

Indexed as:

**R. v. W. (D.) [D.W.]**

D.W., appellant;

v.

Her Majesty The Queen, respondent.

[1991] 1 S.C.R. 742

[1991] S.C.J. No. 26

File No.: 22170.

**Supreme Court of Canada**

1991: February 1 / 1991: March 28.

**Present: Sopinka, Gonthier, Cory, McLachlin and  
Iacobucci JJ.**

**ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO  
(40 paras.)**

*Criminal law — Charge to jury — Recharge — Trial judge making error in recharge as to standard of proof required of Crown — Whether error reversible in light of correct instructions given a few minutes earlier during main charge.*

Appellant was convicted of sexual assault after a trial that pitted the credibility of the accused against that of the complainant. The main charge was relatively short and was correct and fair. The time period between the end of the main charge and the recharge was less than ten minutes. Counsel for the Crown had requested the recharge in order that the judge explain what evidence might assist the jury in making a finding on the issue of credibility. The judge erred in the short recharge in that he characterized the core issue to be determined by the jury as whether they believed the complainant or whether they believed the appellant. When counsel for the appellant objected to the recharge, the trial judge responded that he did not feel that he left the jury with the impression that they must accept the appellant's evidence in order to acquit him. An appeal to the Court of Appeal was dismissed. At issue here is whether the erroneous recharge, viewed in the context of the charge as a whole and the short time that elapsed between the main charge and the recharge, could be said to have left the jury with any doubt that if they had a reasonable doubt they must acquit.

**Held** (Sopinka and McLachlin JJ. dissenting): The appeal should be dismissed.

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Per Gonthier, Cory and Iacobucci JJ.: The original charge was eminently fair and error free so far as the appellant was concerned. The main charge and recharge must be read as a whole in determining whether the jury was left in any doubt as to the application of Crown's onus of proving the charges against the appellant beyond a reasonable doubt.

The trial judge erred in his recharge. It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative: namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

Where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that: (1) if they believe the evidence of the accused, they must acquit; (2) if they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit; (3) even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of the evidence which they do accept. The failure to use such language may not be fatal, however, if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply. Where an error is made in the instruction on the burden of proof, the fact that the trial judge correctly instructed on that issue elsewhere in the charge is a strong indication that the jury were not left in doubt as to the burden resting on the Crown.

Here, the recharge was given not at the request of the jury but of the Crown and only a few minutes after the correctly given charge was completed. In all the circumstances and notwithstanding the error in the recharge, the charge read as a whole adequately instructed the jury that if they had a reasonable doubt as to the guilt of the accused, they must acquit.

Per Sopinka J. (dissenting): Credibility was a fundamental issue and the case fell to be decided on the basis of the evidence of the complainant versus that of the [page744] accused. The charge as a whole must be examined in determining whether or not an instruction is correct.

The jury here were told two things which were in conflict. First, in the main charge, that in dealing with the credibility of the accused, the Crown could fail to prove the case beyond a reasonable doubt even if the jury had a doubt about the credibility of the accused's story. Then, on the recharge, that the Crown would have failed to discharge its onus only if they believed the evidence of the accused. The jury would be uncertain as to which version was correct and it is pure speculation that they would have accepted the first version rather than the second version which was characterized by the trial judge as "better". This takes on additional significance in light of the statement to the jury that the charge might contain errors that would necessitate a recharge.

When dealing with the burden of proof, the trial judge is dealing with the most fundamental rule of the game. It is particularly important, in a case in which the prosecution depends on the credibility of the complainant and the accused testifies, that it be very clear and unequivocal that the prosecution has not proved its case beyond a reasonable doubt if, after considering the evidence of the accused and the complainant together with any other evidence, there is a doubt. This charge did not make this clear to the jury.

Per McLachlin J. (dissenting): The conclusion of Sopinka J. and of Brooke J.A. in the Court of Appeal, that the error in the charge may have misled the jury, was agreed with.

### Cases Cited

By Cory J.

*Referred to:* R. v. Thatcher, [1987] 1 S.C.R. 652; R. v. Morin, [1988] 2 S.C.R. 345; R. v. MacDonald (1989), 48 C.C.C. (3d) 230; R. v. Challice (1979), 45 C.C.C. (2d) 546; R. v. Roberts (1975), 24 C.C.C. (2d) 539; R. v. Desveaux (1986), 26 C.C.C. (3d) 88; R. v. Lane and Ross (1969), 6 C.R.N.S. 273; R. v. Corbett, [1988] 1 S.C.R. 670.

By Sopinka J. (dissenting)

R. v. Challice (1979), 45 C.C.C. (2d) 546; R. v. Morin, [1988] 2 S.C.R. 345; Nadeau v. The Queen, [1984] 2 S.C.R. 570.

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APPEAL from a judgment of the Ontario Court of Appeal dismissing appellant's appeal from conviction by Daudlin Dist. Ct. J. Appeal dismissed, Sopinka and McLachlin JJ. dissenting.

David E. Harris, for the appellant.

David B. Butt, for the respondent.

Solicitors for the appellant: Carter, McCombs & Minden, Toronto.

Solicitor for the respondent: The Ministry of the Attorney General, Toronto.

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The following are the reasons delivered by

¶ 1 **SOPINKA J. (dissenting):**— This case raises the issue as to the correctness of the charge to the jury, on the special application of the burden and standard of proof, in a case which is presented as a contest between the credibility of the complainant and that of the accused.

#### Facts

¶ 2 The complainant, T. W., is the niece of the accused. He was 42, she 16. She testified that on two occasions the accused had intercourse with her without her consent. The incidents are alleged to have happened in the course of a three-day period while the complainant was staying temporarily at the accused's home. The complaint was lodged the day after the second incident, and the accused was arrested that night. She testified that on both occasions he was driving her over to her boyfriend's house. He stopped the car in a remote area, demanded intercourse, she submitted out of fear, and on completion he drove her to her destination.

¶ 3 What corroborative evidence there was of her story is weak. Her panties were found to have semen stains emitted by a Type A secretor. Thirty-two per cent of the population is such a secretor. The accused is one. However, the complainant spent two nights in the same clothing with her boyfriend. There is no evidence of his "type" or whether sexual activity took place with him. Furthermore, her testimony was that the accused ejaculated into a Kleenex on both occasions.

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¶ 4 The accused testified in his own defence that the alleged incidents never happened. He testified that he simply drove her from his house to her destination without incident. There is no independent

evidence corroborative of his version.

¶ 5 There is a valid basis of attack with respect to the credibility of both witnesses. The complainant is sixteen years old, an unemployed dropout, and after leaving her parents' home has since been thrown out of several friends' homes. As the defence made clear, she did not complain of these incidents immediately after they occurred despite numerous opportunities to do so, and indeed went back to the accused's house after both drives. She claimed that she returned because she had left her purse behind. Furthermore, it was the position of the defence that the allegations were made out of spite because the accused had ordered the complainant from his home: because of his and his wife's very constrained financial situation, they simply could not afford to have guests.

¶ 6 It is apparent from the transcript that the accused was a poor witness. It is difficult to assess from the bare transcript whether the primary cause of this was his poor education and diminished intelligence, or obfuscation and inconsistent denial in the face of the truth. The accused can neither read nor write and, according to his testimony, cannot even count money. As a result, what one is to make of the inconsistencies in his testimony concerning, for instance, the days on which the two drives occurred, is far from clear. Similarly, it is difficult to know what to make of the facts that he spoke quickly and quietly, interrupted counsel on several occasions, yet in the main was examined in chief primarily by way of leading questions because, I assume, his answers were so terse.

#### Analysis

¶ 7 The learned trial judge charged the jury on the issue of the credibility of witnesses generally in the following terms:

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In deciding what the facts are in this case you will be the sole judges of the truthfulness of the witnesses and of the weight to be given to the testimony of each of them. In deciding whether a witness is worthy of belief you should bring your own common everyday experience to such matters. Simply, in effect, exercise your good common sense. I tell you that you are entitled to believe all of the evidence given by a witness, part of that evidence or none of it. In determining whether to believe that witness you should consider such things as his or her ability and opportunity to observe his appearance or her appearance in the manner while testifying before you, his or her power of recollection, any interest, bias or prejudice that he or she may have, any inconsistencies in the testimony and the reasonableness of that testimony ought to be considered by you when considering the light of all of the evidence in the case. You are not obliged to accept any part of the evidence of a witness just because there has been no denial of it.

Shortly thereafter, he dealt with the status of the accused as a witness as follows:

In this case the accused himself gave evidence. He is in exactly the same position as any other witness as to credibility.

Immediately thereafter, however, the trial judge stated:

Shortly I will instruct you as to how to weigh that testimony and I have already given the general direction in terms of how in fact one would view evidence as to credibility, but for the present let me tell you that if you believe the accused and he did not commit the offence or what he did lacks some essential element of the offence or if the evidence of the accused either standing alone or taken together with all of the other evidence leaves you in a state of reasonable doubt you must acquit him, but if upon consideration of all of the evidence, the arguments of counsel and my charge you are satisfied that the accused has been proven guilty beyond a reasonable doubt as I have defined those words to you, it is your duty to convict the accused.

¶ 8 This is in accordance with *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, [1988] 2 S.C.R. 345. See also *Nadeau v. The Queen*, [1984] 2 S.C.R. 570. I have serious misgivings that it is appropriate to make the bald statement that the credibility of the accused is to be treated [page748] exactly as that of any other witness. When considered with the earlier passage, they can be read to suggest that if whole or part of the evidence of the accused is disbelieved, it can be discarded in whole or in part and not considered as part of the body of evidence to which the criminal standard is ultimately applied. It was suggested that this statement is part of the standard charge and is intended to convey to the jury that the accused, like any other witness, is entitled to testify and in this respect is no different than any other witness. If that is its purpose, some elaboration of that statement is desirable.

¶ 9 Nonetheless, immediately after this statement, the trial judge did go on to instruct the jury that if the evidence of the accused left them in a state of doubt, the Crown had failed to discharge the burden of proof to prove the case beyond a reasonable doubt.

¶ 10 The effect of all of this would have been that the jury understood that there was a general obligation to prove the case beyond a reasonable doubt but that when it came to a contest of credibility, there was a special rule. That special rule was correctly stated in this part of the charge. Nowhere else in the charge does the trial judge repeat this instruction.

¶ 11 After the main charge, the trial judge did advise the jury that there might be a further instruction based on submissions of counsel but that they were not to give an additional charge any more prominence than the charge. He stated:

After you retire I will be discussing my charge with counsel and they may have some matters which they wish corrected or some matters which they wish me to give you further instruction. This is perfectly proper as it is quite possible that I may have made some error or overlooked something. If I call you back to deal with such matters I ask you not to have any special or give any special emphasis to what I say to you on that occasion, but rather that you regard it as additional instruction that I might have given to you just now had I in fact considered it worth mentioning. To this end I would ask [page749] that you give me ten minutes before you start your actual deliberation. [Emphasis added.]

¶ 12 After hearing the submission of counsel, during which counsel for the Crown strenuously objected to the absence of a charge drawing to the jury's attention the inconsistencies in the accused's testimony, the trial judge recalled the jury. He explained to them that after hearing from counsel as he had advised them, there were some things which he might have said better. The learned trial judge stated:

As I indicated might happen, I have been assisted by the counsel in terms of some issues that I perhaps could better put before you.

¶ 13 He then proceeded with a recharge during which he went into considerable detail with respect to the inconsistencies in the accused's evidence without reference to any inconsistencies in the complainant's evidence or without reference to other reasons for non-acceptance of her evidence which had been dealt with in the earlier charge.

¶ 14 At the beginning of this part of the charge, the following instruction was given which was found to be in error by the Court of Appeal and is conceded to be an error of law:

... that leads me to the second area which I wish to perhaps offer some further assistance to you and that is in determining the credibility to be given to the evidence by each of the witnesses and in particular the evidence of the complainant versus the evidence of the accused because in this instance is very fundamental to this trial and that is the very heart in effect is who you are going to believe, the two stories being so diametrically opposed one to the other. Now you will recall by way of general instruction I indicated to you that one of the things that you will want to consider when determining credibility and who is to be believed is inconsistencies in the evidence given, either within itself or with evidence given independently of the persons, the complainant and the accused given. [Emphasis added.]

He then referred to the inconsistencies in the accused's testimony and continued:

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At the end of the day the core issue to be determined by yourselves is whether you believe the complainant or whether you believe the accused. If in fact you believe the accused then clearly nothing took place and in fact the Crown will have failed to prove beyond a reasonable doubt that he is guilty as charged. On the other hand if you in fact believe the complainant totally, then he is guilty as charged. If you disbelieve her totally, but you accept that there is evidence upon which you can factually find that a simple assault took place then you can find the accused not guilty as charged, but guilty of the included offence of assault and if you disbelieve her and accept the evidence of the accused then clearly you must find him not guilty. [Emphasis added.]

¶ 15 In my opinion, in this case credibility was a fundamental issue and the case fell to be decided on the basis of the evidence of the complainant versus the evidence of the accused. While there was some circumstantial evidence, it is not suggested that it had any important role in the case. While it is true that the charge as a whole must be examined in determining whether or not an instruction is correct, this is a case in which the jury were told two things which were in conflict. First, they were told that in dealing with the credibility of the accused the Crown would fail to prove the case beyond a reasonable doubt if the jury had a doubt about the credibility of the accused's story. On the recharge, they were told that this would only be the case if they believed the evidence of the accused. This statement was made following a detailed recounting of inconsistencies in the evidence of the accused which would be understood to be reasons why the jury should not accept the evidence of the accused. In my opinion, at the very least the jury would be uncertain as to which version was correct and it is pure speculation that they would have accepted the first version rather than the second version which was characterized by the trial judge as

"better". This takes on additional significance in light of the statement to the jury that the charge might contain errors that would necessitate a recharge.

¶ 16 When dealing with the burden of proof, the trial judge is dealing with the most fundamental rule of the game. It is particularly important in a case in which the prosecution depends on the credibility of the complainant and the accused testifies, that it be [page751] very clear and unequivocal that the prosecution has not proved its case beyond a reasonable doubt if, after considering the evidence of the accused and the complainant together with any other evidence, there is a doubt. I cannot say with confidence that this charge made this clear to the jury in this case, and therefore I would direct a new trial.

The judgment of Gonthier, Cory and Iacobucci JJ. was delivered by

¶ 17 **CORY J.**— The sole issue in this appeal is whether the error made by the trial judge in his recharge as to the standard of proof required of the Crown constitutes reversible error in light of the correct instructions given a few minutes earlier during the main charge.

#### Facts

¶ 18 At the conclusion of a trial before judge and jury, the appellant, D. W., was convicted of two charges of sexual assault. The only oral evidence given was that of the appellant and the complainant. A forensic report was submitted revealing that the type of secretion found in the complainant's underwear matched that of the appellant, but the trial judge very properly instructed the jury that this evidence was of a limited value since 32 per cent of the population had this type of secretion. As well, it was observed that the complainant had testified that she had spent two nights with her boyfriend during the relevant period, although no evidence was adduced that sexual intercourse had occurred.

¶ 19 The main charge took approximately one hour. On numerous occasions during this relatively short charge, the trial judge correctly instructed the jury that the burden of proof rested upon the Crown to prove the charges beyond a reasonable doubt. It is agreed by both parties that the main charge was both correct and fair. At the conclusion of the main charge, the trial judge warned the jury of the possibility of a recharge. He asked the jury to wait ten minutes until they began their deliberations and told them that if counsels' submissions took longer than ten [page752] minutes, he would notify them so that they could continue to postpone their consideration of the case. The time period between the end of the main charge and the recharge was probably less than ten minutes since the trial judge did not send any message back to the jury.

¶ 20 After the jury retired, counsel for the Crown requested a recharge to deal with the issue of credibility. Specifically, he wanted the trial judge to explain what there was in the evidence that might assist the jury in making a finding on the issue of credibility. The trial judge agreed to the suggestion. As well, he reviewed the possible verdicts and the evidence in support of each.

¶ 21 During the recharge, which lasted only 11 minutes, the trial judge erred in that he characterized the core issue to be determined by the jury as whether they believed the complainant or whether they believed the appellant. Counsel for the appellant objected to the recharge. The trial judge responded that he did not feel that he left the jury with the impression that they must accept the appellant's evidence in order to acquit him.

#### Judgment of the Court of Appeal

¶ 22 The appeal was heard before the panel of Brooke, McKinlay and Griffiths JJ.A. The reasons for judgment endorsed on the record by Brooke J.A., are as follows:

The court is divided. The majority is of the view that the appeal fails must be dismissed [sic]. My colleagues, MacKinlay [sic] and Griffiths are of the opinion that while the recharge read by itself was erroneous as it omitted the third alternative, which was really the basic requirement, nevertheless read as a whole the charge clearly conveyed the basic requirement that if at the end of the evidence there was a reasonable doubt the jury must acquit. I do not agree but differ only on the effect of the recharge. Expressed as it was as the core issue it was tantamount to a direction as to when there could be a reasonable doubt and it was wrong. I would allow the appeal and direct a new trial.

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Result the appeal fails and is dismissed.

#### The Issue

¶ 23 The sole question is whether the erroneous recharge viewed in the context of the charge as a whole and the short time that elapsed between the main charge and the recharge could be said to have left the jury with any doubt that if they had a reasonable doubt they must acquit.

#### The Charge

¶ 24 Any consideration of the directions to the jury must begin with the observation, agreed to by the appellant, that the original charge was eminently fair and error free so far as the appellant was concerned. In determining whether the jury was left in any doubt as to the application of the onus resting upon the Crown to prove the charges against the appellant beyond a reasonable doubt, the main charge and recharge must be read as a whole. See R. v. Thatcher, [1987] 1 S.C.R. 652, at p. 701; R. v. Morin, [1988] 2 S.C.R. 345, at p. 356; and R. v. MacDonald (1989), 48 C.C.C. (3d) 230, at p. 246. It is therefore necessary to set out in some detail the portions of the main charge and recharge that contain the instructions of the trial judge on the burden of proof. For easy reference, I have identified the passages with letters. The relevant portions of the main charge are as follows:

- A. It is your duty to be guided by my explanation and my explanation only of the law to be applied .... It is not only your right, but your duty to make your own decision as to what is the relevant and important evidence in this case.
- B. Having decided what evidence you accept you will consider it as a whole in arriving at your verdict.
- C. The onus or burden of proving guilt of an accused person beyond a reasonable doubt rests upon the Crown and it never shifts .... The Crown must prove beyond a reasonable doubt that an accused person is guilty of the offence with which he is charged before he can be convicted. If you have a reasonable doubt as to whether the accused committed [page754] the offence with which he is charged, it is your duty to give that accused the benefit of the doubt and to find him not guilty on such counts. Now let me say by way of assistance that proof beyond a reasonable doubt has been achieved when you as a juror feel sure of

the guilt of the accused. It is that degree of proof which convinces the mind and satisfies the conscience so that you as a conscientious juror feel bound or impelled to act upon it. Conversely, when the evidence you have heard leaves you as a responsible juror with some lingering or nagging doubt with respect to the proof of some essential element of the offence with which the accused is charged so that you are unable to say to yourself that the Crown has proven the guilt of the accused beyond a reasonable doubt as I have defined those words then it is your duty to acquit the accused.

- D. ... if you believe the accused and he did not commit the offence or what he did lacks some essential element of the offence or if the evidence of the accused either standing alone or taken together with all of the other evidence leaves you in a state of reasonable doubt you must acquit him, but if upon consideration of all of the evidence, the arguments of counsel and my charge you are satisfied that the accused has been proven guilty beyond a reasonable doubt as I have defined those words to you, it is your duty to convict the accused.
- E. ... remember always that it is the duty and responsibility of the Crown to prove beyond a reasonable doubt that it was this accused who did the offence. It is not the obligation of the defendant or the accused to prove his innocence.
- F. I have already explained to you that the burden is on the Crown to prove beyond a reasonable doubt that the offence charged was committed and that the accused committed it .... The Crown will not have discharged that burden of proof unless you are satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from the proven facts as you find them is that the accused was the person who committed the assault .... Now I tell you that it is rarely possible to prove anything with absolute certainty and so the proof or the burden of proof on the Crown is only to prove guilt beyond a reasonable doubt and when I speak of reasonable doubt I use the words in their ordinary natural meaning, not as a legal term having some special connotation. A reasonable doubt is an honest and fair doubt based on reason and common sense. It is a real doubt, not an [page755] imaginary or frivolous doubt which might be conceived by an irresponsible juror to avoid his or her plain duty.
- G. Now in the continuing course of this charge I shall be referring to the Crown proving or establishing something or I may refer to your making some findings or being satisfied of something and when I use those expressions or expressions of a like nature I mean in all cases prove beyond a reasonable doubt.
- H. The onus is on the Crown to satisfy you beyond a reasonable doubt that the complainant did not consent to intercourse with the accused and I say that because in this case essentially the matter resolves itself to this issue ... I have indicated to you that the Crown has to prove beyond a reasonable doubt all of the elements of the offence have in fact taken place as alleged in the indictment and that the accused did in fact commit the crime.
- I. It is also conceded that there is no dispute that if the offence took place and if you find them to have taken place that you need not be troubled as to whether or not the Crown has proved beyond a reasonable doubt that they took place on the 15th and 18th of December 1987.
- J. There are ... no ... eyewitnesses ... In such a case I suggest to you that you

carefully consider all of the evidence that is independent of the oral testimony of the complainant to see whether it contains evidence which you accept are facts which may support or cast doubt on the truth of the complainant's evidence that she did not consent.

- K. It is only necessary for you and it remains your burden to determine whether or not the Crown has proved beyond a reasonable doubt that the events as complained of by the complainant and as given in evidence before you did in fact take place whether that has been proven to you beyond a reasonable doubt. If in fact you be satisfied that the Crown has not proven beyond a reasonable doubt that there are other reasonable inferences to be drawn from the circumstantial evidence which is presented and that you are left with a nagging doubt in terms of whether the events took place as alleged by the complainant then you are obliged to acquit. If, on the other hand you have been satisfied beyond a reasonable doubt as I have defined it that the complainant was indeed assaulted by the accused and I tell you [page756] that if you find that the assault took place you will have no difficulty in law that it was a sexual assault as I have defined it, then in fact you must find the accused guilty as charged.
- L. If then at the end of the day the Crown has not satisfied you beyond a reasonable doubt that the complainant did not consent to the acts of the accused and that the accused in fact had intercourse with the complainant without her consent then the Crown has failed to prove that the accused sexually assaulted the complainant and you must find the accused not guilty.
- M. This then is the end of my charge to you and I would like to conclude by dealing with your duties as jurors in the jury room. When you go to your jury room it is your duty to consult with one another and to deliberate with a view to reaching a just verdict based on the evidence that you have heard and seen. Your verdict will be based, as I have stated earlier on the facts as you find them and on the law as I have explained it to you.
- N. After you retire I will be discussing my charge with counsel and they may have some matters which they wish corrected or some matters which they wish me to give you further instruction. This is perfectly proper as it is quite possible that I may have made some error or overlooked something. If I call you back to deal with such matters I ask you not to have any special or give any special emphasis to what I say to you on that occasion, but rather that you regard it as additional instruction that I might have given to you just now had I in fact considered it worth mentioning. To this end I would ask that you give me ten minutes before you start your actual deliberation .... If in fact it will take longer than that, I will send advice to you not to commence your deliberations because I am going to be calling you back.

...

Now if there is anything about which you are not clear, I will be available to you to answer your questions.

¶ 25 The error in the recharge is as follows:

- O. ... that leads me to the second area which I wish to perhaps offer some further assistance to you and that is in determining the credibility to be given to the [page757] evidence by each of the witnesses and in particular the evidence of the complainant versus the evidence of the accused because in this instance is very fundamental to this trial and that is the very heart in effect is who you are going to believe ....
- P. At the end of the day the core issue to be determined by yourselves is whether you believe the complainant or whether you believe the accused. If in fact you believe the accused then clearly nothing took place and in fact the Crown will have failed to prove beyond a reasonable doubt that he is guilty as charged. On the other hand if you in fact believe the complainant totally, then he is guilty as charged.
- Q. Once again, with my thanks, I will ask you to retire mindful of all of those duties that I have indicated are yours and ask you to pick your foreperson and then to proceed.

¶ 26 It is clear that the trial judge erred in his recharge. It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative; namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

¶ 27 In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, supra, at p. 357.

¶ 28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well [page758] instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

¶ 29 Nonetheless, the failure to use such language is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply: *R. v. Thatcher*, supra.

¶ 30 Where an error is made in the instruction on the burden of proof, the fact that the trial judge correctly instructed on that issue elsewhere in the charge is a strong indication that the jury were not left in doubt as to the burden resting on the Crown. The following passage from the case of *R. v. Roberts* (1975), 24 C.C.C. (2d) 539 (B.C.C.A.), at p. 550, aptly summarizes this principle:

... the appellant argued that the ... trial Judge misdirected the jury in charging that to support the appellant's defences they must "accept his evidence as truthful" rather than charging that the jury could find that his evidence might reasonably be true or that the jury could have reasonable doubt as to his guilt. It was acknowledged by counsel for the appellant that the ... trial [page759] Judge had earlier in his charge to the jury clearly and accurately directed the jury generally on the matter of reasonable doubt, but, in the passage particularly impugned, counsel maintains the trial Judge should have added "beyond a reasonable doubt". The comment ... of Chief Justice Cartwright ... in *R. v. Trinneer* ... is appropriately applicable (at p. 295): "It is not incumbent on a trial Judge to repeat again and again a rule of law which he has put before the jury clearly and accurately."

¶ 31 In the case at bar, upon reading the charge as a whole I find that the jury was clearly instructed that if they had a reasonable doubt as to the guilt of the appellant, they must acquit. I have reached this conclusion for the following reasons.

¶ 32 First, although the trial judge erred in his recharge, he did give proper directions on the issue of credibility in his main charge at paragraphs B, C and D.

¶ 33 Second, in paragraph G, he reminded the jury that whenever he referred to the Crown proving something or the jury being satisfied of something, he was referring to proof or being satisfied beyond a reasonable doubt.

¶ 34 Third, the trial judge repeated the instruction on the reasonable doubt standard on other occasions throughout the main charge. See paragraphs E, F, H, I, J, K, and L. Thus, in a relatively short charge the burden of proof resting on the Crown was put forward on numerous occasions.

¶ 35 Fourth, there was a very short delay between the one-hour long correctly given main charge and the eleven-minute recharge. The time that elapsed between the end of the main charge and the beginning of the recharge could not have been more than ten minutes.

¶ 36 Fifth, the recharge was not the result of a question from the jury. When a jury submits a question, it gives a clear indication of the problem the jury is having with a case. Those questions merit a full, careful [page760] and correct response. As well, the answer should remind the jury of its instructions given in the course of the main charge. See *R. v. Desveaux* (1986), 26 C.C.C. (3d) 88 (Ont. C.A.), at p. 93, where it was said:

Questions from a jury manifest their concern and indicate their desire for direction on a particular issue. The trial judge should read the question to counsel and obtain their submissions as to the response that should be made. It is then incumbent on the trial

judge to answer the question in a complete and reasonably detailed manner. It is unfair to the parties and the jury to attempt a short form answer to a problem that is obviously presenting difficulties. The definitions requested had been adequately set out early in the charge. However, memories are short and much had intervened in the way of directions and recharges before the question was submitted. The original instructions should have been repeated in the response.

If the error had occurred in the course of a response to a question from the jury or if the recharge had been given some hours after the main charge, a new trial would have to be ordered. However, in the case at bar, the jury had not yet begun its deliberations and the main charge, correctly and fairly given, had been completed just a few minutes earlier. The correct instructions as to the burden of proof must have been fresh in the minds of the jury at the time of the recharge.

¶ 37 Sixth, the trial judge warned the jury not to give any special emphasis to the recharge (paragraph N). More importantly, at the very end of the recharge, the trial judge asked the jury to retire "mindful of all of those duties that I have indicated are yours" (paragraph Q). At several points during the main charge, the trial judge had told the jury that it was their "duty" to determine whether the Crown had proved the offence beyond a reasonable doubt (paragraphs A, C, D, K and M). Thus, at the end of the recharge, the trial judge reminded the jury of their duty to apply the reasonable doubt standard, so repeatedly explained and emphasized throughout the main charge.

¶ 38 Seventh, it would be an insult to the intelligence of the members of this jury to conclude after the extensive, [page761] repeated and thorough instruction on the burden of proof given in the main charge, coupled with the warning given not to give special emphasis to the recharge and the reminder of their "duties" previously set out, that the error made in the recharge led the jury to believe that they could only acquit if they believed the accused. Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions. The following passage from R. v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.), at p. 279, approved in R. v. Corbett, [1988] 1 S.C.R. 670, at p. 695, is apposite:

I feel that it is quite possible, as has been done in many cases in the past, to explain clearly to the jury, in such a way that they will govern themselves in accordance with the directions of the Judge, that the confession of one accused in a joint trial is not evidence against his co-accused. The danger of a miscarriage of justice clearly exists and must be taken into account but, on the other hand, I do not feel that, in deciding a question of this kind, one must proceed on the assumption that jurors are morons, completely devoid of intelligence and totally incapable of understanding a rule of evidence of this type or of acting in accordance with it. If such were the case there would be no justification at all for the existence of juries .... [Emphasis added.]

#### Disposition

¶ 39 The main charge was correct and fair. The recharge given within ten minutes of the main charge reminded the jury of the duties imposed upon them in the main charge. In all the circumstances of this case, despite the error in the recharge, the charge read as a whole adequately instructed the jury that if they had a reasonable doubt as to the guilt of the accused, they must acquit. In the result, I would dismiss the appeal.

The following are the reasons delivered by

¶ 40 **McLACHLIN J.** (dissenting):— I agree with the conclusion of Sopinka J. and Brooke J.A., in the Court of [page762] Appeal, that the error in the charge may have misled the jury. I would allow the appeal.

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