



SUPREME COURT OF CANADA

CITATION: R v. G.R., [2005] 2 S.C.R. 371, 2005 SCC 45

DATE: 20050722

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BETWEEN:

Her Majesty The Queen

Appellant

v.

G.R.

Respondent

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 43)

Binnie J. (McLachlin C.J. and Major, Fish and Charron JJ.
concurring)

DISSENTING REASONS:
(paras. 44 to 70)

Abella J. (Bastarache, LeBel and Deschamps JJ. concurring)

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Indexed as: R. v. G.R.

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File No.: 30108.

2004: December 17; 2005: July 22.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for quebec

Criminal law — Incest — Included offences — Whether offences of sexual interference and sexual assault included in offence of incest — Criminal Code, R.S.C. 1985, c. C-46, s. 662.

R was charged with committing incest with his daughter. At trial, when asked by the trial judge whether R had put his penis into her vulva, the girl answered in the negative. Moreover, she could not say if R had tried to introduce his penis into

her vulva because she could not see what he was doing. At the time of the alleged incest, the daughter was in fact between the ages of five and nine. The physical examination of the child as well as a sexual abuse profile revealed that there had been penetration although it could not be determined whether she had been penetrated by a finger, by a penis or by another object. R testified in his own defence and categorically denied having touched his daughter in a sexual manner. R was convicted of attempted incest. In the Court of Appeal, the Crown conceded that there was insufficient proof with respect to attempted incest, but argued that R should be convicted of sexual interference and sexual assault. The court acquitted R of attempted incest and held that sexual interference and sexual assault are not included offences of incest.

Held (Bastarache, LeBel, Deschamps and Abella JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Major, Binnie, Fish and Charron JJ.: Since the same set of facts may give rise to different charges, it is fundamental to a fair trial that an accused know the charge or charges he or she must meet. The Crown did not allege that the daughter was below the age of consent, and there is nothing in the nature of the offence of incest as described in the *Criminal Code* or the wording of the indictment to put R on notice that he was in jeopardy of a conviction for sexual assault or sexual interference. The proper focus is on what the Crown alleges, not on what the accused already knows. An accused will often know a good deal more about the circumstances of an offence than the police or Crown will ever know, but it is not enough for the Crown to say to an accused “you know perfectly well what you’re guilty of”. The basis of our criminal law is that he or she is only called upon to meet

the charge put forward by the prosecution. In this case, lack of consent (or the age of the daughter) was not part of the charge put against R. The Crown thus seeks to have R convicted of charges which require the prosecution to establish elements (non-consent in the case of assault or the age of the victim in the case of sexual interference) which were not part of the allegations against him at trial. An important function of an indictment is thus to put the accused on formal notice of his or her potential legal jeopardy. Here, R was informed of the “transaction” that gave rise to the charge of incest, but he was not notified that in meeting that charge he was also required to defend against the offences of sexual assault and sexual interference. While incest may or may not be consensual and is not concerned with the age or consent of the partner, sexual assault is very much concerned with consent, and a critical element of the offence of sexual interference is that the victim be under the age of fourteen years. [2] [4] [11-17] [22-23] [35]

R cannot be convicted of sexual assault or sexual interference because the Crown cannot bring these offences within any of the three categories of “included offences” set out in s. 662 of the *Criminal Code*: (1) the *Criminal Code* does not explicitly make sexual assault or sexual interference an offence included in incest; (2) incest as “described in the enactment creating it” does not include sexual assault or sexual interference; and (3) the wording of the count in this case does not describe facts to put an accused on notice that, if proven, such facts taken together with the elements of the charge, would disclose the commission of sexual assault or sexual interference. The corollary, however, is that acquittal on the charge of incest does not provide R with a defence of *autrefois acquit* to any future charge of sexual assault or sexual interference. While the evidence adduced at trial shows that the commission of incest in this case would necessarily have involved the commission of sexual

interference and sexual assault due to the age of the daughter, and that the age of the daughter must have been within the knowledge of R, there is nothing in s. 662 that permits the Crown to supplement the allegations in the charge, or the elements of the enactment creating the offence, by reference to evidence subsequently given at trial or the personal knowledge of an accused. [32] [34] [37-41]

Per Bastarache, LeBel, Deschamps and Abella JJ. (dissenting): Sexual assault is included in the offence of incest as charged in this case. For an indictment to be adequate, it must contain sufficient details to give the accused reasonable information with respect to the charge and enable the accused to make full answer and defence. The sufficiency of notice depends on the particular accused and circumstances. While the indictment in this case failed to refer to the daughter's age, by specifying the complainant, the time frame, and the act, R was put on sufficient notice of the age of the child and provided with enough information to make full answer and defence to the included charge of sexual assault. Where, as here, the complainant is under the age of fourteen, consent is no defence to a charge of sexual assault. No one, including R, disputes that the victim was under the age of fourteen during the specified time frame, and R could not have committed the crime of incest with his daughter during that time without also committing the included crime of sexual assault. The acts put in evidence to establish incest and attempted incest on the one hand and sexual assault on the other were the same. Since the trial judge found that there was evidence of sexual touching of a victim under fourteen years of age, a verdict of guilty should be entered with respect to the included offence of sexual assault. [44] [48] [62] [65-70]

Cases Cited

By Binnie J.

Applied: *R. v. Simpson* (No. 2) (1981), 58 C.C.C. (2d) 122, leave to appeal refused, [1981] 1 S.C.R. xiii; **referred to:** *R. v. Plank* (1986), 28 C.C.C. (3d) 386; *R. v. Guérin*, [1996] Q.J. No. 3746 (QL); *Brodie v. The King*, [1936] S.C.R. 188; *R. v. Douglas*, [1991] 1 S.C.R. 301; *R. v. S. (M.)*, [1994] B.C.J. No. 1028 (QL), aff'd (1996), 111 C.C.C. (3d) 467, leave to appeal refused, [1997] 1 S.C.R. ix; *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Bernier* (1997), 119 C.C.C. (3d) 467, aff'd [1998] 1 S.C.R. 975; *R. v. Hess*, [1990] 2 S.C.R. 906; *Lafrance v. The Queen*, [1975] 2 S.C.R. 201; *Fergusson v. The Queen*, [1962] S.C.R. 229; *Barton v. The King*, [1929] S.C.R. 42; *R. v. Manuel* (1960), 128 C.C.C. 383; *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17; *R. v. Drolet* (1988), 14 M.V.R. (2d) 50, aff'd [1990] 2 S.C.R. 1107; *R. v. Allard* (1990), 36 Q.A.C. 137; *R. v. Colburne* (1991), 66 C.C.C. (3d) 235; *R. v. Morehouse* (1982), 65 C.C.C. (2d) 231, leave to appeal refused, [1982] 1 S.C.R. xi; *R. v. Angevine* (1984), 61 N.S.R. (2d) 263; *R. v. Taylor* (1991), 66 C.C.C. (3d) 262; *R. v. Webber* (1995), 102 C.C.C. (3d) 248; *R. v. Rowley* (1999), 140 C.C.C. (3d) 361; *R. v. Beyo* (2000), 144 C.C.C. (3d) 15, leave to appeal refused, [2000] 2 S.C.R. vi; *R. v. Wilmot*, [1940] S.C.R. 53; *R. v. Quinton*, [1947] S.C.R. 234; *R. v. Lucas* (1987), 34 C.C.C. (3d) 28; *R. v. Lépine*, [1993] R.J.Q. 88; *R. v. Carey* (1973), 10 C.C.C. (2d) 330; *Tousignant v. The Queen* (1960), 130 C.C.C. 285; *R. v. Kay*, [1958] O.J. No. 467 (QL); *R. v. Woods*, [1969] 1 Q.B. 447; *Cullen v. The King*, [1949] S.C.R. 658; *R. v. Rinnie*, [1970] 3 C.C.C. 218.

By Abella J. (dissenting)

Fergusson v. The Queen, [1962] S.C.R. 229; *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17; *R. v. Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122, leave to appeal refused, [1981] 1 S.C.R. xiii; *Tousignant v. The Queen* (1960), 130 C.C.C. 285; *R. v. Manuel* (1960), 128 C.C.C. 383; *R. v. Connolly* (1867), 26 U.C.R. 317; *R. v. Loftus* (1926), 45 C.C.C. 390; *R. v. MacDonald* (1952), 102 C.C.C. 337; *Brodie v. The King*, [1936] S.C.R. 188; *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *R. v. Douglas*, [1991] 1 S.C.R. 301; *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 4(5), 150.1(1), 151, 155(1), 265(1), (2), 581(1), (2), (3), 607-610, 660, 662, 686(4)(b)(ii).

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APPEAL from a judgment of the Quebec Court of Appeal (Rothman and Rousseau-Houle JJ.A. and Biron J. (*ad hoc*)), rendered on October 23, 2003, which set aside the accused’s conviction for attempted incest. Appeal dismissed, Bastarache, LeBel, Deschamps and Abella JJ. dissenting.

Joanne Marceau and Annie-Claude Bergeron, for the appellant.

Line Boivin and Karine Piché, for the respondent.

The judgment of McLachlin C.J. and Major, Binnie, Fish and Charron JJ. was delivered by

BINNIE J. —

I. Introduction

1 The respondent was acquitted of a charge of incest with his daughter. The Crown says that on the evidence at trial he is nevertheless guilty of sexual assault and sexual interference, and a conviction should be entered for what the Crown says are those “lesser and included” offences. The issue on this appeal therefore is whether the rules governing “included” offences under s. 662 of the *Criminal Code*, R.S.C. 1985, c. C-46, can be applied to justify such a result.

2 It is fundamental to a fair trial that an accused knows the charge or charges he or she must meet. The proper focus is on what the Crown alleges, not on what the accused already knows. An accused will often know a good deal more about the circumstances of an offence than the police or Crown will ever know, but it is not enough for the Crown to say to an accused “you know perfectly well what you’re guilty of”. The basis of our criminal law is that he or she is only called upon to meet the charge put forward by the prosecution. In this case, lack of consent (or the age of the daughter) was not part of the charge put against the respondent.

3 Defence counsel cannot give informed advice to an accused person about defence preparation, trial strategy or a possible guilty plea unless and until the full range of the client’s legal jeopardy can be ascertained. The Crown too must be able to know with clarity after an acquittal what further charges may be laid, if any, without confronting the defence of *autrefois acquit* or *autrefois convict* (ss. 607 to 610 of the *Code*) (see, e.g., *R. v. Plank* (1986), 28 C.C.C. (3d) 386 (Ont. C.A.)). On the view taken by my colleague Abella J., what may be found to be an included offence in this case may not necessarily be so found in different circumstances. “Included offences” on this view will vary with the facts established in the courtroom and the personal knowledge of each accused. In my view, on the contrary, the exigencies of *autrefois acquit* or *autrefois convict* impose a more solid foundation. Legal jeopardy must be readily ascertainable on the face of the formal proceedings. It is not desirable for such purposes to have to ferret around to determine (if it is determinable) the state of personal knowledge of a previously acquitted or convicted accused. Here, for whatever reason, the Crown did not charge the respondent with sexual assault and sexual interference with a person under the age of fourteen years at the same time as it charged him with incest. The Crown now belatedly wishes to avail itself of these

alternative and different offences only because of the respondent's acquittal on the incest charge it *did* proceed with.

4 In my view, the Quebec Court of Appeal was correct to reject the Crown's position. At no time in these proceedings did the Crown allege against the respondent that his daughter did not consent, or was too young to consent, to sexual activity. Such elements are not "included" in the definition of incest in s. 155(1) of the *Code*, nor are they described by apt words in the indictment. It is well established that a person can be convicted of incest as a result of a consensual sexual relationship. The Crown thus seeks to have the respondent convicted of charges which require the prosecution to establish elements (non-consent in the case of assault or the age of the victim in the case of sexual interference) which were not part of the allegations against him at trial. The Crown's surmise that it might have obtained a conviction for sexual assault or sexual interference if it had prosecuted those charges in the first place, or if it had framed the incest case differently, cannot now deprive the respondent of his procedural rights.

A. *The Charge*

5 The respondent was charged as follows:

[TRANSLATION] Between December 13, 1995 and May 31, 1999, at Québec in the district of Québec, did commit incest with C.R., knowing that person to be his daughter, thereby committing the indictable offence provided for in section 155(2) of the Criminal Code.

6 The Crown argues that *on the particular facts of this case* sexual assault and sexual interference *were* included offences, because the respondent is the father

of the complainant and knew perfectly well that, at the time of the offences charged, his daughter was under fourteen years of age, and therefore was unable to consent to the sexual activity described in the evidence. The Crown thus seeks to supplement the indictment by resort to the personal knowledge of the accused. In my view however, the proper question is not what *the accused* knew but what charges *the Crown* decided to prosecute, or not to prosecute, in the first instance.

B. *Evidence at Trial*

7 At trial, the Crown called four witnesses: the victim, her mother, a doctor and a neighbour of the family. The victim, born in December 1990, testified with respect to various acts on the part of her father which began when she was four or five years old. When asked by the trial judge whether her father had put his penis into her vulva, the girl answered [TRANSLATION] “no”. Moreover, she could not say if the respondent had tried to introduce his penis into her vulva because she could not see what he was doing.

8 The victim’s mother testified as to what her daughter had told her in the fall of 1998 with respect to the acts of the accused. She filed a complaint with the police in 1999 after a neighbour informed her that C.R. had told her that she had [TRANSLATION] “made love” with her father. The neighbour confirmed this in her testimony. The physical examination of the child as well as a sexual abuse profile revealed, in the opinion of Dr. Déry, the Crown’s expert, that there had been penetration, although whether the penetration was done by a finger or penis or other object she could not say. The accused testified in his own defence and categorically

denied having touched his daughter in a sexual manner. The accused admitted to his prior convictions, including a conviction for sexual assault.

C. Judicial History

9 On December 18, 2001, the trial judge convicted the accused of attempted incest. Appearing before the Court of Appeal for Quebec on October 23, 2003, the Crown conceded that there was insufficient proof with respect to attempted incest but invited the court to convict the respondent on what the Crown argued were the lesser but included offences of sexual interference and sexual assault. The Court of Appeal held that sexual interference and sexual assault were not included offences. It therefore allowed the appeal and acquitted the accused.

D. Relevant Provisions of the Criminal Code

10 1. Incest

155. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

2. Sexual Intercourse

4. . . .

(5) For the purposes of this Act, sexual intercourse is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted.

3. Sexual Interference

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

4. Assault

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

...

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

5. Consent No Defence

150.1 (1) Where an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

6. Included Offences

662. (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

- (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
- (b) of an attempt to commit an offence so included.

II. Analysis

11 An important function of an indictment is to put the accused on formal notice of his or her potential legal jeopardy. It is equally important, of course, that if the Crown can establish some but not all of the facts described in the indictment or set out in the statutory definition of the offence, and such partial proof satisfies the constituent elements of a lesser and included offence, that the result be not an acquittal but a conviction on the included offence. As Professor Glanville Williams wrote, “an included offence is one that is made out of bits of the offence charged” (“Included Offences” (1991), 55 *J. Crim. L.* 234, at p. 234). Any other outcome would result in a waste of the resources expended on the trial.

12 The Crown’s argument in this appeal triggers the notice issue. An accused is entitled to be *properly apprised* of the charge or charges he or she is required to meet: *R. v. Guérin*, [1996] Q.J. No. 3746 (QL) (C.A.), at para. 36. The question is not what the respondent knew or did not know about his daughter’s age. It would be remarkable if he *did not* know her age. He may also know of other aspects of the events at issue that could have given rise to additional charges, but the question is what charges did the Crown allege in the indictment. The answer is that the Crown did not allege that the daughter was below the age of consent, and there is nothing in the nature of the offence of incest as described in the *Criminal Code* or the wording of the indictment to put the respondent on notice that he was in jeopardy of a conviction for sexual assault or sexual interference.

13 In other words, the same set of facts may give rise to different charges. An accused is entitled to know which amongst those available charges he or she is required to answer. The indictment is a written accusation that fulfills this function. The rules governing which charges are “included” in “the offence charged, as described in the enactment creating it or as charged in the count” are set out in s. 662 of the *Code*.

14 As my colleague notes, the indictment must go further than simply specifying the offence charged. The indictment must “contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to” (s. 581(3) of the *Code*). In short, it is not sufficient simply to charge an accused with “incest contrary to s. 155(1) of the *Criminal Code*”. The accused in this case was entitled to know in “sufficient detail” the circumstances or “the transaction” that gave rise to the Crown allegation that he committed incest to enable him to mount a full answer and defence, or to decide to plead guilty. In this case the respondent was fully informed of “the transaction” that gave rise to the charge. That is not, with respect, the problem here.

15 It is important not to confuse the requirement to specify the charge with the need to provide sufficient supporting detail of the underlying transaction or circumstances. In *Brodie v. The King*, [1936] S.C.R. 188, cited by my colleague, the charge of seditious conspiracy was clearly made in the indictment, but the transaction that gave rise to the charge was not sufficiently identified. The Court accepted as correct “the apt words of counsel for the appellants: ‘it does not describe the offence

in such a way as to lift it from the general to the particular” (p. 198). Since *Brodie*, the courts, encouraged by amendments to the *Criminal Code*, have taken a broader view of sufficiency and of the exercise of the courts’ powers of amendment, but such a relaxation has nothing to do with the fundamental requirement that the accused be able clearly to ascertain from the offence charged (as described in the enactment creating it or as charged in the count or as expressly stated to be an included offence in the *Criminal Code* itself), the charges for which he or she risks conviction. In the more recent case of *R. v. Douglas*, [1991] 1 S.C.R. 301, for example, there was no question but that the *charge* was specified in the indictment. The question was whether the underlying *transaction* was identified in sufficient detail to permit a full answer and defence. In my view, it is important to keep separate and distinct the different issues of the offence(s) charged and the sufficiency of notice of the underlying circumstances or transaction to which the charge(s) relate. It is on this point, it seems, that my colleague Abella J. and I find ourselves in disagreement.

16 Turning to the offence charged here, it is well established that an allegation of incest is not directed to assaultive behaviour. Consent is irrelevant to the charge and irrelevant to the defence. On the other hand, the prohibition against sexual assault is very much concerned with consent but not at all concerned with the “forbidden degrees of consanguinity or affinity”. Sexual interference is related to the age of the victim; incest is indifferent to the age of the victim (or willing partner). Historically, incest was dealt with by the ecclesiastical courts, sexual assault and sexual interference were prosecuted in the criminal courts (M. Ingram, *Church Courts, Sex and Marriage in England, 1570-1640* (1987), at p. 366). The elements of the offences were and are different.

A. *The Prohibition Against Incest*

17 Incest may or may not be consensual. Proof of consent makes no difference to the result (*R. v. S. (M.)* (1996), 111 C.C.C. (3d) 467 (B.C.C.A.), leave to appeal refused, [1997] 1 S.C.R. ix). In Queens County, Nova Scotia, for example, a mother was charged with incest with her two adult sons, one of whom in turn was charged with sex with his two adult half-sisters, all of it consensual. Nevertheless, convictions were upheld: *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435 (N.S.C.A.). The court rejected the argument that consensual “‘recreational’ sexual activity with blood relations should be legalized and constitutionally protected” (p. 441) because the prohibition against incest has nothing to do with consent but is directed to preserving

the integrity of the family by avoiding the confusion in roles that would result from incestuous sex . . . there is a “heavy physiological penalty imposed by inbreeding”, that is, the sharply increased risk of genetic defects in the children born of incestuous relationships. [pp. 443-44]

18 The prohibition against incest is also associated with “protection of vulnerable family members” (p. 445). Writing for the court, Roscoe J.A. concluded that incest, whether consensual or non-consensual, is

unacceptable, incomprehensible and repugnant to the vast majority of people, and has been for centuries in many cultures and countries. [p. 445]

19 To similar effect, Meredith J. at the trial level in *R. v. S. (M.)*, [1994] B.C.J. No. 1028 (QL) (S.C.), agreed at para. 13 with the 1984 report of the Criminal Law Revision Committee in England on *Sexual Offences* that

[w]hatever may have been the origin of the incest taboo, as to which there are many different theories, two main reasons are given today for the intervention of the law in this area. They are, first, the genetic risk and, second, the social and psychological consequences. [para. 8.8 of the report]

20 On appeal from the conviction of the accused despite his claim that the sexual relationship with his adult daughter was consensual, Donald J.A. in *S. (M.)* agreed with the trial judge that consent is irrelevant in part because in many family situations it would be difficult to determine “the difference between consent and acquiescence as between a father and a daughter of any age” (para. 37 (emphasis added); Meredith J., at para. 36). As well, he believed, a change in the law to permit consent as a defence would overlook “the adverse [e]ffects on the progeny of incest, social as well as physical” (para. 37; Meredith J., at para. 36).

21 In Canada, the Law Reform Commission in its *Report on Sexual Offences* (1978) stated that “the Commission continues to believe that incest between consenting adults ought no longer to fall within the purview of criminal justice” (p. 26), but this recommendation, which would require a change in the law, has not been acted upon by Parliament.

B. The Prohibition Against Sexual Assault

22 Sexual assault, on the other hand, is very much concerned with consent. Its purpose is to protect the “personal integrity, both physical and psychological, of every individual”: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 28. “The inclusion of assault and sexual assault in the *Code*”, Major J. continued, “expresses society’s determination to protect the security of the person from any non-consensual contact

or threats of force” (emphasis added). See also *R. v. Bernier* (1997), 119 C.C.C. (3d) 467 (Que. C.A.), *per* Deschamps. J.A., at p. 474:

[TRANSLATION] In fact, the assault component in a sexual assault comes rather from the lack of consent on the part of the victim in relation to the touching

(aff’d [1998] 1 S.C.R. 975)

C. *The Prohibition Against Sexual Interference*

23 A critical element of this offence is that the victim be under the age of fourteen years. Unless that fact is proven there can be no conviction: *R. v. Hess*, [1990] 2 S.C.R. 906. By contrast, proof of incest does not require an underage victim.

D. *Effect of the Respondent’s Acquittal on the Charge of Incest*

24 Conviction for incest requires proof beyond a reasonable doubt that “sexual intercourse” occurred (s. 155(1) of the *Code*). The respondent was acquitted of the only charge brought against him. In light of that acquittal, he can only be convicted of sexual assault or sexual interference as “included offences” if the Crown is able to bring the case within the terms of s. 662 of the *Code*.

E. *The Law Governing “Included” Offences*

25 An offence is “included” if its elements are embraced in the offence charged (as described in the enactment creating it or as charged in the count) or if it is expressly stated to be an included offence in the *Criminal Code* itself. The test is

strict. It must “necessarily” be included, *per* Martland J. in *Lafrance v. The Queen*, [1975] 2 S.C.R. 201, at pp. 213-14:

. . . the offence created by s. 281 [joy-riding] is not necessarily included in the charge of theft . . . and it is not included in the count as charged in the present case. [Emphasis added.]

What is not “necessarily included” is excluded. See also *Fergusson v. The Queen*, [1962] S.C.R. 229, at p. 233; *Barton v. The King*, [1929] S.C.R. 42, at pp. 46-48.

26 The strict interpretation of s. 662 is linked to the requirement of fair notice of legal jeopardy, as emphasized by Sheppard J.A. in *R. v. Manuel* (1960), 128 C.C.C. 383 (B.C.C.A.):

Further, to be an included offence the inclusion must form such an apparent and essential constituent of the offence charged that the accused in reading the offence charged will be fairly informed in every instance that he will have to meet not only the offence charged but also the specific offences to be included. Such apparent inclusion must appear from “the enactment creating” the offence or “from the offence as charged in the count”; either of those two may be considered under [s. 662(1)] but not the opening by counsel or the evidence. [Emphasis added; p. 385.]

27 Martin J.A. of the Ontario Court of Appeal also insisted on making clear to an accused the precise extent of his or her legal jeopardy:

The offence charged as described either in the enactment creating the offence, or as charged in the count, must contain the essential elements of the offence said to be included. . . .

. . . the offence charged, as described either in the enactment creating the offence or as charged in the count, must be sufficient to inform the accused of the included offences which he must meet. [Emphasis added.]

(*R. v. Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122, at p. 133 (leave to appeal refused, [1981] 1 S.C.R. xiii); see also *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17 (Ont. C.A.), at p. 19.)

28 The principles set out in Martin J.A.’s encyclopaedic reasons for judgment in *Simpson (No. 2)* have since been adopted and applied across Canada, including the Quebec Court of Appeal in *R. v. Drolet* (1988), 14 M.V.R. (2d) 50, aff’d [1990] 2 S.C.R. 1107; *R. v. Allard* (1990), 36 Q.A.C. 137; *R. v. Colburne* (1991), 66 C.C.C. (3d) 235. See also: *R. v. Morehouse* (1982), 65 C.C.C. (2d) 231 (N.B.C.A.), leave to appeal refused, [1982] 1 S.C.R. xi; *R. v. Angevine* (1984), 61 N.S.R. (2d) 263 (S.C., App. Div.); *Plank*; *R. v. Taylor* (1991), 66 C.C.C. (3d) 262 (N.S.S.C., App. Div.); *R. v. Webber* (1995), 102 C.C.C. (3d) 248 (B.C.C.A.); *R. v. Rowley* (1999), 140 C.C.C. (3d) 361 (Ont. C.A.); *R. v. Beyo* (2000), 144 C.C.C. (3d) 15 (Ont. C.A.), leave to appeal refused, [2000] 2 S.C.R. vi.

29 At common law, where an offence consisted of several ingredients (“divisible”) the jury could convict of any offence “the elements of which were included in the offence charged, subject to the rule that on an indictment for felony the jury could not convict of a misdemeanor” (*Simpson (No. 2)*, at p. 132). The subject is now governed by statute, and s. 662 authorizes convictions for “included” offences in only three categories:

- (a) offences included by statute, e.g., those offences specified in s. 662(2) to (6), and attempts provided for in s. 660;

- (b) offences included in the enactment creating the offence charged, e.g., common assault in a charge of sexual assault;
- (c) offences which become included by the addition of apt words of description to the principal charge.

In none of these categories is there reference to the “sufficiency” of the factual particulars of the transaction underlying the charge. That is a wholly different subject and is dealt with in s. 581 of the *Code*.

30 In terms of the need for fair notice, “included” offences in the first category can be ascertained from the *Criminal Code* itself: see, e.g., *R. v. Wilmot*, [1940] S.C.R. 53. Cases in the second category also meet the test of fair notice because “an indictment charging an offence also charges all offences which as a matter of law are necessarily committed in the commission of the principal offence as described in the enactment creating it” (*Harmer and Miller*, at p. 19 (emphasis added)). See also: *R. v. Quinton*, [1947] S.C.R. 234, at p. 240; R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), at para. 6.4650; *R. v. Lucas* (1987), 34 C.C.C. (3d) 28 (Que. C.A.); *R. v. Lépine*, [1993] R.J.Q. 88 (C.A.).

31 With respect to the second category, it may be said that “[i]f the whole offence charged can be committed without committing another offence, that other offence is not included” (P. J. Gloin, “Included Offences” (1961-62), 4 *Crim. L.Q.* 160, at p. 160 (emphasis added)). This proposition was endorsed by the Manitoba Court of Appeal in *R. v. Carey* (1972), 10 C.C.C. (2d) 330, at p. 334, *per* Freedman

C.J.M.; by the Ontario Court of Appeal in *Simpson (No. 2)*, at p. 139, *per* Martin J.A., and by the Quebec Court of Appeal in *Colburne*, at p. 243, to which Proulx J.A. added:

[TRANSLATION] For my part, I would add that an offence would be included where the essential elements of this offence are *part* of the offence charged. [Emphasis in original.]

Clearly the offence of incest can be committed without committing sexual assault or sexual interference.

32 It is the third category of cases that is more likely to cause difficulty. What is required are words of description in the count itself of facts which put an accused on notice that, if proven, such facts taken together with the elements of the charge, disclose the commission of an “included” offence: *Allard*. For example, in *Tousignant v. The Queen* (1960), 130 C.C.C. 285 (Que. Q.B. (Appeal Side)), the indictment charged the accused with attempting to murder the victim [TRANSLATION] “by striking him on the head with the aid of a blunt object” (p. 285 (emphasis added)). The underlined words were not essential to the charge of an attempt to murder, but their inclusion in any event permitted conviction on the lesser and (thereby) included offence of causing bodily harm with intent to wound, or assault: see *Simpson (No. 2)*, at p. 139. Similarly in *R. v. Kay*, [1958] O.J. No. 467 (QL) (C.A.), the indictment charged manslaughter “by a blow or blows”. The addition of these words of description to the indictment disclosed the allegation of an assault, and a conviction of the accused of the included offence of assault causing bodily harm was upheld on appellate review.

33 Of course, the added words must be pertinent to the offence charged. As Evans J.A. wrote in *Harmer and Miller*:

... the charge must be so worded that the accused is afforded reasonable notice of the offence or offences alleged to be included in the principal offence charged. Moreover, the offence must be one which is properly included in the count. [p. 19]

34 The question in this case is whether the Crown can bring sexual assault and/or sexual interference within any of the three categories of included offences.

F. Application of the Law to the Facts

35 In my view, it cannot be said that the respondent in this case was fairly notified that in meeting the charge of incest he was also required to defend against sexual assault or sexual interference as “included” offences. I would apply to this case what was said by Phillimore L.J. in *R. v. Woods*, [1969] 1 Q.B. 447 (C.A.), at p. 451:

It is of the first importance that a man charged with an offence should know with certainty what it is he may be convicted of. No court should be encouraged to cast around to see whether somehow or other the words of the indictment can be found to contain by some arguable implication the seeds of some other offence.

36 The fact of the matter is that the Crown *could* have charged the respondent with sexual assault and sexual interference but in the exercise of its prosecutorial discretion refrained from doing so. On the facts of this case, the rules governing “included” offences do not provide a remedy for this omission.

37 As to the first category, there is nothing in the *Criminal Code* that explicitly makes sexual assault or sexual interference an offence included in incest.

38 As to the second category, it cannot be said that incest as “described in the enactment creating it” includes sexual assault or sexual interference. As discussed earlier, incest can be committed without any assault whatsoever. Consent is no defence: *S. (M.)*, *F. (R.P.)*. Nor must the victim be under fourteen years of age. The five accused persons in *F. (R.P.)* were all adults. The age of the complainant constitutes merely a factual circumstance which is irrelevant to whether or not the offence of incest is committed.

39 As to the third category, it cannot be said that the wording of the count charging the respondent with incest described a sexual assault, or indeed gave any information from which an issue of non-consent could fairly be inferred, or suggested that the victim was underage and therefore was incapable of consenting. It is true, of course, that an allegation of incest includes the allegation of a physical act which, if done without consent, would be an assault. However, if the Crown wished to dispense with proof of non-consent by relying on s. 150.1(1), it was incumbent upon it to allege the factual condition precedent to the operation of s. 150.1(1), namely the fact that the victim was under fourteen years old. This was not done. The age of the victim would be for the Crown to prove, not for the defence to disprove. To repeat, for ease of reference, the count in the indictment read in its entirety:

[TRANSLATION] Between December 13, 1995 and May 31, 1999, at Québec in the district of Québec, did commit incest with C.R., knowing that person to be his daughter, thereby committing the indictable offence provided for in section 155(2) of the Criminal Code.

40 The Crown says the evidence subsequently led in the case shows that commission of incest in this case would necessarily have involved the commission of sexual interference and a sexual assault due to the age of the daughter, and that the age of the daughter must have been within the knowledge of the respondent, but there is nothing in s. 662 that permits the Crown to supplement the allegations in the charge, or the elements of the enactment creating the offence, by reference to the personal knowledge of an accused.

41 The corollary, to what I have said above however, is that acquittal on the charge of incest would not provide the respondent in these circumstances with a defence of *autrefois acquit* to a charge of sexual assault or sexual interference. The rule against double jeopardy requires that the accused at the earlier trial have been in jeopardy of conviction of the subsequent charge: *Cullen v. The King*, [1949] S.C.R. 658, at p. 668; *R. v. Rinnie*, [1970] 3 C.C.C. 218 (Alta. S.C., App. Div.). The respondent here was in no such jeopardy.

42 Whether or not the Crown chooses to proceed with other charges against the respondent is for the Crown to decide.

III. Disposition

43 I would dismiss the appeal.

 The reasons of Bastarache, LeBel, Deschamps and Abella JJ. were delivered by

44 ABELLA J. (dissenting) — I have had the benefit of reading the reasons of Justice Binnie. With respect, I do not agree with his conclusion that sexual assault is not included in the offence of incest as charged in this case.

45 The charge of incest put the father, G. R., on notice that the Crown would seek to prove that he had committed an act of sexual intercourse with his daughter during a specified period of time. At the relevant times, his daughter was between five and nine years of age. The issue therefore is whether he could have committed incest without committing sexual assault. Demonstrably, he could not.

46 The father acknowledged, not surprisingly, that he knew that his daughter was under the age of fourteen at the relevant times. It follows that the indictment provided him with sufficient information to enable him to make full answer and defence to offences arising out of, and included in, the alleged acts of sexual intercourse with his daughter during the time frame specified.

I. Background

47 At trial, as observed by Binnie J., the father testified in his own defence and categorically denied having touched his daughter in a sexual manner. He admitted that he had prior convictions, including a conviction for sexual assault.

48 The trial judge found that the father's penis had touched the top of his daughter's vulva. On this basis, he said he was satisfied beyond a reasonable doubt that the accused had attempted incest. He also found that there was evidence of sexual touching as defined in the *Criminal Code*, R.S.C. 1985, c. C-46, that there was

evidence of sexual assault, and that there could be no issue of consent in this case since the *Code* provides that a child under the age of fourteen touched in a sexual manner, cannot consent.

49

The trial judge's oral reasons are set out in full:

[TRANSLATION] O.K., let's see. I have evidence of facts, in the record, which constitute sexual touching within the meaning of the Criminal Code, namely touching by the father of his daughter or invitations to his daughter to touch him. I have that evidence.

I also have evidence of sexual assault, because there is no issue of consent here, in the case of a child under fourteen (14) years of age. As soon as there is sexual touching of a child under fourteen (14) years of age, it is sexual assault. I have this evidence, too.

I have evidence, uncontrad- . . . I have evidence, which I have accepted, that the father's penis touched the top of his child's vulva. I have evidence that there was sperm in a condom, if I make the necessary inferences from the facts I have heard, that have been related to me. I also have evidence of the positions in the bed of the father and his little girl.

So I have all the evidence I need to conclude, beyond a reasonable doubt, that there was attempted incest by the father.

Pursuant to section 660, I find him guilty of attempted incest.

50

On appeal, for reasons that are unclear from the record, the Crown conceded that there was insufficient proof to sustain a conviction for attempted incest, asking instead that the Court of Appeal substitute convictions for sexual interference and sexual assault. The Court of Appeal appears to have concluded that these were not included offences. It allowed the appeal and acquitted the accused for the following reasons:

[TRANSLATION] WHEREAS the appellant was charged solely with the crime of incest;

WHEREAS he was convicted of attempted incest;

WHEREAS the child in question stated that there was no penetration;

WHEREAS there is no proof whatsoever of incest;

WHEREAS, as the Attorney General's prosecutor has in fact conceded, attempted incest has not been proven beyond a reasonable doubt;

WHEREAS the appellant was not charged with sexual assault or sexual touching under section 151 of the *Criminal Code*;

FOR THESE REASONS, THE COURT:

ALLOWS the appeal;

SETS ASIDE the verdict; and

ACQUITS the appellant.

II. Analysis

51 The issue before this Court is whether the Court of Appeal ought to have rejected the Crown's submission that sexual assault and sexual interference were included offences in the offence of incest in this case. The father was charged under s. 155 of the *Code* as follows:

[TRANSLATION] Between December 13, 1995 and May 31, 1999, at Québec in the district of Québec, did commit incest with C.R., knowing that person to be his daughter, thereby committing the indictable offence provided for in section 155(2) of the Criminal Code.

52 Pursuant to s. 155, everyone commits incest who has sexual intercourse with a person knowing that he or she is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild. Whether an act of sexual intercourse has occurred is determined by reference to s. 4(5) of the *Code*, which provides that sexual

intercourse “is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted”.

53 The consent of the complainant is not a defence to a charge of incest.

54 The fundamental principle underlying included offences is that an accused is entitled to know from the indictment or information the offence or offences with which he or she is charged so that there will be no prejudice to the defence. For the majority, the principal issue is one of notice. As Binnie J. points out in his reasons, the accused must be given reasonable notice of the offence or the offences alleged to be included in the principal offence charged. Binnie J. concludes that in the present case “the Crown did not allege that the daughter was below the age of consent, and there [was] nothing in the nature of the offence of incest as described in the *Criminal Code* or the wording of the indictment to put the respondent on notice that he was in jeopardy of a conviction for sexual assault or sexual interference” (para. 12).

55 Unlike my colleague, I am of the view that the father had reasonable notice. This is based on the premise that the requirement of reasonable notice is satisfied if the following can be shown: the accused could not have committed the offence charged without committing the purported included offence, and the accused knows what offences he or she must be prepared to meet. The test is not a hypothetical one. The question is whether this particular accused had a full opportunity to know and meet the case against him.

56 The law of included offences in Canada is governed by s. 662 of the *Code*. An offence is included if all of its essential elements are also elements of the principal

offence (see *Fergusson v. The Queen*, [1962] S.C.R. 229, at p. 233). There are three ways in which an accused can be convicted of an included offence: (1) the secondary offence is expressly stated to be an included offence in the *Code* itself; (2) the secondary offence is included under the statutory enactment creating the primary offence; (3) the secondary offence is included in the description of the count charged (see *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17 (Ont. C.A.); *R. v. Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122 (Ont. C.A.), leave to appeal refused, [1981] 1 S.C.R. xiii).

57 Where it is argued that an offence is included in the charge by reason of the words used, the issue becomes one of the sufficiency of information in the indictment. Words in that indictment sufficient to identify a particular criminal transaction may also serve to identify any included offences (see, e.g., *Tousignant v. The Queen* (1960), 130 C.C.C. 285 (Que. Q.B. (Appeal Side)); *R. v. Manuel* (1960), 128 C.C.C. 383 (B.C.C.A.); *Simpson (No. 2)*). The formal requirements are found under s. 581 of the *Code*, which provides that:

581. (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

(2) The statement referred to in subsection (1) may be

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;

(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or

(c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the

transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

58 As with included offences, the fundamental principle which governs the interpretation of the information or indictment is that the accused must be provided with enough information to make full answer and defence. At common law, and particularly by the beginning of the 19th century, the indictment had become a highly technical document. Strictly proper language was required when framing the charges against an accused and all the facts and circumstances of the offence, including the intent, were required to be set out in the indictment in great detail and with meticulous certainty (see E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. (loose-leaf)), vol. 1, at p. 9-5; R. E. Salhany, *Canadian Criminal Procedure* (6th ed. (loose-leaf)), at paras. 6.800 to 6.840). There are examples of cases from this period where the failure to include the age of the complainant, or even of the accused, was considered fatal (see, e.g., *R. v. Connolly* (1867), 26 U.C.R. 317; *R. v. Loftus* (1926), 45 C.C.C. 390 (Ont. S.C., App. Div.); *R. v. MacDonald* (1952), 102 C.C.C. 337 (N.S.S.C.)).

59 The classic statement of the standard against which the sufficiency of the indictment was to be measured was articulated by this Court in *Brodie v. The King*, [1936] S.C.R. 188. Rinfret J., writing for the Court, discussed the requirements of then s. 852 of the *Code* as follows:

If section 852 be analysed, it will be noticed the imperative requirement (“shall contain”) is that there must be a statement that the accused has committed an indictable offence; and such offence must be “specified.” It will be sufficient if the substance of the offence is stated; but every count must contain such statement “in substance.” In our view, this does not mean merely classifying or characterizing the offence; it calls

for the necessity of specifying time, place and matter . . . of stating the facts alleged to constitute the indictable offence. [p. 193]

60 He outlined the justification for this degree of required particularity as follows:

. . . the statement must contain the allegations of matter “essential to be proved,” and must be in “words sufficient to give the accused notice of the offence with which he is charged.” Those are the very words of the section; and they were put there to embody the spirit of the legislation, one of its main objects being that the accused may have a fair trial and consequently that the indictment shall, in itself, identify with reasonable precision the act or acts with which he is charged, in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly. [p. 194]

61 Since *Brodie*, however, there has been an increased tendency for Canadian courts to reject such arguments on the basis that, in the words of Wilson J. in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, “they are overly technical and an unnecessary holdover from earlier times” (p. 42). In *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, this Court distanced itself from an approach whereby even the slightest defect made an indictment a nullity. Writing for the Court, Dickson J. stated that “Parliament has made it abundantly clear in those sections of the *Criminal Code* having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities” (p. 1307).

62 The current state of the law with respect to the sufficiency of an indictment or information was articulated by Cory J. in *R. v. Douglas*, [1991] 1 S.C.R. 301. It confirms that the sufficiency of notice is examined based on the particular accused and circumstances:

From these cases it can be seen that an indictment is adequate if it contains sufficient details to give the accused reasonable information with respect to the charge and to enable the accused to identify the transaction so as to permit the adequate preparation of the defence. Whether an indictment is sufficient will depend on the offence charged and the facts of the case. [Emphasis added; p. 314.]

63 He cited with approval, at pp. 313-14, the decision of Krever J.A. in *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399 (Ont. C.A.), at p. 403, adopting R. E. Salhany, *Canadian Criminal Procedure* (4th ed. 1984), at p. 214:

Whether or not the charge contains sufficient details to give the accused reasonable information and to identify the transaction referred to will depend upon the facts of each case and the nature of the charge.

64 Krever J.A. had held that “[t]he information possessed by the accused otherwise than through the language of the count in question was also relevant” (p. 404). The ability of an accused to make full answer and defence, in other words, depends not only on the wording of the indictment, but on the information indisputably known to the accused.

65 The question then is whether the father’s ability to make full answer and defence to a charge of sexual assault, based on the information in the indictment and his own knowledge, has been compromised. In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, this Court considered the elements of sexual assault. Writing for the majority, Major J. held that sexual assault is a crime of general intent. In order to satisfy the basic *mens rea* requirement, the Crown need only prove that the accused intended to touch the complainant in a sexual manner. The *actus reus* of sexual assault is established by proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. As with incest, however, s. 150.1 of the *Code* provides that the

consent of the complainant is no defence to a charge of sexual assault where the complainant is under fourteen years of age.

66 The trial judge found that he had evidence of sexual assault by the accused and evidence that the complainant was under the age of fourteen. These findings were not contested. This father could not have committed the crime of incest, namely having sexual intercourse with his young daughter commencing when she was five years old, without also committing the included crime of sexual assault. By specifying the complainant, the time frame, and the act, the father was put on sufficient notice of the age of the child and provided with enough information to make full answer and defence to the included charge of sexual assault.

67 No one disputes that the victim was under the age of fourteen during the specified time frame, nor do they dispute that the accused knew that his daughter was under the age of fourteen at that time. The acts put in evidence to establish incest and attempted incest on the one hand and sexual assault on the other were the same.

68 There was, moreover, no impact on the defence in this case. The father did not raise the issue of consent. His defence was to deny any touching of his daughter in a sexual manner. His defence was based not on lack of penetration, but on the absence of sexual touching. He was therefore in no way prejudiced in his defence by the failure of the indictment to refer to his daughter's age, since her age was, aside from being a fact within his knowledge since her birth, and sufficiently particularized by the designation of the time frame in the indictment, entirely irrelevant to his defence.

III. Conclusion

69 Pursuant to s. 686(4)(b)(ii) of the *Code*, I would allow the appeal and enter a verdict of guilty with respect to the included offence of sexual assault. In view of my conclusion that sexual assault is an included offence, I see no practical purpose in examining whether sexual interference is similarly included.

70 The father was sentenced to 40 months' detention on March 15, 2002 and was eligible for conditional parole on April 25, 2003. Since he has served the better part of his sentence, there is no reason for this Court to interfere with the sentence.

Appeal dismissed, BASTARACHE, LEBEL, DESCHAMPS and ABELLA JJ. dissenting.

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