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*Feb. 7, 8, 9
June 25

RUSSELL D. HORSBURGH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Contributing to juvenile delinquency—Evidence—Accomplices—Corroboration—Character evidence—New evidence—Affidavit of trial witness contradicting previous testimony—Whether admissible on appeal—Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 33(1)(b).

The appellant, an ordained Minister, was convicted on five out of eight counts involving the commission of several acts of contributing to juvenile delinquency under s. 33(1)(*b*) of the *Juvenile Delinquents Act,* R.S.C. 1952, c. 160. The evidence which was adduced related, except as to the first count, to various acts by juveniles of sexual

*PRESENT: Cartwright, Fauteux, Martland, Judson, Ritchie, Hall and Spence JJ.

immorality, and the case alleged against the appellant was that he had encouraged these acts. The children were in their teens; they were witnesses for the Crown and gave sworn evidence at the trial. The appellant testified to deny the children's testimony against him. Several character witnesses testified to his good character. His appeal from the convictions was dismissed, and on further appeal to the Court of Appeal, his convictions were affirmed. He was granted leave to appeal to this Court. Two affidavits were tendered before this Court, as well as before the Court of Appeal, sworn to by witnesses who had testified at the trial, both of which were to the effect that their evidence at trial was untrue.

Held (Fauteux, Judson and Ritchie JJ. dissenting): The appeal should be allowed and a new trial directed.

Per Cartwright, Martland, Hall and Spence JJ.: The charges in the present case were criminal charges, even though not laid under the *Criminal Code*. In criminal trial, it is the duty of the judge to warn the jury that, although they may convict upon the evidence of an accomplice, it is dangerous to do so unless that evidence is corroborated. The reasons of the trial judge make it clear that he did not consider it necessary, as a matter of law, to pay heed to that warning. What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. The facts in this case show that there had been such participation. All the material evidence tendered to establish that the appellant aided and abetted at the commission of delinquencies was given by persons who had knowingly and wilfully committed those very delinquencies or, as in the case of one of them, had been guilty of aiding and abetting. In the circumstances of this case, the witnesses were *participes criminis* and were accomplices. Each of the witnesses whose evidence is in question here did commit an offense under the *Juvenile Delinquents Act*. When they seek to place the responsibilities for their conduct upon the appellant, there is no reason why, in relation to the charge brought against him, he is not entitled to the same protection, in relation to the evidence of accomplices, as he would be entitled to receive in respect of any other criminal charge. The reasons for such protection are certainly as valid, in relation to accomplices who are children, as they are with respect to accomplices who are adults. There was an error in law in the failure by the trial judge to take account of his duty to assess the evidence of the participants in the sexual acts as being that of accomplices and not of independent witnesses.

It was not a valid ground for the refusal to hear the evidence of the two self-contradicting witnesses that the said witnesses had testified at the trial and had been subject to cross-examination.

Per Spence J.: The view expressed by the trial judge was not only that the evidence of children, once sworn, must be received, but that it must be treated as that of a competent adult witness. This was a serious misdirection as the witnesses, despite the fact that it was properly determined that they were capable of being sworn, were nevertheless child witnesses and their testimony bore all the frailties of testimony of children. Added to this was the failure of the trial judge to give proper appreciation to the character evidence given in favour of the appellant.

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Per Fauteux, Judson and Ritchie JJ., *dissenting*: The essence of the case made against the appellant was not that certain children committed delinquencies, but that he did "an act or acts contributing" to children being or becoming juvenile delinquents or likely to make them juvenile delinquents. There was no error in law in the trial judge failing to mention, in his reasons for judgment, the danger of convicting on the uncorroborated evidence of the children, since the appellant was not charged with a sexual offence. Furthermore, the statement of the trial judge to the effect that the sworn evidence of a child witness may be received and treated as if it was the evidence of a competent adult witness, is to be taken as being confined to the competence of the child witness whose evidence was taken under oath, and is not to be construed as meaning that he ignored the special considerations which apply to the credibility of such witnesses.

Finally, the trial judge did not err in law in failing to mention the danger inherent in convicting on uncorroborated evidence of the children because their evidence was that of accomplices. The evidence of the children under 16 years of age was not the evidence of accomplices, because they were not *participes criminis* in the offence of contributing to the delinquencies of the children named in the charges. The offence of contributing to the delinquency of children as specified in s. 33(1) of the *Juvenile Delinquents Act* is not an offence which can be committed by children under 16 years of age, and therefore these children are not to be treated as accomplices. Some of the older witnesses were accomplices. However, although the trial judge made no mention of accomplices, the reasons which he assigned for his decision did not disclose any self-misdirection in this regard.

As to the affidavit evidence tendered before this Court and the Court of Appeal, it should be rejected.

Droit criminel—Contribuer à faire d'un enfant un jeune délinquant—Preuve—Complices—Corroboration—Preuve de caractère—Nouvelle preuve—Affidavit d'un témoin au procès contredisant son témoignage antérieur—Est-ce recevable en appel—Loi sur les jeunes délinquants, S.R.C. 1952, c. 160, art. 33(1)(b).

L'appelant, un ministre du culte, a été trouvé coupable de cinq chefs d'accusation sur huit comportant la commission de plusieurs actes ayant contribué à faire d'un enfant un jeune délinquant sous l'art. 33(1)(*b*) de la *Loi sur les jeunes délinquants*, S.R.C. 1952, c. 160. La preuve qui a été produite se rapportait, à l'exception de celle sur le premier chef, à plusieurs actes d'immoralité sexuelle commis par des adolescents, et ce qu'on a reproché à l'appelant c'est d'avoir encouragé ces actes. Les enfants étaient tous âgés de 13 à 20 ans; ils ont été des témoins de la Couronne et ont donné leur témoignage sous serment. L'appelant a témoigné et a nié le témoignage des enfants. Plusieurs témoins ont témoigné du bon caractère de l'appelant. Son appel à l'encontre des verdicts a été rejeté, et sur appel subséquent à la Cour d'Appel, les verdicts ont été confirmés. Il a obtenu la permission d'en appeler devant cette Cour où, ainsi que devant la Cour d'Appel, deux affidavits, assermentés par des témoins qui avaient témoigné au procès à l'effet que leur témoignage au procès n'était pas véridique, ont été présentés.

Arrêt: L'appel doit être maintenu et un nouveau procès ordonné, les Juges Fauteux, Judson et Ritchie étant dissidents.

Les Juges Cartwright, Martland, Hall et Spence: Les accusations dans la présente cause étaient des accusations criminelles, malgré qu'elles n'aient pas été portées sous le *Code Criminel*. Dans un procès criminel, il est du devoir du juge d'avertir le jury que, quoiqu'il puisse rendre un verdict de culpabilité en se basant sur la preuve d'un complice, il est dangereux de le faire à moins que cette preuve ne soit corroborée. Les notes du juge au procès démontrent clairement qu'il n'a pas jugé nécessaire, en droit, de tenir compte de cet avertissement. Ce qui est nécessaire pour devenir un complice c'est d'avoir participé au crime en question, il n'est pas nécessaire d'avoir actuellement commis ce crime. Les faits dans la cause présente démontrent qu'il y a eu une telle participation. Toute la preuve matérielle, qui a été présentée pour établir que l'appelant avait aidé et avait engagé des enfants à commettre des délits, a été donnée par des personnes qui avaient sciemment et de propos délibéré commis ces mêmes délits ou, comme dans le cas de l'un d'eux, avaient été coupables d'avoir aidé et encouragé. Dans les circonstances de cette cause, les témoins étaient des *participes criminis* et étaient des complices. Chacun des témoins dont le témoignage est en question ici a commis une offense sous la *Loi sur les Jeunes Délinquants*. Lorsqu'ils cherchent à placer la responsabilité de leur conduite sur les épaules de l'appelant, il n'y a aucune raison pour que ce dernier n'ait pas le droit, en regard de l'accusation portée contre lui, à la même protection en regard du témoignage de complices, qu'il aurait droit de recevoir en regard de toute autre accusation criminelle. Les raisons pour une telle protection sont certainement aussi valides, en regard des complices qui sont des enfants, qu'elles le sont en regard des complices qui sont des adultes. Il y a eu une erreur de droit de la part du juge lorsqu'il n'a pas tenu compte de son devoir d'évaluer la preuve des participants aux délits sexuels comme étant celle de complices et non pas de témoins indépendants.

Le fait que les deux témoins en contradiction avec eux-mêmes ont témoigné au procès et ont été contre-interrogés n'est pas un motif valide pour refuser de prendre connaissance des deux affidavits.

Le Juge Spence: Le juge a exprimé l'opinion non seulement que le témoignage des enfants, une fois assermentés, doit être reçu, mais qu'il doit être traité comme étant celui de témoins adultes compétents. Cette directive constituait une erreur sérieuse parce que les témoins, en dépit du fait qu'il a été adjugé avec raison qu'ils pouvaient être assermentés, étaient néanmoins des jeunes témoins et leur témoignage comportait toutes les faiblesses du témoignage d'un enfant. A ceci il faut ajouter que le juge au procès n'a pas donné l'appréciation voulue à la preuve de caractère qui a été faite en faveur de l'appelant.

Les Juges Fauteux, Judson et Ritchie, *dissidents*: L'essence de l'accusation établie contre l'appelant n'était pas que certains enfants avaient commis des délits, mais que l'appelant avait posé «un acte ou des actes contribuant» à faire d'enfants des jeunes délinquants ou les portant vraisemblablement à le devenir. Le juge au procès n'a pas commis d'erreur en droit en ne mentionnant pas dans ses notes de jugement, le danger de rendre un verdict de culpabilité en se basant

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sur la preuve non corroborée d'enfants, puisque l'appelant n'a pas été accusé d'une offense sexuelle. De plus, la déclaration du juge à l'effet que la preuve assermentée des enfants peut être reçue et traitée comme si elle était la preuve d'un témoin adulte compétent, doit être prise comme étant limitée à la compétence de l'enfant dont le témoignage est pris sous serment, et ne doit pas être interprétée dans le sens que le juge aurait mis de côté les considérations spéciales qui s'appliquent à la crédibilité de tels témoins.

Finalement, le juge au procès n'a pas erré en droit en ne mentionnant pas le danger inhérent à un verdict de culpabilité basé sur la preuve non corroborée d'enfants sous le prétexte qu'ils étaient des complices. Le témoignage des enfants de moins de 16 ans n'était pas le témoignage de complices, puisqu'ils n'étaient pas des *participes criminis* dans l'offense d'avoir contribué aux délits commis par les enfants nommés dans les accusations. L'offense de contribuer à faire d'enfants des jeunes délinquants, telle que spécifiée à l'art. 33(1) de la *Loi sur les jeunes délinquants* n'est pas une offense qui peut être commise par des enfants âgés de moins de 16 ans, et conséquemment ces enfants ne peuvent pas être traités comme des complices. Quelques-uns des témoins plus âgés étaient des complices. Cependant, bien que le juge au procès ne mentionne pas des complices, le raisonnement que l'on trouve dans sa décision ne montre pas qu'il s'est donné une mauvaise directive à cet égard.

Quant à la preuve par affidavit présentée à cette Cour et à la Cour d'Appel, elle doit être rejetée.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant un verdict de culpabilité. Appel maintenu et nouveau procès ordonné.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a conviction. Appeal allowed and new trial directed.

C. L. Dubin, Q.C., and *C. E. Perkins, Q.C.*, for the appellant.

Clay M. Powell, for the respondent.

The judgment of Cartwright, Martland and Hall JJ. was delivered by

MARTLAND J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1], which, by a majority of two to one, dismissed an appeal by the appellant from a judgment of Moorhouse J., who had dismissed the appellant's appeal from his conviction by W. H. Fox, Esq., Q.C.,

[1] [1966] 1 O.R. 739, 47 C.R. 151, 3 C.C.C. 240, 55 D.L.R. (2d) 289.

a Juvenile Court Judge, on five out of eight charges brought against him under s. 33(1)(*b*) of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160.

Section 33(1) of that Act provides as follows:

> 33. (1) Any person, whether the parent or guardian of the child or not, who, knowingly or wilfully,
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> (*a*) aids, causes, abets or connives at the commission by a child of a delinquency, or
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> (*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,
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> is liable on summary conviction before a Juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

Although the charges were laid under para. (*b*) of this subsection, apart from the first one, they would, I think, more properly have been brought under para. (*a*). That paragraph makes it an offence to aid, cause, abet or connive at the commission by a child of a delinquency. "Juvenile delinquent" is defined in s. 2(*h*) so as to include a child "who is guilty of sexual immorality". The evidence which was adduced, except as to the first charge, related to various acts by witnesses of the Crown of sexual immorality, and the case alleged against the appellant was that he had encouraged these acts.

Paragraph (*b*) makes it an offence to do an act producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make a child a juvenile delinquent. The charges were framed to cover both alternatives, but the evidence, except as to the first charge, related to actual juvenile delinquency.

The facts are summarized by Laskin J.A., in his dissenting judgment in the Court below, as follows:

> Each of the eight charges alleged that the accused, during certain specified periods, which comprehensively covered the time span between July 24, 1963 and June 29, 1964 did certain acts contributing to the juvenile delinquency of (1) Susanne Westfall; (2) Robert Miller; (3) Mary Doolittle; (4) Jon Whyte; (5) Judy Kivell; (6) Glen Eldridge; (7) Brenda Wolfe; and (8) Janice Janes. Each charge or count set out the acts by which the contribution to juvenile delinquency was allegedly effected. Count 1 specified three acts; count 2 specified five acts; count 3 specified one act; count 4 specified one act; count 5 specified three acts; count 6 specified two acts; count 7 specified two acts, and count 8 specified seven acts.
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> The accused was convicted on five counts, as follows: count 1, in respect of specified act three; count 2 in respect of specified acts one,

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three and four; count 5, in respect of specified acts one and two; count 6, in respect of specified act one; and count 8, in respect of specified acts six and seven. The convictions were registered in the following terms:

(1) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between January 1, 1964 and June 1, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Susanne Westfall, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent, to wit: by, during the Easter school vacation, 1964, attempting to induce the said child to have a relationship with Terry Lord by placing the said boy's arm around the said child and by telling the said child her boy friend would never know and that he, Russell D. Horsburgh wanted some action, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(2) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between January 1, 1964 and June 29, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Robert Miller, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent, to wit: by, between March 13 and March 25, 1964 in the office of the said Russell D. Horsburgh, telling the said child that there was nothing wrong with the said child having intercourse; by, explaining to the said child how to have sexual intercourse without hurting the girl; by signs indicating to the said child to take the said girl to the apartment for sexual intercourse, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(5) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between December 1, 1963 and June 1, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Judy Kivell, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent to wit: by, during the month of January or February, 1964, sending the said child to the apartment in the Park Street United Church Buildings, and sending Glen Eldridge there to have sexual intercourse with the said child; by asking the said child when she returned to his office, if she enjoyed herself, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(6) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between December 1, 1963 and June 1, 1964 inclusive, knowingly or wilfully did unlawfully do an act or acts contributing to Glen Eldridge, a child, being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent, to wit: by, during the month of January or February, 1964, telling the said child to have sexual intercourse with Judy Kivell in the apartment in the Park Street United Church Buildings and by asking the said child how did you make out, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

(8) Russell D. Horsburgh, at the City of Chatham, in the County of Kent, between July 24, 1963 and June 1, 1964 inclusive, knowingly or wilfully, did unlawfully do an act or acts contributing to Janice Janes, a child, being or becoming a juvenile delinquent, to wit: by, sending the said child to the said apartment on March 31, 1964, to see Terry Lord and his friend from Toronto where sexual intercourse took place with Terry Lord; by, between July 24, 1963

and June 1, 1964, permitting the said child on several occasions to have sexual intercourse with Jack Best in the parlour and apartment of the said Park Street United Church Buildings, contrary to section 33, subsection (1)(*b*) of the *Juvenile Delinquents Act*.

Susanne Westfall was 14 years of age when the alleged offence against her was committed; Robert Miller was 15 years old at the material time; Judy Kivell was 14 years of age; Glen Eldridge was then 15 years of age; and Janice Janes was also 15 years of age when the alleged offence in her case was committed. Terry Lord mentioned in the conviction on count 1 did not give evidence. Susanne Westfall was the girl mentioned in the conviction on count 2 involving Robert Miller. Judy Kivell and Glen Eldridge are associated in the acts on which the convictions on counts 5 and 6 were made. Jack Best, who, in addition to Terry Lord, is associated in an act for which there was a conviction on count 8, was at the material time 19 years old, beyond juvenile age, and was a witness for the prosecution, as were Susanne Westfall, Robert Miller, Judy Kivell, Glen Eldridge and Janice Janes.

The accused is a married man, 45 years of age who has been an ordained minister since 1947, following the completion of his education at McMaster University where he earned a B.A. degree and Queen's University where he earned a divinity degree. He came to a Chatham pastorate in 1961 after previous service in Creighton Mine, Sudbury, Hamilton and Waterloo. The offences of which he was convicted had as their locale the church in Chatham at which he served, and an apartment attached to the church which was not inhabited but was used as a collection and distribution centre for used clothing available to needy persons for the taking.

The accused on coming to Chatham expanded the existing social and recreational programme carried on at the church. With the approval of a responsible church committee, he organized a senior young people's group, a Tuxis group for boys in their late teens, a Sigma-C group for boys in their early teens and, subsequently, a teen-town and youth anonymous programme. This last mentioned group was designed to attract to the church young persons who had no traditional attachment and to provide them with an opportunity to discuss personal problems on a confidential group basis. The result of this expanded programme was to keep the church buildings in constant use by a range of young people. The accused set aside, in addition, a counselling period from 4:30 to 6 p.m. for teenage persons and this was made known through church publications. There is evidence that many youngsters visited the accused in his office for general talk and that he made himself accessible to them, even lending them small amounts of money, apparently in line with a social service conception of his ministry.

The young people named in the charges brought against the accused admittedly engaged in delinquent conduct in the church premises. Neither the church nor the accused can be held responsible for this simply because they permitted access to the church unless they were, or should have been, aware of what was happening and allowed it to continue. There was evidence that the frequent dances held in the church were chaperoned, there was a janitor who serviced the premises, and the accused's secretary was there from 10 a.m. to 5 p.m. or later. What is alleged against the accused are not acts of omission but of commission, and, as already indicated, of the twenty-four acts specified in the eight counts, nine were brought home to him under five counts.

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Various grounds of appeal were submitted on behalf of the appellant, but it is only necessary for me to deal with one of them; namely, that the learned trial judge failed to apply the rule of caution as to the danger of convicting on the uncorroborated evidence of accomplices.

The learned trial judge gave detailed reasons for his judgment. He did not consider the matter of the evidence of accomplices at all, but he did deal with the requirement as to the matter of corroboration of the evidence of a complainant in relation to a sexual offence. With respect to this matter he said:

> The second observation I would like to make concerns the question of "corroboration" and the necessity for it in a case of this kind, having regard to the nature of the offences and the ages of the witnesses for the prosecution.
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> In the first place the accused is not charged with one of the sexual offences mentioned in the Criminal Code. Therefore, the possibility of false accusations of sexual crime does not exist in this case and there is no possibility of a conviction on the uncorroborated evidence of a possible victim, with respect to a sexual crime. The accused is simply charged with contributing to Juvenile Delinquency in connection with eight different counts. Because of the nature of the offences, therefore, I do not believe that corroboration is required.

He also dealt with the need for corroboration of the evidence of a child, who has been sworn as a witness. After discussing the provisions of s. 16 of the *Canada Evidence Act*, R.S.C. 1952, c. 59, he went on to say:

> In other words, once the Judge has decided, after making due inquiry, that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness. From my reading of the law, and, in particular, those cases which have been decided under section (16) (above) notably *R. v. Antrobus* 87 C.C.C. 18 and *R. v. Sankey* (1923) S.C.R. 436 such is the law with respect to the admissibility of the evidence of a child and, in particular, the necessity of corroboration of a child's evidence — qua child.

It is clear from these passages that the learned trial judge approached the consideration of the evidence of the child witnesses on the basis that the matter of corroboration did not enter into the case at all.

It is now settled law that in a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.

The charges in the present case are criminal charges, even though not laid under the *Criminal Code*. The warn-

ing required to be given to the jury is for the purpose of ensuring that, in their consideration of the evidence, the danger involved in convicting on the uncorroborated evidence of an accomplice should always be present in their minds. The reasons of the learned trial judge make it clear that he did not consider it necessary, as a matter of law, to pay heed to that warning in weighing the evidence. If the evidence against the accused did consist of the evidence of accomplices, then there was error in law.

The question then arises as to whether or not the various children, who were parties to the sexual acts of which evidence was given, are to be considered as accomplices.

Counsel for the respondent contended that they were not, and relied upon the judgment of the House of Lords in *Davies v. Director of Public Prosecutions*[1]. At page 400 the Lord Chancellor, Lord Simonds, said:

> There is in the authorities no formal definition of the term "accomplice": and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:—
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> (1) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors). This is surely the natural and primary meaning of the term "accomplice". But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule: viz.:
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> (2) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (*Rex v. Jennings,* (1912) 7 Cr. App. R. 242: *Rex v. Dixon,* (1925) 19 Cr. App. R. 36):
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> (3) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration. (*Rex v. Farid,* (1945) 30 Cr. App. R. 168).

A little later in his reasons he went on to say that he could see no reason for any further extension of the term "accomplice".

In the *Davies* case the charge was murder, the victim having been stabbed by a knife. Davies, with other youths, including the witness Lawson, attacked, with their fists,

[1] [1954] A.C. 378.

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another group, one of whom was the victim who was stabbed. In considering whether or not Lawson was an accomplice of Davies, the Lord Chancellor said:

> Lawson, if he was to be an accomplice at all had to be an accomplice to the crime of murder. I can see no reason for any further extension of the term "accomplice". In particular, I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use. It should be borne in mind in this connexion that all suggestion of a concerted *felonious* onslaught had, by consent at the instance of counsel for the defence himself, been expunged from the Crown's case and from the issues put to the jury.

It will be seen that the issue considered was as to whether or not Lawson was "particeps criminis" in respect of the crime of murder.

It was submitted by counsel for the respondent that, to be particeps criminis, the witness in question would have to be guilty of the crime charged against the accused. On this basis, as none of the witnesses in question in this case could have been charged with the crime of which the appellant was charged under s. 33 of the *Juvenile Delinquents Act*, they could not be accomplices.

I do not agree that this result follows from the *Davies* case. Particeps criminis means one who shares or co-operates in a criminal offence. The passage cited from that case shows that the term includes an accessory after the fact, who certainly could not be convicted of the main offence. What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. Whether or not there has been such participation will depend upon the facts of the particular case.

The substance of the case made against the appellant was that he had aided and abetted at the commission of delinquencies. The delinquencies consisted of various acts of sexual intercourse. Sexual intercourse was not involved in the first charge, in relation to Susanne Westfall, but she is the girl mentioned in the second charge and she gave evidence of sexual intercourse with Robert Miller. Terry

Lord, who is mentioned in the first charge, did not give evidence. Jack Best, who is mentioned in the last charge, and who did give evidence, was not a juvenile at the material time. In the result, each of the persons to whose delinquency the appellant was charged with contributing had been guilty of an offence under the *Juvenile Delinquents Act*, i.e., sexual immorality.

In addition, each of such persons, other than Janice Janes, mentioned in the last count, had aided and abetted another juvenile in the commission of an act of juvenile delinquency, an act which is made an offence by s. 33(1)(*a*). It appeared to be assumed in argument that only adults could be charged under that section, but, apart from the marginal note, which forms no part of the Act (*Interpretation Act*, R.S.C. 1952, c. 158, s. 14(2)), this section does not so provide.

In any event, the situation in this case is that all the material evidence tendered to establish that the appellant aided and abetted at the commission of delinquencies was given by persons who had knowingly and wilfully committed those very delinquencies, or, as in the case of Best, had been guilty of aiding and abetting. In the circumstances of this case, in my opinion they were particeps criminis and were accomplices. In saying this I do not contend that every child who becomes a juvenile delinquent is necessarily an accomplice of a person who contributes to such a delinquency. I say only that such a child may, depending upon the circumstances of the case, be an accomplice.

I recognize that the charges against the appellant were laid under para. (*b*) and not para. (*a*) of s. 33(1), but I repeat that the case, as presented, other than the first charge, related to an offence under para. (*a*). I agree, on this point, with what was said by Laskin J.A.:

> Crown counsel contended that the accused would be guilty of the offences charged by reason merely of giving the encouragement to the acts committed by the juveniles, regardless of whether they were committed or not. I do not disagree, but that is not how the case against him was proved; and it is the nature of the evidence given against the accused that has to be regarded in determining whether accomplice evidence is being adduced.

In the reasons of Evans J.A., in the Court below, the following proposition is stated:

> It is my view that the children under sixteen who testified cannot be considered as accomplices nor as particeps criminis. The *Juvenile Delin-*

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quents Act was specifically designed for the protection of such children and to hold that they are accomplices in the very act which contributed to their delinquency would be contrary to the intention expressed in the Act. They did not commit a crime by becoming involved in an action which forms the basis of a prosecution against the appellant.

I am not in agreement with this reasoning. The fact is that each of the witnesses whose evidence is in question here did commit an offence under the *Juvenile Delinquents Act*. Had proceedings been taken against them, they would have enjoyed the benefits afforded by ss. 2 and 38 in being treated not as criminals, but as misdirected children. But when they seek to place the responsibility for their conduct upon the appellant, I see no reason why, in relation to the charge brought against him, he is not entitled to the same protection, in relation to the evidence of accomplices, as he would be entitled to receive in respect of any other criminal charge and the reasons for such protection are certainly as valid, in relation to accomplices who are children, as they are with respect to accomplices who are adults.

In my opinion, there was an error in law in the failure by the learned trial judge, when weighing the evidence, to take account of his duty to assess the evidence of the participants in the sexual acts as being that of accomplices and not of independent witnesses.

This conclusion makes it unnecessary to deal with the ground of appeal based upon the refusal by the Court of Appeal to consider the self-contradicting evidence of two witnesses who testified at the trial. I would, however, like to express my view that the fact that the witnesses in question had testified at the trial on the issues on which further examination was sought, and had been subject at trial to cross-examination, is not a valid ground for the refusal to hear such evidence.

In my opinion the appeal should be allowed and a new trial directed.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment prepared by my brother Martland in which he recites much of the factual background giving rise to this appeal. I shall endeavour not to

duplicate this recital excepting in so far as it appears to me to be essential to an understanding of my views.

Although the accused was a man of 45 years of age and an ordained minister of the United Church of Canada, he was tried in the Juvenile and Family Court of the County of Kent on eight charges involving the alleged commission of 24 separate acts of contributing to children becoming juvenile delinquents or which were likely to make them juvenile delinquents contrary to s. 33(1)(*b*) of the *Juvenile Delinquents Act*. It was, in my view, unfortunate that all these charges were heard together but there was no motion for severance and no objection appears to have been raised to this procedure on behalf of the accused although in the result, in my opinion, its adoption made a difficult case more difficult for the judge to try.

Judge Fox, who presided at the trial, is described in the reasons for judgment of the majority of the Court of Appeal as "a learned and experienced Juvenile Court Judge" and I do not question this assessment. He appears to have been able to deal with each charge independently of the others and the fact that he only found 9 of the 24 alleged acts to have been committed and consequently dismissed 3 of the charges, is the best evidence of his approach to the matter.

The trial, which involved the taking of more than 1,600 pages of evidence, was characterized by a direct conflict of testimony between the Crown witnesses, many of whom were admittedly juvenile delinquents, and the evidence for the defence which consisted of a complete denial of all the charges by a minister of the Church whose integrity was vouched for by a number of respectable citizens.

This was preeminently a case which turned on the trial judge's assessment of the credibility of the witnesses and Judge Fox was careful to instruct himself in this regard in the following terms:

> Counsel for both the Crown and the defence referred to that issue in their arguments as the most important issue in the whole case and with that view I am in entire agreement for on that issue, solely, I think depends the accused's guilt or innocence.
>
> As the Honourable Mr. Justice Estey of the Supreme Court of Canada pointed out in the case of *Rex v. White*, 1947 S.C.R. 268 at 272:
>
> > 'the issue of credibility is one of fact and cannot be determined by following a set of rules which it has been suggested have the force of law.'

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In his judgment in that case Mr. Justice Estey quoted as follows from a judgment of Mr. Justice J. Anglin (later Chief Justice) in the case of *Raymond v. Township of Bosanquet* (1919) 59 S.C.R. 452:

> '...by that (in speaking of credibility) I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence. ...'
>
> 'Eminent Judges' Mr. Justice Estey says, 'have from time to time indicated certain guides that have been of the greatest assistance but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember, and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere or frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.'

...I respectfully adopt the decision in that case and particularly the statement of Mr. Justice Estey as my guide in determining the issue of credibility in this case.

I do not think that the comments made by the trial judge in the course of his detailed consideration of the evidence of the various witnesses indicate that he deviated, in assessing their credibility, from the standards which he found to have been laid down by this Court, and I therefore proceed on the assumption that in reaching his conclusions Judge Fox treated credibility as the most important issue in the whole case and that he evaluated the testimony of the witnesses having regard to (1) their demeanour in the witness box and their manner in giving evidence, (2) their general integrity and intelligence, (3) their powers to observe, (4) their capacity to remember, (5) their accuracy in statement, (6) whether they were honestly endeavouring to tell the truth and (7) whether they were sincere and frank, or whether they were biased, reticent and evasive. Applying these standards, the learned judge determined the issue of credibility against the accused.

As Mr. Justice Estey said, *supra*, "the issue of credibility is one of fact..." and it is not open to this Court to interfere with the conclusions reached by the trial judge in this regard unless it can be shown that he erred in law in his consideration of the evidence.

One of the chief errors in law alleged by counsel for the appellant was that the trial judge wrongfully directed himself on the issue of corroboration in relation to the evidence of the children who testified before him. In this regard it was contended that the trial judge should have found that corroboration of the children's evidence was necessary because of the sexual nature of the offences, the ages of the children, their bad character and the fact that they were accomplices.

The trial judge specifically directed himself on the question of corroboration and whether it was necessary having regard (*a*) to the nature of the offences and (*b*) to the ages of the witnesses for the prosecution, but he made no mention whatever of the rule relating to the danger of convicting on the uncorroborated evidence of an accomplice although, as will hereafter appear, I do not think that this affords any basis for the assumption that he was ignorant of that rule or that he ignored it in the present case.

In finding that corroboration was not made necessary by the nature of the offences here charged, the learned trial judge said:

> In the first place the accused is not charged with one of the sexual offences mentioned in the *Criminal Code*. Therefore, the possibility of false accusations of sexual crime does not exist in this case and there is no possibility of a conviction on the uncorroborated evidence of a possible victim, with respect to a sexual crime. The accused is simply charged with contributing to Juvenile Delinquency in connection with eight different counts. Because of the nature of the offences, therefore, I do not believe that corroboration is required.

The trial judge's concept of the "nature of the offences" is spelled out in the comments which he made on the third act alleged on the first charge. This act consisted in the accused placing a young man's arm around a girl whom he knew was "going with" somebody else, and then turning towards them, saying, "I want to see some action". Under all the circumstances, the trial judge found the accused guilty of this act although no sexual intercourse took place between the young people and no offence of delinquency was committed by either of them, and in so finding he said:

> With respect to act (3) in the first charge Counsel for the defence said in his summation that the act itself could not possibly make Susanne or cause her to become a juvenile delinquent, that unless there is direct evidence of sexual intercourse there is no act of contributing to juvenile

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delinquency. I cannot agree with the second part of this proposition. Subsection (4) of Section 33 is directly opposed to it, when it provides that it is not a valid defence to a prosecution under the section that the child, notwithstanding the conduct of the accused, did not in fact become a juvenile delinquent. Section 33 speaks of any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent. *This wording, in my view, defines precisely what an act of contributing is and it does not make it dependent upon an accomplished act of delinquency by the child.*

The italics are my own.

The contention of counsel for the appellant as to the necessity for self-instruction by the judge concerning the danger of convicting on the uncorroborated evidence of the children insofar as it relates to the nature of the offences and to the assumption that they were accomplices, is based on the fact that there was evidence of sexual intercourse having taken place between them and I think it to be of first importance to recognize at the outset that such intercourse was not an essential ingredient of the charges against the appellant. With the very greatest respect for those who may hold a different view, I do not think that the essence of the case made against the appellant was that certain children committed delinquencies; the essence of the case made against the appellant was that he "did unlawfully do an act or acts contributing to" children being or becoming juvenile delinquents or likely to make them juvenile delinquents, and I regard it as essential to the disposition of this case that the evidence of sexual intercourse having taken place between these children should not be treated as altering the rules of evidence which apply to the proof of the offences with which the accused was actually charged.

At common law the evidence of a complainant in a sexual case was always admissible but the rule requiring that the jury should be warned of the danger of convicting on such evidence without corroboration has long been recognized as a rule of practice. Section 131 of the *Criminal Code* requires corroboration in cases of incest, seduction, illicit sexual intercourse and in the case of a parent or guardian procuring the defilement of a female person, and section 134 provides that a jury must be instructed that it is not safe to find the accused guilty on the uncorroborated evidence of a female complainant in cases where he is charged with rape, attempted rape, inter-

course with children or indecent assault. These provisions, of course, have the force of law but they have no application to the present case as the appellant was not charged with any of the specified offences, and accordingly the only argument open to counsel for the appellant in this regard is that the trial judge *erred in law* in failing to instruct himself in respect of *a rule of practice*. This appears to me to be a *non sequitur*. The case which was chiefly relied upon in support of this branch of the argument is *Regina v. McBean*[1], where the accused had been charged under s. 33(1) of the *Juvenile Delinquents Act* and Mr. Justice Davey of the British Columbia Supreme Court said at page 30:

> It is a rule of practice that in trials without a jury the judge should keep in mind the danger of convicting a person charged with a sexual offence upon the uncorroborated evidence of the complainant. It appears that this rule of practice should be applied not only in charges under the Criminal Code but in all judicial inquiries involving sexual offences.

It will be noted that it is the evidence of a *complainant* which requires corroboration and in the *McBean* case, although the charge was one of "contributing" to delinquency, the contribution which McBean was alleged to have made to the delinquency of the child in question was "that he did have carnal knowledge of her" and the decision was based on the case of *Mattouk v. Massad*[2], where Lord Atkin, speaking on behalf of the Privy Council said, at page 591:

> It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age (15) in charging a man with sexual intercourse. No doubt there is no law against believing them but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law.

In the present case the accused is not charged with sexual intercourse with young girls and although the delinquency to which he is alleged to have contributed is "sexual immorality" the gravamen of the offences of which he was convicted is, as I have said, that he did "an act or acts contributing" to children being or becoming juvenile delinquents or likely to make them juvenile delinquents.

The reasons for the rule requiring corroboration of the evidence of a complainant in a sexual case do not appear to

[1] (1953), 107 C.C.C. 28, 17 C.R. 357, 10 W.W.R. (N.S.) 351
[2] [1943] A.C. 588.

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me to be clearly defined in any of the authorities, but it is suggested in Cross on Evidence, 2nd ed., page 177, that they are in some respects similar to those which apply to the uncorroborated evidence of an adulterer in that in both cases the charge is easy to make and difficult to refute "and could easily be concocted on account of hysterical or vindictive motives". In any event, it appears to me to be clear that the danger to be guarded against in cases of sexual offences is that the complainant, through a motive of spite, vengeance, hysteria or perhaps gain by way of blackmail, may make false accusations against which the accused, by reason of the nature of the charges, has no means of defence except his own unsupported denial. It is the fact of sexual misconduct which requires corroboration and this rule of practice can have no application to a case like the present in which such conduct is freely admitted by the persons concerned. I am satisfied that there was no error in law in the Judge failing to mention this rule in his reasons for judgment.

The passage from the trial judge's reasons for judgment in which he dealt with the question of "corroboration" in relation to the evidence of children was made the subject of bitter attack by counsel for the appellant. This passage reads as follows:

> But what of the evidence of children? Fourteen of them gave evidence for the Crown, only one of whom was under the age of fourteen years.
>
> Section 16 of the *Canada Evidence Act*, dealing with the evidence of a child provides that:
>
> > (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth.
> >
> > (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.
>
> By that is meant, of course, no case shall be tested upon the unsworn evidence alone.
>
> I have been unable to find any definition of the term 'tender years' but I think it is clear from the wording in the above section that it is only the evidence of a child who, after due inquiry, is permitted to give unsworn evidence, that must be corroborated by some other material evidence, before a conviction can be made on that child's evidence alone. In other words, once the judge has decided, after making due inquiry,

that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness. From my reading of the law, and, in particular, those cases which have been decided under Section (16) (above) noteably *R. v. Sankey* (1927) S.C.R. 436 such is the law with respect to the admissibility of the evidence of a child and, in particular, the necessity of corroboration of a child's evidence —qua child.

I do not think that in this passage the learned judge was doing more than stating that the sworn evidence of children differs from their unsworn evidence in that unsworn evidence must be corroborated before it can form the basis of a decision. I think that he was quite right in saying that a child who has been sworn as a witness is as *competent* a witness as any adult. In this regard, the distinction between "competency" and "credibility" must be borne in mind, and I refer to the judgment of Buller J. in the old case of *R. v. Atwood and Robins*[1], where he said:

> The distinction between competency and the credit of a witness has been long settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge; but if the ground of the objection go to his credit only, his testimony must be received and left with the jury, under such directions and observations from the court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision on that case.

As I have indicated, I think that the excerpt last above quoted from the reasons of the learned trial judge is to be taken as being confined to the *competency* of the child witnesses whose evidence was taken under oath, and I do not think that it is to be construed as meaning that he ignored the special considerations which apply to the *credibility* of such witnesses. These considerations are described in the reasons for judgment delivered on behalf of this Court by Judson J. in *Kendall v. The Queen*[2], where he said:

> The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness is the mental immaturity of the child. The difficulty is four-fold: (1) his capacity of observation, (2) his capacity of recollection, (3) his capacity to understand the questions put and frame intelligent answers, and (4) his moral responsibility.

In my view, all these considerations are included in the factors referred to by Mr. Justice Estey in *Rex v. White*[3]

[1] (1788), 1 Leach 464 at 465-6, 168 E.R. 334.
[2] [1962] S.C.R. 469 at 473, 37 C.R. 179, 132 C.C.C. 216.
[3] [1947] S.C.R. 268, 3 C.R. 232, 89 C.C.C. 148.

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and in the case of "an experienced Juvenile Court Judge" who had expressly directed himself in accordance with that case, I do not think that his failure to mention in his reasons for judgment the rule of practice with respect to the danger of convicting on the evidence of a child is to be treated as an error in law. In the nature of things Judge Fox must have had to deal with child witnesses daily in the course of discharging his duties.

As I have indicated, counsel for the appellant further alleged that the trial judge erred in law in failing to state in his reasons for judgment that he had taken into consideration the danger of convicting on the evidence of persons of bad character. It appears to me that Judge Fox, who spent his time trying cases under the *Juvenile Delinquents Act* must be taken to have been aware of the fact that the Crown witnesses in this case were mostly juvenile delinquents and must be taken also to have been aware of the danger of convicting on their evidence without giving it the most careful and anxious consideration. His reasons for judgment indicate to me that he did give this evidence just that kind of consideration and I am not prepared to hold that his failure to make any specific comment on the bad character of these children constituted an error in law.

Finally, appellant's counsel took the position that the evidence of those who had participated in the alleged delinquencies was the evidence of accomplices and that the trial judge erred in law in failing to mention the danger inherent in convicting on their uncorroborated evidence.

In so far as the evidence of the children under 16 years of age is concerned, I do not think that it is the evidence of accomplices.

Before considering this submission in relation to that evidence, I think it desirable to consider the reasons for the existence of the rule which is now recognized as a rule of law that a judge should always instruct a jury that although they may convict on the evidence of an accomplice, it is dangerous for them to do so unless that evidence is corroborated.

The rule appears to have its origin in the old law respecting approvers which fell into disuse during the first half of the 18th century and under which a person who was in custody and who had been indicted of the offence with

which the accused was charged could upon confessing his guilt and accusing accomplices obtain his pardon. By 1775 Lord Mansfield was able to say in the case of *Rex v. Rudd*[1]:

> Great inconvenience arose out of this practice of approvement.—No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be received as witnesses, the practice is liable to many objections. And though, under the practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself.

By 1837 the rule had begun to take on something of the character of the rule of law as which it is presently recognized. In that year Lord Abinger in addressing the jury in *R. v. Farler*[2] observed at page 107:

> It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance.

and he pointed out at page 108 the nature of the danger against which the rule was designed to protect saying:

> the danger is, that when a man is fixed, and knows his own guilt is detected, he purchases impunity by falsely accusing others.

This observation is quoted by Wigmore in his work on evidence 3rd ed., (1940) at page 322, paragraph 2057 and is accompanied by the following comment:

> The essential element however, it must be remembered, is the suggested promise or expectation of conditional clemency. If that is lacking the whole basis of mistrust fails.

In Cross on Evidence, 1963, 2nd ed., page 172, the matter is approached from a slightly different angle. The author there says:

> The danger that the accomplice will minimize his role in the crime and exaggerate that of the accused is the usual justification for the requirement.

Different shades of meaning are to be found in the reasons given for the rule by other text writers, but running through them all is the thought that the accomplice's evidence is to be mistrusted because his testimony might be given in order to purchase lenient treatment for himself at the expense of the accused by co-operating with the authorities.

[1] (1775), 1 Cowp. 331 at 336, 98 E.R. 1114.
[2] (1837), 8 Car. and P. 106, 173 E.R. 418.

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It does not appear to me that any useful purpose is to be served by reviewing the history of the law as to who is and who is not an accomplice because I am satisfied to adopt the definition of that term which is found in the reasons for judgment of Lord Simonds L.C. in *Davies v. Director of Public Prosecutions*[1], to which reference has been made by my brother Martland. In that case Lord Simonds made it plain that he thought the natural and primary meaning of the term "accomplice" to be limited to

> ...persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors).

The Lord Chancellor, however, also recognized receivers of stolen goods and witnesses giving evidence of similar crimes committed by the accused to which they had been parties, as persons whose evidence required the same warning as that of accomplices.

It will be seen that apart from receivers of stolen goods and accessories after the fact to a felony (both of which offences are distinct from the main charge) the only witnesses who come within the meaning of "accomplices" as defined by Lord Simonds are those who have been *participes criminis* in respect of the actual crime charged against the accused or in respect of some similar crime concerning which they, being parties, have testified against him.

In the present case none of the witnesses were receivers of stolen goods and the fact that the appellant's "contribution" to their delinquency resulted in some of the child witnesses having sexual intercourse does not, in my opinion, make them accessories after the fact to the offence of making the "contribution" with which the appellant is charged. It follows, in my view, that in order to have been "accomplices" within the meaning of that word as defined in the *Davies* case, the child witnesses in the present case would have had to be *participes criminis* in *and therefore subject to prosecution for,* the offence of contributing to the delinquencies of the children named in the charges against the appellant or contributing to some other delinquencies concerning which they had testified as to his guilt to which they had been parties.

[1] [1954] A.C. 378 at 400-1.

As I take it to be obvious that the offence of contributing to the delinquency of children as specified in s. 33(1) of the *Juvenile Delinquents Act* is not an offence which can be committed by children under 16 years of age, I am satisfied that these children are not to be treated as "accomplices".

I am, with the greatest respect, unable to accept the suggestion that children are capable of committing this offence. The word "child" is defined in s. 2(1)(*a*) and I think that it is used in s. 33(1) in contradistinction to the word "person" as that word is employed in the same section. The only offence for which a child can be convicted under the *Juvenile Delinquents Act* is the offence of "delinquency" and s. 3(2) makes it plain that when a "child" has committed a delinquency "he will be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision". These latter provisions conform with the terms of s. 38 which defines the purpose of the Act as being:

> ...that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

All these provisions appear to me to conflict with the suggestion that it was intended that children should be exposed to being fined $500, imprisoned for two years or to both fine and imprisonment for contributing to the delinquency of other children. This in my view would be the effect of making s. 33(1) applicable to children.

It is said, however, that the essence of the case against the appellant is that certain children committed delinquencies and that although he is not charged with aiding and abetting the delinquencies to which these children confessed, the appellant is to be treated as having done so, so that he is *participes criminis* in relation to the commission of delinquencies by the children for which he could not himself be charged.

It is on this basis that it is contended that the children are to be treated as having been accomplices in the commission of offences of which the appellant was found guilty and with which they could not themselves have been charged.

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With the greatest respect for those who may take the opposite view, I do not think that, even if the appellant had been *participes criminis* in committing the delinquencies, it would follow that the juveniles were accomplices of his in committing the offences of which he was convicted.

The two things appear to me to be quite different and this is illustrated by the fact that the reasoning based on the appellant being *participes criminis* in the commission of the delinquencies could not, as it seems to me, have any application to his conviction on the first charge with respect to which the trial judge found no evidence of the commission of a delinquency by anyone.

The gravamen of each charge on which the accused was convicted was the same, namely, that he "knowingly or wilfully did unlawfully do an act or acts contributing to ...a child being or becoming a juvenile delinquent or likely to make the said child a juvenile delinquent". It is the act or acts of the appellant which were in question and I am unable to follow any reasoning which leads to the conclusion that when his "contribution" has resulted in a child committing a sexual delinquency that child is an accomplice in the doing of the appellant's acts which contributed to it, whereas when the appellant's "contribution" has not resulted in anyone committing a delinquency, the children in respect of whom the "contribution" was made are not accomplices.

It appears to me that the suggestion that because there was evidence of Susanne Westfall's delinquency in respect of the second charge she should therefore be treated as an accomplice in respect of the first charge, must be predicated on the assumption that the essence of the case made against the appellant was that the children committed delinquencies. If this indeed were the essence of the case then it would perhaps be understandable to treat the mere fact of a child having been guilty of sexual delinquency in respect of one charge as tainting her evidence and constituting her an accomplice in another offence with respect to which the accused is charged with contributing to her delinquency whether any delinquency was in fact involved in that offence or not. As I have indicated, with the greatest respect for those who hold a different view, I do not agree with this reasoning.

To treat children of tender years as untrustworthy witnesses on the ground that they have been concerned in contributing to their own delinquency by reason of the fact that the "contribution" made by the appellant to their immorality has actually resulted in their committing acts of sexual delinquency, is in my view inconsistent with the purpose of s. 33(1) of the *Juvenile Delinquents Act* which is clearly designed to protect children against being led astray by the bad influence of adults. The fact that they have actually gone astray does not, in my opinion, make the children accomplices of the adult accused in exercising the bad influence which led them to their state of delinquency.

It was strongly contended on behalf of the appellant that the judgment of Pickup C.J.O., speaking on behalf of the Court of Appeal for Ontario in *Reg. v. Gauthier*[1], constituted authority for enlarging the class of "accomplices" whose evidence requires corroboration so as to include all persons "concerned...in committing or attempting to commit" the offence with which the accused was charged. The *Gauthier* case was one in which charges had been withdrawn against two of the witnesses who had allegedly been engaged in the armed robbery for which the accused was indicted. In the course of his reasons for judgment, Chief Justice Pickup said:

> There was evidence tending to indicate the complicity of at least one of these witnesses, if not both, and in our opinion it was the duty of the learned trial judge to tell the jury what in law constitutes an accomplice, and direct their attention to any facts in evidence which would tend to indicate the witnesses' complicity and then submit to the jury the issue whether what a witness was proved to have done made her an accomplice...

This excerpt does not, in my view, indicate any broadening of the rule but it is contended that by adopting a sentence from the reasons for judgment of Chisholm J., (as he then was) in *The King v. Morrison*[2], Chief Justice Pickup approved an enlarged meaning of the word "accomplice". The sentence referred to reads as follows:

> An accomplice is one who is concerned with another or others in committing or attempting to commit any criminal offence whether treason, felony or misdemeanor.

[1] [1954] O.W.N. 428, 108 C.C.C. 390.
[2] (1917), 51 N.S.R. 253 at 270, 29 C.C.C. 6, 38 D.L.R. 568.

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This statement was made in relation to the effect of s. 69(2) of the *Criminal Code* (now s. 21(2)) and Mr. Justice Chisholm went on to say of the two witnesses (Burke and McNeil) who were alleged to be accomplices:

> I am of opinion that both Burke and McNeil were accomplices of the accused; that each is as liable to indictment as is the accused,—and this is sometimes made the test in deciding who is an accomplice—and that the requirements of the law as to the corroboration of the evidence of accomplices ought to have been observed...

There are two other cases decided in the Court of Appeal for Ontario, *R. v. Morin*[1] and *R. v. Fleming*[2], in both of which it was held that the evidence of certain prostitutes was to be taken as the evidence of accomplices in cases where the accused was charged with living on the avails of prostitution. These cases turned on their own particular facts but it is revealing to note that in the course of his reasons for judgment in the *Fleming* case, Porter C.J.O. put his decision on the ground that the witnesses whose evidence was there in question were accomplices because they were actual parties to the offence. He there said:

> I am of opinion that the witnesses in question in the case at bar were accomplices, being concerned with another in committing a criminal offence, and *being parties to the offence by aiding and assisting in its commission.*

The italics are my own.

I do not think that anything which was said in the last two cases alters the law applicable to the evidence of prostitutes testifying in respect of such charges as it was laid down by Lord Reading in *Rex v. King*[3] where he found no evidence that the prostitute there in question was an accomplice and where, at page 119, he applied this test:

> It is impossible to say that she is therefore an accomplice *in the crime with which the appellant was charged.*

The italics are my own.

I have said that the rule requiring a judge to direct a jury as to the danger of convicting on the uncorroborated evidence of an accomplice does not, in my opinion, apply to the children under 16 years of age who gave evidence in this case because they are not capable of committing the

[1] (1957), 118 C.C.C. 234, 26 C.R. 226.
[2] (1961), 129 C.C.C. 423, 34 C.R. 137, [1961] O.W.N. 9.
[3] (1914), 10 Cr. App. R. 117.

offence with which the appellant was charged, but the same considerations do not apply to the evidence of Jack Best, an adult of 19 years, who testified to having had sexual intercourse with a child named Janice Janes with the knowledge and encouragement of the accused. In so doing, he was, in my opinion, undoubtedly contributing to the child's delinquency and he was doing so in concert with Mr. Horsburgh and was therefore an accomplice. I think also that James Butler and Michael Bechard, who were both over 16 years of age and could thus have been guilty of contributing to the delinquency of young girls, must also be regarded as accomplices because they gave evidence of similar acts by the accused in which they had participated.

Although, as I have indicated, Judge Fox instructed himself carefully in respect of corroboration (*a*) in relation to the nature of the offences and (*b*) in relation to the evidence of children, *qua* children, he at no time made any reference to the law relating to accomplices.

The well-known rule concerning the evidence of accomplices was stated in this Court by Anglin C.J.C. in *Vigeant v. The King*[1], where it was recognized as a rule of law that where an accomplice has given evidence the judge must first instruct the jury as to what in law constitutes an accomplice and then proceed to tell them that although they are at liberty to do so, it is dangerous to convict on the uncorroborated evidence of such witnesses.

The rule there stated is so well known that it is difficult to imagine that a "learned and experienced Juvenile Court Judge" would not have it in mind and I would adopt the following statement of Martin C.J.B.C., speaking in the British Columbia Court of Appeal in *Rex v. Bush*[2] as being applicable to the present circumstances. The learned judge there said:

> . . . there is no obligation upon a Judge to exemplify his legal qualifications respecting the rules of evidence in trying a case, because his requisite knowledge of the law pertaining to the proper discharge of the duties of his office must be assumed, and it cannot be inferred that he does not possess a sufficient knowledge of the rules of evidence to try a case properly as regards the evidence of accomplices, or otherwise, without distinction. Nor can it be presumed that he has fallen into error and misdirected himself unless that error is made manifest, *e.g.* it has been in some appeals that have come before us wherein the reasons assigned themselves disclosed the self-misdirection.

[1] [1930] S.C.R. 396 at 399, 400, 54 C.C.C. 301, [1931] 3 D.L.R. 512.
[2] (1939), 71 C.C.C. 269 at 271, 1 D.L.R. 428, 53 B.C.R. 252.

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As I have said, the trial judge made no mention of accomplices and in my opinion the reasons which he assigned for his decision did not disclose any self-misdirection in this regard. If he had given no reasons at all, his decision would not, in my view, have been open to question and I do not think that what he did say afforded any ground for presuming that he fell into error in relation to one of the most elementary rules of evidence.

Judge Fox obviously gave the most careful consideration to the evidence of Jack Best and while I do not say that I would have reached the same conclusion as he did concerning that young man's evidence, the question of credibility is not before us on this appeal and the trial judge was certainly at liberty to convict on it.

In this regard it may also be observed that even Mr. Justice Laskin in the powerful dissent which he delivered in the Court of Appeal did not find the young girls to be accomplices although he did say that their evidence could not amount to corroboration against the accused because it did not itself confirm his participation or implicate him in the offences charged. I disagree with this latter finding and observe that Janice Janes stated that on more than one occasion on Saturday nights the accused had admitted Jack Best and herself to the church where they repaired to an apartment which was furnished with nothing but two couches and one chair, and there had sexual intercourse and remained until about 11:30 p.m. during all of which time Mr. Horsburgh was in the church and after which Janice Janes says: "I think we always went to say goodbye to him". In my opinion this evidence corroborates and confirms the evidence of Jack Best in relation to the accused's participation in the offence of contributing to the girl's delinquency.

The evidence of the youths Butler and Bechard was admissible as proving system and intent, but there is no way of knowing what weight was attached to it by the trial judge as he made no comment whatever on either of these witnesses. I am not prepared on this account to assume that he acted on it or that if he did act on it he failed to appreciate the danger of doing so. There was, in my view, ample other evidence that the accused committed the offences of which he was found guilty.

Counsel for the appellant advanced the further objection that the examination of the child witnesses on the question of whether or not they understood the nature of an oath was not sufficient to enable the judge to form an opinion in that regard as he is required to do under s. 19 of the *Juvenile Delinquents Act*. That section is almost identical with s. 16 of the *Canada Evidence Act* and reads as follows:

> 19. (1) When in a proceeding before a Juvenile Court a child of tender years who is called as a witness does not, in the opinion of the judge, understand the nature of an oath, the evidence of such child may be received, though not given under oath, if in the opinion of the judge such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
>
> (2) No person shall be convicted upon the evidence of a child of tender years not under oath unless such evidence is corroborated in some material respect.

The provisions of s. 16 of the *Canada Evidence Act* were considered in this Court in *Sankey v. The King*[1], where Anglin C.J. said at 439 and 440:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself on the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; *as to both he is entrusted with discretion, to be exercised judicially* and upon reasonable grounds. The term 'child of tender years' is not defined. Of no ordinary child over seven years of age can it be safely predicated from his mere appearance, that he does not understand the nature of an oath. Such a child may be convicted of crime. *A very brief inquiry may suffice to satisfy the judge on this point.* But some inquiry would seem to be indispensable.

(The italics are my own.)

In my opinion, very special considerations apply to the determination of this issue when the child is appearing before "an experienced Juvenile Court Judge" who has the special advantage of having children come before him from day to day. A man of such experience should, indeed, be able to satisfy himself on this point after "a very brief inquiry". I am not prepared to find on the present record that Judge Fox acted otherwise than judicially in forming the opinions which he did with respect to the children who came before him.

[1] [1927] S.C.R. 436, 48 C.C.C. 97, 4 D.L.R. 245.

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Two affidavits were tendered before this Court, as they were before the Court of Appeal, sworn to by witnesses who had testified at the trial, both of which were to the effect that their evidence was untrue. We were asked to accept these affidavits, and while I do not for a moment suggest that there might not be cases where this kind of evidence should be accepted, I am nonetheless of opinion, for the reason stated by Mr. Justice Evans, whose conclusion was unanimously adopted by the Court of Appeal, that these affidavits should be rejected. As Mr. Justice Evans said: "I believe there must be some finality to the evidence of a trial."

For all these reasons I would dismiss this appeal.

SPENCE J.:—I have had the opportunity of reading the reasons of Mr. Justice Martland and I agree with his conclusion and also agree with the view which he expressed that it is not a valid ground for the refusal to hear the evidence of the two self-contradicting witnesses that the said witnesses had testified at the trial on the very issues where they now had expressed willingness to retract their previous evidence and contradict it.

In view, however, that a new trial may result, I think it proper to express my view on other submissions made by counsel for the appellant.

The said counsel submitted that five young witnesses who gave evidence for the Crown should not have been sworn in that the examination of the said witnesses failed to demonstrate that they understood the nature of an oath. These witnesses were the following persons:

Susanne Westfall who was, at the time of the trial, one month less than 15 years of age.

Robert Miller who was 16 years of age.

Judy Kibble who was 15 years of age.

Glen Eldridge who was 16 years of age, and

Janice Janes who was 15 years of age.

I have considered the authorities quoted by counsel for the appellant and it should be noted that none of them is concerned with children of such age, but on the other hand deal mostly with children much younger in years.

Mr. Justice Ritchie in his reasons for judgment herein has cited the judgment of Anglin C.J. in this Court in *Sankey v. The King*[1]. As the learned Chief Justice pointed out, the trial judge is entrusted with a discretion to determine whether or not a child offered as a witness understands the nature of an oath, and that such discretion, of course, must be exercised judicially and upon reasonable ground. The learned Chief Justice, however, noted that a very brief inquiry may suffice to satisfy the judge on this point.

Sankey v. The King was concerned with a child ten years of age, who indeed first gave her age as eight. I am of the opinion that a very brief inquiry indeed would have sufficed to satisfy the learned trial judge as to the ability of witnesses 15 and 16 years of age to understand the nature of an oath.

I have considered the examination of each of the witnesses by the learned trial judge and I have come to the conclusion, to use the words of the majority of this Court in *The Matter of a Reference concerning Steven Murray Truscott*[2], that "the learned trial judge properly exercised the discretion entrusted to him and that there were reasonable grounds for concluding that (the child witnesses) understood the moral obligation of telling the truth". I am of the opinion that the test so set out must be considered to be that upon which the competency of a child of tender years to be sworn must now be determined.

As Mr. Justice Ritchie notes, the statement in the learned trial judge's reasons in reference to the consideration of the evidence of children who had been sworn was made the subject of a vigorous attack by counsel for the appellant. I refer particularly to the sentence "in other words, once the judge has decided, after making due inquiry, that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness". With respect, I must differ from the view of Mr. Justice Ritchie that there the learned trial judge was doing no more than stating that the sworn evidence of children differs from unsworn evidence of children in that the latter requires corroboration.

[1] [1927] S.C.R. 436 at 439, 48 C.C.C. 97, 4 D.L.R. 245.
[2] [1967] S.C.R. 309, 1 C.R.N.S.1, 2 C.C.C. 285, 62 D.L.R. (2d) 545.

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The view expressed by the learned trial judge is not only that the evidence of children, once sworn, must be received, but it must be treated as that of a competent adult witness. In my opinion, this is a serious misdirection, as the witnesses, despite the fact that it was determined, in my opinion properly, that they were capable of being sworn, were nevertheless child witnesses and their testimony bore all the frailties of testimony of children, such frailties as Judson J. in this Court referred to in *Kendall v. The Queen*[1]. The evidence of such children was, as Judson J. pointed out, subject to the difficulties related to (1) capacity of observation, (2) capacity to recollect, (3) capacity to understand questions put and frame intelligent answers, and (4) the moral responsibility of the witness. It is this fourth difficulty which is very marked in the present case.

These five children particularly as well as other witnesses were all juveniles who had on their own repeated admissions been guilty of the most serious sexual misconduct. It was the whole import of their evidence that they had been encouraged or even led into that conduct by the words and acts of the accused. It would be natural that children making such confessions of their own misconduct would be only too anxious to seek excuse in attempting to put, whether it be to foist or not, the blame on the adult accused. To consider their evidence as that of competent adult witnesses under the circumstances, in my opinion, constituted the gravest error. Their testimony should have been weighed in the light of these most serious circumstances. With respect, I am of the opinion that the learned trial judge did not do so. Having noted the inconsistencies of their evidence, and having shown he was fully aware of their equivocal position, he nevertheless proceeded to assign credibility to their testimony, it would appear, basing such view upon their demeanour and not keeping in mind their history.

Findings of fact are, of course, for the learned trial judge but such findings must be made upon a consideration of the proper factors. I am of the opinion that the learned trial judge here, in the sentence I have quoted, deprived

[1] [1962] S.C.R. 469 at 473, 37 C.R. 179, 132 C.C.C. 216.

himself of one of the proper factors and proceeded, in his assignment of the credibility of the witnesses, to exhibit that he had so deprived himself.

I am further of the opinion that the learned trial judge erred in his assessing the credibility of the witnesses not only by failing to view with sufficient caution the evidence of children given in the circumstances to which I have referred but by failing to consider the evidence given by the accused in denial of such evidence of the children with any proper appreciation of the character of the accused who gave such evidence. There was adduced at trial for the defence not only the evidence of the accused but, inter alia, evidence testifying to the good character of the accused given by:

Mrs. Beatrice W. Fennell who had known the accused during the four years he occupied the position of pastor at this Church in Chatham;

The Reverend G. Morton Patterson, who had been acquainted with the accused since 1948 in the Sudbury area and in the City of Hamilton, and who had worked with him;

Reginald Johnson, a metallurgical chemist with the International Nickel Company at Copper Cliff, who had also worked with the accused in the Church at Sudbury;

David Innes, a barrister practising at Sudbury;

Cecil Robinson, Q.C., of Hamilton, who had been a member of the Trustees of the Church in Hamilton at which the accused was minister for some years;

Dr. Gordon Price, Director of Education in the City of Hamilton, a member of the same Church for many years;

Donald Fairfax, another member of the same Church in Hamilton;

The Reverend Donald Smeaton, a United Church clergyman who had been the accused's assistant when the accused had been pastor of a congregation in Waterloo, Ontario;

Mrs. Mae Hallman, who had been a member of the congregation in Waterloo;

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Jack Hansford, Sr., and *Jack Hansford, Jr.*, members of the same Church in Waterloo;

Mrs. Ida Davis, also a member of such Church;

Robert Lang, another member of such Church.

Without stating the evidence of these twelve witnesses in detail, suffice it to say they gave very strong character evidence in favour of the accused man. The learned trial judge, although he realized and acknowledged that the accused was a clergyman and had been so for years, did not, in weighing the evidence of the many child witnesses for the prosecution whose admitted conduct may well be characterized as disreputable, assess that evidence having in view the denial of it by the accused whose character was vouched for by the very large volume of evidence to which I have referred.

The learned trial judge did not refer at all to the character evidence in giving his reasons.

In *Rex v. Britnell*[1], Meredith J.A., in considering an appeal by a bookseller from a conviction for sale of obscene books, said at pp. 137-8:

> The convicted man is a reputable book-seller, who carries on business, in an extensive way, in one of the business centres of Toronto. Although neither his reputation, or the character and extent of his business, is a reason why he should not be convicted, and punished, if guilty, yet they are not things without weight, and very considerable weight, in considering the probabilities of the truth of the charge against him upon the question whether there was any reasonable evidence of guilt adduced against him at the trial, as well as upon the question of fact, with which the Court cannot deal, whether guilty or not guilty.

In *Regina v. Chapman*[2], O'Halloran J.A. said at p. 362:

> According to the rules which this Court recognizes as inherent in any finding of credibility, his professional reputation must stand unless it is shown by conclusive evidence beyond reasonable doubt, that he has engaged in some practice that denies the maintenance of that reputation.

And at 363:

> In the second place a man's professional reputation ought not to be taken away from him, except for conclusive reasons which in fairness to the man himself ought to be carefully set out by the trial judge whose decision deprives him of that reputation. It is to be regretted that was not done in this case.

[1] (1912), 26 O.L.R. 136, 20 C.C.C. 85, 4 D.L.R. 56.
[2] (1958), 121 C.C.C. 353, 29 C.R. 168, 26 W.W.R. 385.

I am of the opinion that the accused on whose behalf such evidence had been adduced was entitled to have that evidence of his character cited and considered by the trial judge in arriving at his decision. As the record stands, there is no way of determining whether such evidence was given any consideration by the learned trial judge.

For these reasons, as well as for those outlined by Mr. Justice Martland, I would allow the appeal and direct a new trial.

Appeal allowed, new trial ordered, FAUTEUX, JUDSON *and* RITCHIE JJ. *dissenting.*

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Solicitor for the respondent: The Attorney General for Ontario.