various problems such as bed-wetting and nightmares during late 1985 and 1986. Following this testimony, counsel for the defence pointed out that the complainant had, in fact, been in grade one in the fall of 1984 and not 1985. The Crown sought to amend the indictment to read between November 1, 1985 and December 20, 1985. The trial judge refused to allow the amendment and the three accused were acquitted. On appeal to the Ontario Court of Appeal, the acquittal was overturned on the basis that the time of the offence

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was not an essential element of the crime. On further appeal, the judgment of the Court of Appeal was upheld. Wilson J. for the Supreme Court said (at p. 40):

> balance . . . must be maintained between eschewing unnecessary technicalities and the right of an accused to make full answer and defence. . . .

According to her, as long as the accused was provided with enough information in the indictment to identify the circumstances of the charge and to prepare a defence to these accusations, time was not an essential element of the offence of sexual assault.

The present day context of child sexual abuse indicates that each year, in Canada, the number of children who are victims of sexual abuse increases (Report of the Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (1984)). In fact, according to the Department of Justice, Research Section in *Sexual Assault Legislation in Canada: An Evaluation*, (Report No. 5 1990), at p. 28, reports of sex crimes increased over 100 percent to 29,111 offences across Canada from 1983 to 1988. Further, some researchers estimate that almost 80 percent of sex crimes are committed against children and teenagers (N. Bala and M. Bailey, "Canada: Recognizing the Interests of Children" (1992-93), 31 *J. Fam. L.* 283, at p. 292).

Judicial recognition of this reality, however, is not new and has, in fact, been commented on by our Court in *R. v. W. (R.)*, *supra*, by McLachlin J., whose remarks are very apposite to the situation at hand at p. 133:

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> One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that
>
> > . . . it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. . . . While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.

It is crucial that similar considerations be had in the case at hand. Mere technicalities cannot be allowed to hamper the administration of justice, especially in the context of child sexual abuse, particularly when no prejudice of any kind can result to the accused.

The Reopening of the Crown's Case

In the Chief Justice's opinion the trial judge erred in allowing the Crown to reopen its case at such a late stage in the proceedings, particularly since, in his view, the respondent was prejudiced because he had begun to answer the case against him by stating that he would be calling three witnesses one of whom would testify as to his alibi during the period mentioned in the indictment, that is the summer of 1982. In reaching his determination, the Chief Justice reviews the leading case of *Robillard v. The Queen*, [1978] 2 S.C.R. 728, and, although he agrees with Pigeon J. that a trial judge has a wide discretion to reopen a case, he suggests that *Robillard* should be limited to its own facts. In so doing, the Chief Justice attaches great significance to the stage of the trial when such reopening was

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allowed. I disagree. In my view, unless *Robillard* is overruled, it is the law and it cannot be distinguished from the facts of this case, even limited to its own facts.

In *Robillard*, the Supreme Court abolished the artificial distinction historically made between the discretion to allow the reopening of the Crown's case before, as opposed to after, the defence has commenced answering the case against it. The appellant Robillard was charged with armed robbery. An accomplice identified him at the preliminary inquiry as one of the robbers, but refused to testify at the trial. The evidence given at the preliminary inquiry was read to the jury at the trial and the Crown closed its case. The accused did not call any evidence and the defence closed its case. After the Crown had addressed the jury, counsel for the accused argued, in his address to the jury, that the appellant had not been identified at trial as the "Robillard" referred to in the accomplice's testimony. As a result, the Crown moved that the inquiry be reopened to permit evidence to be adduced on the identification issue. The trial judge granted the Crown's motion and the appellant was convicted. Both the Quebec Court of Appeal and the Supreme Court of Canada dismissed the appeal. Pigeon J., writing for the unanimous Court, held (at p. 732):

> A trial judge may allow the Crown to submit additional evidence after the Crown has closed its case, and this discretionary power is not subject to the strict limitation mentioned by Sloan J.A. in *Kishen Singh*.

In his reasons, Pigeon J. expressly rejected Sloan J.A.'s comments in *R. v. Kishen Singh* (1941), 76 C.C.C. 248 (B.C.C.A.), at p. 251, that the trial judge's power to reopen exists only if "some matter arises *ex improviso* which no human ingenuity

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could have foreseen". On the contrary, Pigeon J. clearly stated (at pp. 732 and 733) that:

> (1) the trial judge has the discretionary power to permit the correction of an omission or inadvertence in the evidence; and
>
> (2) such discretionary power should not be interfered with unless an injustice has resulted.

Applying these principles to the facts, Pigeon J. was of the view that the fact that the defence had closed its case was not a factor to be taken into consideration in the review of the trial judge's exercise of discretion. *Robillard* clearly provides that, whether the Crown seeks to reopen its case before or after the defence has closed its case, the trial judge may exercise his or her discretion to reopen the case in order to correct an omission in the evidence on the sole condition that no unfairness to the opposing party results. In brief, although it may be more likely that there will be prejudice from the fact that the reopening of the case occurred at a late stage of the trial as the Chief Justice noted, it will not automatically be the case, even if such reopening occurred after the defence had closed its case.

This Court's conclusion in *Robillard* is consistent with earlier jurisprudence. Pigeon J. (at p. 733) cited *R. v. Huluszkiw* (1962), 37 C.R. 386 (Ont. C.A.) as authority for the proposition that a trial judge's discretionary power to allow a reopening of the case should not be interfered with unless it is unfair. In *Huluszkiw*, McLennan J.A., allowing the reopening and the appeal, held (at p. 390):

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> It would be unfortunate if the ends of justice were defeated by the inadvertence of counsel in failing to prove what is essentially a matter of form in relation to procedure and provided always that the calling of further evidence, whatever its character, is for an honest purpose and that there are no unfair consequences to the opposite party so far as the presentation of that case is concerned. [Emphasis added.]

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Robillard has been both applied and further developed in subsequent cases. In *R. v. Assu* (1981), 64 C.C.C. (2d) 94, a case of drug possession, the British Columbia Court of Appeal, referring to its previous decision in *R. v. Champagne*, [1970] 2 C.C.C. 273, allowed the appeal on the ground that the trial judge had erred in denying the Crown's motion to reopen the inquiry in order to prove the nature and the quality of the substance described in the certificate of analyst. Notwithstanding the fact that the Crown made the request to reopen its case in the middle of the defence evidence, Carrothers J.A. made no distinction as to the moment when the application to reopen the inquiry is made, when he said (at p. 96):

> . . . the ends of justice are not to be defeated by inadvertence of counsel in a matter of form in relation to procedure and where there is no prejudice and no unfair consequences to the opposite party so far as the presentation of the case is concerned.

Similarly, in *Thatcher v. The Queen*, [1986] 2 W.W.R. 97 (appeal dismissed by the Supreme Court of Canada but on grounds not dealing with the reopening, [1987] 1 S.C.R. 652), the majority of the Saskatchewan Court of Appeal dismissed Thatcher's appeal on the ground that the rule in *Robillard*, *supra*, had been correctly applied by the trial judge. In the view of the Court of Appeal, the trial judge properly exercised his discretion in allowing the Crown, following the receipt of new information, to reopen its case to call a witness, regardless of the fact that the defence was by then closed. (See also *R. v. Karens*, B.C. Co. Ct.,

Vernon Reg. No. 14035, January 31, 1986, [1986] B.C.J. No. 2165 (QL), and *Protection de la jeunesse -- 449*, [1990] R.J.Q. 2367 (Ct. Qué., Youth Div.), which have applied and expanded on *Robillard*, *supra*.)

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This brief overview of the jurisprudence prior to and following this Court's judgment in *Robillard*, *supra*, makes it amply clear that a trial judge has wide discretion to allow the reopening of the case and that such discretion, as long as it is exercised in a manner which does not result in injustice or prejudice to the parties, should not be interfered with. Although it may be that, in certain circumstances, it will be more likely that prejudice may arise if the case is reopened later rather than earlier in the trial, in my view, *Robillard* has definitely eliminated the distinction between cases where the reopening is sought prior to and those where such reopening is sought after the defence has started to answer the case against it, where no prejudice is demonstrated. The Chief Justice's analysis is predicated, in my view, on the very narrow and legalistic approach which prevailed before *Robillard* and which *Robillard* has definitely abolished. In fact, the Chief Justice's treatment of the reopening of cases virtually overrules *Robillard*, an issue which was neither pleaded before us nor was the parties' contention.

The respondent's whole argument rests on the alleged prejudice resulting from the fact that he could no longer present an alibi defence as regards the amended period during which the alleged assaults occurred and that he was prejudiced by advancing a certain strategy. It is clear, and the Chief Justice himself agrees that, in the circumstances of this case, no prejudice could have ensued to the respondent from the fact that the dates do reflect the evidence and the defence of alibi could no longer succeed on these facts.

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Contrary to what the Chief Justice asserts, the reopening of the Crown's case in no way affected the case against the accused. The offence was one of indecent assault and sexual intercourse with the complainant who was under 14 years of age while the respondent lived at the complainant's parents' house. The dates were immaterial; the respondent knew throughout that the acts were alleged to have occurred when he lived with the complainant and her family. There was no prejudice or denial of full answer and defence in depriving the defence of the opportunity of relying on an irrelevant detail by allowing the Crown to submit fresh evidence which did not change the essential features of the case which the defence had to meet. The key to this flexibility is, in my view, rooted in *B. (G.)*, *supra*, in which this Court recognized the difficulties of pinpointing the exact date of sexual assaults against children and the need to accommodate this difficulty in our criminal justice system. A similar approach was advanced by the English Court of Appeal in *R. v. Scott* (1984), 79 Cr. App. R. 49, in which the court overturned the rule laid down in *R. v. Pilcher* (1974), 60 Cr. App. R. 1, and concluded that the reopening will depend on the discretion of the trial judge and what could reasonably have been foreseen based on the facts of the particular case and, finally, whether there is prejudice on the specific facts of the case.

The only reason that the Crown sought to reopen its case was because the young abuse victim could not recall the precise dates of events which occurred eight years earlier, although she was able to identify the period during which it occurred, a period the respondent himself recognized. Common sense dictates that the same exacting standard cannot apply in such circumstances as it perhaps should in others. In light of the context of child sexual abuse and the difficulty that children have in determining exact dates and times of occurrences and, most often,

have to rely on recollections of surrounding events as well as the assistance of others, courts must not unduly limit and complicate the trial judge's discretion to reopen the case with inordinate technicalities. The reopening of the Crown's case was, in the words of McLennan J.A. in *Huluszkiw*, "for an honest purpose and . . . there are no unfair consequences to the [respondent] so far as the presentation of that case is concerned" (p. 390). The respondent always knew the case to be met and that he was accused of having fondled the complainant and of having sexual intercourse with her on two occasions during the summer that he lived with the complainant and her family, particularly during the weekend that the respondent was responsible for baby-sitting her. The test for injustice, in my view, is one of actual prejudice to the defence and in the case at hand no such prejudice was suffered by the respondent. The Crown did not seek to reopen its case as a consequence of the defence statements but, rather, in order to remedy an inaccurate testimony that arose through human error. Since the defence counsel was able to seek an adjournment and re-cross-examine the witness, any minimal inconvenience that may have arisen could easily have been remedied. Although I agree with the Chief Justice that there must be great value placed on the right of an accused to silence and the presumption against self-incrimination, in my view these rights have not been violated in the case at hand and the reopening of this case clearly meets the limited circumstances set out in *Robillard*. The trial judge properly allowed the Crown to reopen its case in order to accord with the principles advanced by this Court in *B. (G.)*, *supra*, and to correct a simple matter of inadvertence given the fact that time is generally not an essential aspect of the offence of sexual assault in cases involving children. Thus, in so doing, no injustice arose to the respondent M.B.P.

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Finally, it is clear, in my view, that the reopening and amendment will often be closely linked in cases of child sexual assault. With this in mind, I now turn to the issue of the amendment.

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The Amendment

The *Criminal Code*, s. 601, specifically confers on a trial judge the discretion to permit an amendment to the indictment in the absence of prejudice. More specifically still, s. 601(4.1) deals with amending the time period mentioned in an indictment. This section was added in 1985 (S.C. 1985, c. 19, s. 123(3)) and codifies the common law rule that the date of an offence need not be proven unless it is an "essential element" of the offence pursuant to *R. v. Dossi* (1918), 13 Cr. App. R. 158 (C.C.A.).

The respondent's main argument rests on the defence of alibi which, in his view, he intended to use and could have used as regards the period mentioned in the amended indictment, alleging the abuse to have occurred between January 1, 1982 to January 1, 1983. As the Chief Justice points out (at p. 567), "[t]he fact that an accused may have an alibi for the period (or part of the period) described in an indictment does not necessarily or automatically "freeze" the dates specified in that indictment. That is to say, there is no vested right to a given alibi. Alibi evidence must respond to the case as presented by the Crown, and not the other way around." Besides, the availability of a particular defence is no bar to the application of s. 601, just as a defence prompted by a simple error or inadvertence by a complainant or Crown cannot be in the interest of justice. This is precisely why s. 601 was enacted -- to avoid having technicalities impair the truth-seeking

function of the courts. It seems to me that the amendment here sought by the Crown was precisely for those reasons and fell squarely within the trial judge's discretion. The trial judge, who had heard all the evidence adduced by the Crown before allowing the amendment, was in the best position to assess whether or not the respondent was or could be prejudiced by the amendment. He clearly put his mind to it when he said:

> . . . there is always difficulty of pinpointing the exact date because of the age of these complainants in trying to remember the time.
> . . . the incidences are not changed, we are talking here of people trying to recall a certain date by certain events and the young complainant related it to the van trip. Somebody has made a mistake in the summer of the van trip. I do not believe that this will prejudice the accused in amending that date.

The Court of Appeal failed to recognize that a finding that the appellant has not been able to rely on the defence of alibi does not necessarily render the amendment prejudicial. In my view, as set out above, it is sufficient that the accused was aware of the case he had to meet and that the offences were alleged to have occurred during the summer he lived with the complainant and her family. As a consequence, the conclusion of the Court of Appeal that the amendment "materially changed" the case against the accused to an "altogether different case" is a distortion of the facts of the case at hand. The Court of Appeal erred in substituting its own assessment of the prejudice to the accused for that of the trial judge. Besides, there was no prejudice in this case since the respondent was fully aware of the period the complainant was referring to. The respondent's arguments must, accordingly, fail and the decision of the trial judge must be upheld.

<u>Conclusion</u>

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In the result, I conclude that the trial judge properly exercised his discretion to allow both the reopening of the case and the amendment to the indictment. I would accordingly allow the appeal, reverse the judgment of the Court of Appeal and restore the conviction.

Appeal dismissed, LA FOREST, L'HEUREUX-DUBÉ, GONTHIER *and* MCLACHLIN JJ. *dissenting*.

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