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Charge to the Jury,
Errico, C.C.J.

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Jury Question 32

Verdict of the Jury 33

1

Charge to the Jury
Errico, C.C.J.

Smithers, B.C.

12th April, 1988

1
2
3
4
5 THE COURT: Members of the jury, you have now heard all
6 of the evidence in this case and you will recall the submissions
7 of counsel that you heard yesterday. As I indicated to you,
8 before you retire to consider your verdict I will instruct
9 you on the law and review the evidence with you.

10
11 When the trial started I told you about the
12 general procedure involved in a criminal trial and about each
13 of our responsibilities. At that time I mentioned to you
14 that you were selected as judges of the facts and that it was
15 my duty to deal with all questions of law and that it is your
16 duty to deal with all questions of fact arising from the evi-
17 dence. You must accept the law as I explain it to you without
18 question. If either Mr. O'Byrne or Mr. Byl has said anything
19 differently about the law from what I say, you must accept
20 my version. This means when you decide what the facts in this
21 case are you must apply the rules of law that I will give you.
22 It also means you must apply the law as I explain it to you
23 when you decide whether or not the crown has proved the elements
24 of the offences charged beyond a reasonable doubt. You are
25 not allowed to decide this case on the basis of what you think
26 the law is or what you think it should be. You see, if I am
27 wrong about the law then justice can still be done. The Court
28 of Appeal can always correct me because my remarks are recorded
29 by the court reporter. But justice will not be done if you
30 wrongly apply the law. This is because your discussions are
31 secret. No-one keeps a record of your discussions for the
32 Court of Appeal to review. Therefore it is very important
33 that you accept the law from me without question.

34
35 On the other hand, you as jurors are the sole
36 judges of the facts. I will try and assist you by reviewing
37 the evidence for you but at the end of the day it is you and
38 you alone who must decide what the facts in this case are.
39 And as I told you at the beginning of the trial, you must do
40 so only on the basis of evidence presented here in the court
41 room. You must ignore anything that you hear or read about
42 this case outside this courtroom. As judges it is your duty
43 to consider the evidence carefully and dispassionately and
44 to weigh it without any trace of sympathy or prejudice for
45 or against anyone involved in these proceedings. Reflect
46 upon the evidence you have heard, weigh it and make a decision
47 as to whether you accept it entirely, partially or not at all.

2

Charge to the Jury
Errico, C.C.J.

1 You may be troubled by the difference between
2 what is evidence and what is fact. Evidence is the body of
3 testimony that you have heard, including the exhibit that was
4 filed. Facts are the things that you choose to believe from
5 the evidence. The things that you choose not to accept must
6 not be taken into account when arriving at your verdict.
7 From the facts that you find you may draw inferences with respect
8 to other facts and you may rely upon these inferences in deter-
9 mining whether the accused is guilty or not guilty.

10
11 It is your memory of the evidence that counts.
12 The evidence that you heard in this trial generally is not
13 typed up in the form of a transcript. I will be reviewing
14 the evidence with you from my notes taken during the course
15 of the trial. These notes may not be completely accurate because
16 I am not trained as a shorthand reporter. Indeed, I freely
17 admit to you that the notes are simply that - notes. They
18 don't purport to be verbatim by any means. You must therefore
19 rely on your own memory of the evidence and if it is different
20 from what I suggest to you in my review of the evidence, it
21 is your memory that counts. The same caution applies to any-
22 thing that counsel may have said about the evidence. It is
23 also your opinion of the evidence that counts. When I am
24 reviewing the evidence for you I may say something that suggests
25 whether or not I think you should believe some or all of a
26 witness' testimony. If I do this you are not bound by my
27 opinion. The evidence may have left an entirely different
28 impression with you than it left with me. It is your duty
29 to place your own interpretation on the evidence because you
30 are the judges of the facts arising from the evidence. During
31 my remarks to you I might consciously or unconsciously express
32 my opinion as to whether the accused is guilty or not guilty.
33 You must ignore my opinion. You are the judges of the facts.
34 It is your responsibility to apply the law that I give you
35 to the facts that you find in order to reach a proper verdict
36 of guilty or not guilty.

37
38 I will now tell you about the presumption of
39 innocence and the requirement for proof beyond a reasonable
40 doubt.

41
42 The presumption of innocence is perhaps the
43 most fundamental principle of our criminal law. Every person
44 charged with a criminal offence is presumed to be innocent
45 until the crown proves his or her guilt beyond a reasonable
46 doubt. The accused does not have to prove that he is innocent.
47 You are to presume that the accused is innocent throughout

3

Charge to the Jury
Errico, C.C.J.

1 your deliberations. You may only find the accused guilty
2 if, after you consider all of the evidence, you are satisfied
3 that the crown has proved its case beyond a reasonable doubt.
4 Let me put this another way. The accused does not have to
5 prove anything. It is up to the crown to prove its case on
6 each element of the offence beyond a reasonable doubt. The
7 burden or onus of proving the guilt of the accused beyond a
8 reasonable doubt rests upon the crown and never shifts. You
9 must find the accused not guilty if you have a reasonable doubt
10 about his guilt after you consider all the evidence.

11
12 You may ask what proof beyond a reasonable
13 doubt means. There is no simple answer to this question.
14 A reasonable doubt may arise from the evidence, a conflict
15 in the evidence or from a lack of evidence. A reasonable
16 doubt is based upon reason. It is not an imaginary or frivolous
17 or speculative doubt. It is the sort of doubt for which you
18 could give a logical and rational explanation if asked. If
19 you are morally certain or feel sure that the accused committed
20 the offences with which he is charged then you do not have
21 a reasonable doubt. If you believe that the accused is prob-
22 ably guilty or likely guilty but still have a reasonable doubt,
23 you must give the benefit of that doubt to the accused and
24 return a verdict of not guilty. When I say this I am, of
25 course, referring to each of the separate counts in the indict-
26 ment that you will be considering in your deliberations. On
27 the other hand, you must not set up a standard of absolute
28 certainty that the crown must meet in order to prove guilt.
29 You must be satisfied beyond a reasonable doubt as to the guilt
30 of the accused. The requirement of proof beyond a reasonable
31 doubt applies to each element or essential part of each count
32 on the indictment. The crown must prove that the accused did
33 each of the elements that make up the offence. If I use words
34 such as "the crown must prove" or "the crown must establish"
35 or "the crown must show" or "you must be satisfied", or words
36 of a similar sort, please understand that these words mean
37 proof by the crown beyond a reasonable doubt.

38
39 I will now instruct you on the rules you will
40 use when you consider the evidence in this case. First I will
41 discuss some general rules and then I will discuss some specific
42 rules that apply to this case because of the nature of the
43 evidence.

44
45 As I told you earlier when I spoke to you about
46 the functions of a judge and jury, you must decide which evidence
47 you will believe. You must also decide how much weight or

4

Charge to the Jury
Errico, C.C.J.

1 importance you will give to the testimony of each witness.
2 My remarks are intended to help you in these tasks. Generally
3 I would suggest you use your common sense and experience as
4 men and women of the community to assess the credibility of
5 each witness. In doing so you should keep the following points
6 in mind. When you consider the evidence of a witness please
7 understand you do not have to accept or reject everything a
8 particular witness said. You may, of course, decide to accept
9 or reject everything a witness said in the witness box but
10 you may also decide to accept only some of what a witness said
11 and reject the rest. That decision is yours. As you know,
12 people hear and see things differently. This means that we
13 should not be surprised to find innocent discrepancies in the
14 testimony of a witness. Such discrepancies do not mean that
15 you must reject the testimony of a witness. Discrepancies
16 in minor matters are often unimportant. On the other hand,
17 it is entirely different when a witness deliberately lies under
18 oath. A deliberate lie under oath is always serious and may
19 well taint the entire testimony of a witness. There is no
20 fixed set of rules to use in assessing the credibility of a
21 witness but the following are some of the things you should
22 probably want to consider. Was there something specific that
23 helped the witness remember the details of the event that he
24 or she described? In other words, was there something unusual
25 or memorable about the events so that you would expect the
26 witness to remember the details or was the event relatively
27 unimportant at the time so the witness might easily have been
28 mistaken about some of the details? Did the witness have
29 a good opportunity to observe the event which he or she des-
30 cribed? How long was the witness watching or listening?
31 Was there anything else happening at the same time that might
32 have distracted the witness? Does the witness appear to have
33 a good memory? How did the witness appear to you in giving
34 evidence? Was the witness forthright and responsive to ques-
35 tions or was he or she evasive, hesitant or argumentative with
36 counsel? Is the testimony of the witness reasonable and con-
37 sistent or did the witness contradict himself or herself?
38 Is the witness' testimony consistent with the testimony of
39 other witnesses? Is the witness impartial? Does he or she
40 have some interest in the outcome of the case? Is there
41 some reason why the witness might tend to favour the crown
42 or the accused? You should apply your common sense and decide
43 what evidence you accept and how much weight or importance
44 you wish to give to it.

45
46 Now I wish to deal with some rules with respect
47 to evidence that relate particularly to this case.

5

Charge to the Jury
Errico, C.C.J.

1 You have heard evidence that a certain written
2 statement was made by the accused and it is before you as Exhibit
3 1. The fact that this statement was given does not mean it
4 was made or that it is true. It is for you to decide whether
5 the statement was made. If you have a reasonable doubt about
6 whether or not a particular statement was made, in whole or
7 in part, you must reject it entirely or reject those parts
8 to which you have a reasonable doubt as to the making. On
9 the case you have before you I do not think there is really
10 any issue that the statement was in fact made. Nevertheless,
11 that is a finding for you to be satisfied of beyond a reasonable
12 doubt before you can go on and consider the statement. If
13 you find that the statement was made, you may believe all of
14 the statement, part of it, or you can reject it entirely.
15 You are the sole judges as to whether an unsworn statement
16 alleged to have been made by the accused in whole or in part
17 is an acknowledgement by the accused of the truth of the matters
18 contained in it. So much of the statement as you find to
19 be an acknowledgement of the truth you will take into considera-
20 tion as evidence in this case and you will decide the weight
21 to be given to such evidence. The statement was not given
22 under oath but you may act on those parts which in your judgment
23 are an acknowledgement by the accused of the truth of the facts
24 in the statement. If you decide to accept part or all of
25 it, it will be considered by you with the other evidence that
26 you decide to accept. And you must, of course, reach your
27 verdict on the whole evidence that you decide is worthy of
28 belief.

29
30 The fact that a witness has on a prior occasion
31 made a statement or statements that are contradictory or incon-
32 sistent with her evidence at this trial goes to the credibility
33 or truthfulness of the witness. The testimony of a witness
34 may be discredited in whole or in part by showing that the
35 witness previously made statements which are inconsistent with
36 his or her present testimony. I think I can refer safely
37 to "her" in this case because all of the suggestions of incon-
38 sistency deal with the evidence of the three complainants.
39 I want to make it clear that such prior statements cannot be
40 used to prove the truth of the facts to which they relate unless,
41 in your opinion, the witness has, while testifying here, accepted
42 the truth of the previous statement. It is for you to decide
43 which parts, if any, of the earlier statement have been accepted
44 by a witness as true and the weight to be given to those parts.
45 Any part of the earlier statements which were not accepted
46 by the witness here in the witness box as being true cannot
47 be relied upon by you as proof of the facts stated in the prior

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1 statement. You can only use those parts in deciding the truth-
2 fulness of the witness. You are the sole judges if there
3 has been a contradiction with an earlier statement by a witness
4 and the effect of it on her credibility.

5
6 Some of these suggested contradictions of the
7 principal crown witnesses in this case are with respect to
8 their previous sworn testimony at the preliminary inquiry.
9 If you find that the evidence of a witness here at the trial
10 is in direct conflict with their earlier sworn testimony -
11 and when I say "in conflict" I mean something more than a slight
12 inconsistency - if you find it is in direct conflict with their
13 earlier sworn testimony, I instruct you that it would be dan-
14 gerous for you to accept that witness' testimony unless you
15 are satisfied with the witness' explanation for such contra-
16 dictions.

17
18 I will now give you some examples of what is
19 suggested, principally by defence counsel, to be prior incon-
20 sistent statements. Firstly with respect to the evidence
21 of Shawna Zettergreen. She denied here in her testimony that
22 she had discussed the case before with her sister. She was
23 then directed to certain questions and answers in the prelimi-
24 nary inquiry at which she testified. And she was asked, "Now,
25 you have a younger sister, don't you?" "Yes." "And she is
26 now turning 12 years old? Eleven, 12?" "She is turning 12
27 in November." "And her name is Jodina?" "Yes." "And she
28 is also a witness in these proceedings? Right?" "Yes." "Have
29 you talked to her about this case?" "Recently or before or
30 --" "At any time have you talked to her about this case?"
31 "Hm. Just in January or February. I just found out." And
32 then she was cross-examined further about that passage. She
33 acknowledged that that was evidence that she gave at the pre-
34 liminary inquiry. And she acknowledged that she gave those
35 answers but that she didn't talk to her sister but that she
36 had only heard Jodina talk to a person called Peter. Then
37 she said here in her testimony that what was said in the trans-
38 cript was not true.

39
40 Some examples of prior inconsistent statements
41 alleged to have been made by Jodina Zettergreen. She testified
42 in cross-examination that there was more than one time that
43 she was sexually assaulted by the accused. And she agreed
44 that's the statement that she gave to the police and in that
45 statement she said that it was only once. You will recall
46 that counsel for the accused read her statement to her verbatim.
47 And so you understand I think it's appropriate that I read

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1 it to you.

2
3 "When I was seven years old I went to Emsley Morgan's
4 place to spend the night with Camilla and Bertha Ann.
5 I was alone in Camilla's bedroom when Emsley came in
6 to the bedroom and shut the door behind him. And then
7 he came over and sat down on a chair in the bedroom.
8 He called me over to him so I went over to him and he
9 put me on his lap. He then put his hands under my clothes
10 and felt my private spots. I didn't do anything as
11 I was afraid of him and started to cry. He then stopped
12 after a while and left the bedroom. Then Bertha Ann
13 came in and we started playing.

14
15 Q Has this ever happened to you since the incident?

16
17 A No.

18
19 Q So this is the only time Emsley has done this to
20 you?

21
22 A Yes.

23
24 Q What private spots did Emsley touch on you? Your
25 breasts, bum or your vagina?

26
27 A My vagina.

28
29 Q Did he put his finger inside?

30
31 A No.

32
33 Q Did you ever see Emsley do this to any other girl?

34
35 A No."

36
37 She said - this was also put to her - that she had, at the
38 preliminary inquiry, had this statement put to her and she
39 said that she could not remember if what she had said at the
40 preliminary inquiry was said. This passage was put to her,
41 as you recall. And that passage that was put to her was exactly
42 the same passage and the answer that she gave at the preliminary
43 inquiry was yes, that the statement was true. She couldn't
44 remember that. But you will recall that there's evidence
45 before you that that passage was indeed an accurate passage
46 of what took place at the preliminary inquiry. She acknowledged
47 that what she had told the policeman was not true. That is,

8

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1 she does remember telling the policeman that and she acknowledged
2 that what she told the policeman was not true and that she
3 knew it was a serious matter she was dealing with when she
4 spoke to the policeman. She acknowledged that if she had
5 said that, if she had said at the preliminary inquiry that
6 what she had told the policeman was true then her answer at
7 the preliminary inquiry, when she was sworn to tell the truth,
8 was not true.

9
10 An example of previous inconsistent statements
11 of Melanie Morgan. I think there are a number. She testified
12 here of three incidents of molestation. At the preliminary
13 inquiry-- It was put to her here in her evidence that at the
14 preliminary inquiry she made the following statements and gave
15 the following answers to questions put to her. She was asked,

16
17 "Q And other than these two incidents that you've des-
18 cribed you can't recall any others right now, can
19 you?

20
21 A No.

22
23 Q By "no" you're agreeing with me?

24
25 A No.

26
27 Q You're not agreeing with me?

28
29 A I don't remember any others.

30
31 Q You can't remember any others than these two? Is
32 that right, ma'am?

33
34 A No."

35
36 She was asked here if those answers were true and she said
37 yes. She then said that there were three incidents and that
38 she remembered three in July of 1987; July of 1987 being
39 the date of the preliminary inquiry. She replied "no" when
40 she was asked here if she remembered two incidents then and
41 three now. And she said words to the effect, "I don't know
42 if you guys understood me but I said three." And she agreed
43 that at the preliminary inquiry she testified about one incident
44 in the bedroom and one on the couch. That was an outline
45 of the evidence that deals with the question of prior inconsis-
46 tent conflicting statement with respect to that issue.
47

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1 She then testified here that when she was in
2 the bedroom on the bed and of the allegation that she made
3 then that she did not struggle. She was again referred to
4 the preliminary inquiry.

5
6 "Q I'm sorry, I didn't hear you. Did you say that
7 you tried to struggle?

8
9 A Yes.

10 Q Can you describe that for us, please?

11 A Moved my arm. Sort of shoved.

12 Q How far did you move your arm?

13 A Just enough to shove."

14
15 She confirmed here in her testimony that she gave those answers.
16 She confirmed that now she is saying that there was no struggle.
17 When she was asked here on cross-examination to give a des-
18 cription of the struggle-- No. She was asked here if the
19 description of the struggle she gave at the preliminary inquiry
20 was not true and there was-- at least, I didn't note any res-
21 sponse from the witness.

22
23 Another example is at the trial she described
24 her nightgown. And that was on the occasion on the couch.
25 She described it, as I recall her evidence, as a long night-
26 gown. She was wearing her nightgown and panties when she
27 was in the living room. And she was asked at the preliminary
28 inquiry in July,

29 "Q Okay. Is that the couch in your uncle's house?

30 A Yes.

31 Q What were you wearing, do you remember, when you
32 fell asleep?

33 A No."

34
35 She agreed here then in her testimony that she did not remember
36 that in July of 1987. She said the reason she didn't remember
37 that then was that she was then confused and afraid.

38
39 Members of the jury, these are some and may

10

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1 be all of the contradictions or conflicts allegedly contained
2 in the evidence. I may have overlooked some or you may think
3 there are some that exist that I have not commented on. That
4 is a consideration, then, for you to consider in assessing
5 the evidence in the manner I have earlier described to you.
6

7 Another issue with respect to the evidence
8 in this trial is evidence of what may be referred to as similar
9 facts. It is a fundamental principle of the criminal law
10 that the evidence in one count of the indictment cannot usually
11 be used on another count in the indictment unless there are
12 similarities between the counts. If there is evidence on
13 the one count which shows a similar mode of behaviour to the
14 evidence on another count, and vice versa, then that evidence
15 can be considered in deciding if the accused did the acts com-
16 plained of in the other count. In this case I have decided
17 that the evidence of each complainant is admissible with respect
18 to the offences charged with respect to the other complainants
19 but it is admissible for a limited purpose. That is that
20 you may infer from the evidence, although you are not required
21 to do so, that the incidents mentioned in counts 1 and 2 have
22 characteristics in common with the characteristics of the inci-
23 dents with respect to counts 3 and 4 or 5 and 6. And that,
24 of course, is a finding of fact for you to make or not. And
25 that you may draw the inference from that that it was likely
26 that they were all committed by the accused. It is entirely
27 up to you to draw that inference or not and this is simply
28 a piece of evidence that you can consider with all the other
29 evidence in the case. When examining this evidence of similar
30 facts you should not conclude that the accused is guilty of
31 any offence simply because you think his character or disposi-
32 tion is such that he is likely to have committed the offences
33 charged. It is only the examination of any similarity in
34 the incidents that you find that you may consider as evidence.
35 In considering if this is evidence of similar facts or this
36 is evidence of similar behaviour, you must of course keep in
37 mind the possibility of a collaboration between the complainants
38 to fabricate evidence that implicates the accused. This,
39 as I understand it, is the principal issue raised by the defence
40 in this case. The evidence of similarity is, of course,
41 of no probative value if you find or have a reasonable doubt
42 that the complainants collaborated or conspired together to
43 fabricate that evidence.
44

45 I will now review with you the specific counts
46 on this indictment, the law as it relates to these counts, and
47 review generally the evidence as it relates to each count.

11

Charge to the Jury
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1 I will then review the evidence. I think I am obliged to do
2 that in this case. I will review with you, from my notes,
3 generally the evidence.
4

5 You will note that there are six counts in
6 this indictment. I don't think it would serve any useful
7 purpose if I were to recite them to you just in general. You
8 will note there are six counts on the indictment and that two
9 counts relate to each complainant. For example, count 1 refers
10 to a charge of indecent assault on Shawna Zettergreen and count
11 2 refers to a charge of sexual assault on Shawna Zettergreen.
12 You will also note that the charges of indecent assault all
13 run to the 3rd day of January, 1983, and that the charges of
14 sexual assault run from the 4th day of January in 1983. The
15 reason for this is that the law was amended effective the 4th
16 day of January, 1983, repealing the offence of indecent assault
17 and enacting the offence of sexual assault. Now, as I deal
18 with the law with relation to indecent assault and sexual assault
19 I will not repeat my instructions as to what constitutes indecent
20 assault or sexual assault after I have reviewed it once when
21 discussing counts 1 and 2. I think that would be unnecessary
22 repetition.

24 Each of the counts charges offences that alle-
25 gedly took place at or near Kitwanga, County of Prince Rupert,
26 Province of British Columbia. Also refers to the specific
27 complainant in each count and it refers to the accused, Emsley
28 Robert Moody Morgan. I do not think that there is any issue
29 about the place alleged or of the identity of the accused or
30 of the complainants. But you must be satisfied of these matters
31 as well as all of the other elements of each charge and each
32 count before you can find the accused guilty of that count.
33 With respect to the dates which the offences are alleged to
34 have been committed, you will note they cover a relatively
35 long period of time. The evidence I leave to you. It is
36 not that clear and concise. It has not been raised as a parti-
37 cular issue by counsel for the accused. Nevertheless, I think
38 you're going to have to examine that evidence to satisfy yourself,
39 or not, on whether or not these offences, if at all, were com-
40 mitted within the time frames set out in the indictment. Counts
41 1 and 2 charge indecent assault and sexual assault, respect-
42 ively, involving Shawna Zettergreen. Counts 3 and 4 charge
43 indecent assault and sexual assault, respectively, involving
44 Jodina Zettergreen. Counts 5 and 6 charge indecent assault
45 and sexual assault, respectively, involving Melanie Morgan.
46

47 I will now deal with counts 1 and 2. Count

12

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1 reads:

"Emsley Robert Moody Morgan stands charged that he, at or near Kitwanga, in the County of Prince Rupert, Province of British Columbia, between the 18th day of June 1978 and the 3rd day of January 1983, did commit an indecent assault on Shawna Zettergreen."

In considering an indecent assault you must determine first what is an assault. In the context of this case an assault is the intentional application of force, directly or indirectly, to another person. A slight touching is sufficient. There need not be any degree of force. "Intentional" means a touching that is not accidental. Where the charge, as here, is indecent assault, the consent of a person under the age of 14 years is not a defence. That will mean that you will have to consider the evidence of age with respect to the dates contained in the indictment. The next question is whether the assault, if any, was indecent. An indecent assault is an assault accompanied by circumstances of indecency. "Indecent" means morally offensive; offending against prevailing notions of modesty and decency. It is a question of fact whether the thing done was indecent. I think it's not-- I shouldn't say not an issue but I think it should be clear to you that if you find as a fact that the accused did touch a young girl on her vagina, as is alleged in the evidence of the complainants, that you would have no difficulty in finding that was an indecent assault. However, that is a consideration for you to make and you must be satisfied of that beyond a reasonable doubt if you are to convict the accused.

With respect to count 2 in the indictment,
it reads:

"Count 2. Emsley Robert Moody Morgan stands charged that he at or near Kitwanga, in the County of Prince Rupert, Province of British Columbia, between the 4th day of January 1983 and the 18th day of June 1983, did commit a sexual assault on Shawna Zettergreen."

In considering these charges of sexual assault contained in this indictment you must again determine first what is an assault. Again, as in the charge of indecent assault, an assault is the intentional application of force, directly or indirectly, to another person. No great degree of force is necessary and a slight touching is sufficient. Again, "intentional" means not accidental. With a sexual assault the consent of a person

13

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1 under the age of 14 years is not a defence unless the accused
2 is less than three years older than the complainant. We don't
3 have, I don't think, any direct evidence as to the age of the
4 accused but we certainly do have evidence that he's been married
5 in excess of 24 years and I think you can observe him in the
6 courtroom and you should have no difficulty with that age dis-
7 crepancy. The next question is whether the assault, if any,
8 is sexual. The word "sexual" in this context means anything
9 involved with sexual gratification or reproduction or the urge
10 for these, such that the sexual integrity of the victim is
11 violated. Again, I think if you were to find as a fact, beyond
12 a reasonable doubt, that the accused touched a complainant
13 on her vagina that you would have no difficulty in finding
14 that to be a sexual assault. Again, that is a matter for
15 you as the jury to find or not, as you may determine on the
16 evidence.

17
18 Now, briefly the evidence concerning the inci-
19 dents alleged in counts 1 and 2 is the evidence of the com-
20 plainant, Shawna Zettergreen. You can consider the evidence
21 of similarities that you may find in the evidence of Jodina
22 Zettergreen and Melanie Morgan for those limited purposes that
23 I have mentioned. You may consider the statement of the accused.
24 And you will also consider the evidence called on behalf of
25 the defence, that is the evidence of Gail Morgan, Camilla Morgan
26 and Mabel Morgan.

27
28 Similarly with counts 3 and 4. They allege,
29 with respect to count 3, that the accused at or near Kitwanga,
30 County of Prince Rupert, Province of British Columbia, between
31 the 13th day of November, 1982, and the 3rd day of January,
32 1983, committed an indecent assault on Jodina Zettergreen.
33 And that at or near Kitwanga, the County of Prince Rupert,
34 Province of British Columbia, between the 4th day of January,
35 1983, and the 14th day of November, 1983, did commit a sexual
36 assault on Jodina Zettergreen.

37
38 The law, again, is the same as I mentioned
39 it in counts 1 and 2. The evidence is the evidence of the
40 complainant, Jodina Zettergreen; the evidence of similarities
41 in the evidence of Shawna Zettergreen and Melanie Morgan for
42 the limited purposes that I have mentioned to you; and the
43 statement of the accused and the evidence of Gail Morgan,
44 Camilla Morgan and Mabel Morgan.

45
46 With respect to counts 5 and 6. Again, these
47 are that-- Count 5 that at or near Kitwanga, County of Prince

14

Charge to the Jury
Errico, C.C.J.

1 Rupert, Province of British Columbia, between the 6th day of
2 May, 1979, and the 3rd day of January, 1983, did commit an
3 indecent assault on Melanie Morgan. And count 6, that or
4 or near Kitwanga, in the County of Prince Rupert, Province
5 of British Columbia, between the 4th day of January, 1983,
6 and the 5th day of May, 1985, did commit a sexual assault on
7 Melanie Morgan.

8
9 Again, the law is the same with respect to
10 a sexual assault and an indecent assault as I have told you
11 with respect to counts 1 and 2. The evidence is the evidence
12 of Melanie Morgan and the evidence of whatever similarities
13 you find and the consideration you give to them in the evidence
14 of Shawna Zettergreen and Jodina Zettergreen; and the statement
15 of the accused and the evidence of the defence witnesses, Mabel
16 Morgan, Gail Morgan and Camilla Morgan.

17
18 If you are satisfied beyond a reasonable doubt
19 that the crown has proved each element in each count-- or
20 any count, rather, then you will convict the accused of that
21 count. If you have a reasonable doubt of any element in a
22 count in the indictment you will find him not guilty of that
23 count.

24
25 I will now review with you the evidence. Again,
26 members of the jury, let me emphasize that what I am doing
27 is reviewing my notes and reviewing what I consider to be perhaps
28 the more important evidence in this case but it is your recol-
29 lection of the evidence. And if you have thoughts that I am
30 raising something that you don't consider important, that's
31 your decision. And if you think that I overlooked something
32 that is important, that again is your decision. What I am
33 attempting to do is review it with you so it just might bring
34 back to you the actual testimony of the witnesses.

35
36 You will recall that the first witness, crown
37 witness, was Melanie Morgan and she was sworn. She said she
38 is 16 years of age and she was born on May 6th, 1971. She
39 lived in Kitwanga all her life. She knows the accused, Emsley
40 Morgan. She identified him. "He's my dad's uncle", she
41 testified to. "I'm a friend of his daughter, Camilla. When
42 I was younger I would stay overnight at Emsley Morgan's home.
43 My parents would leave me there. I don't know how old I was
44 the first time. My little sister was also left in Emsley
45 Morgan's house. Her name is Leslie. I don't recall how
46 old Leslie was the first occasion. Leslie is three years
47 younger than me. I think she was born in 1975. The first

15

Charge to the Jury
Errico, C.C.J.

1 time I was at Emsley Morgan's house..."-- The first time,
2 in any event, was her evidence. I'm not sure if that was
3 the first time in the house or not. The evidence was first
4 time. "My younger sister was in school. I don't recall what
5 grade she was in. I don't recall how old she was or know
6 how old she was when she started school". Described, "First
7 time I was at Morgan's overnight I slept in the girls' room."
8 "Camilla's?", she was asked. Said, "I don't know." Then
9 she said, "Yes. Others than Camilla slept in that room".
10 When asked who else she didn't give a reply. You will recall,
11 I think, in the evidence that there were a number of pauses
12 in this witness' testimony, some of which I have noted. "I
13 slept in Camilla's bed with Camilla". That seems to clear
14 that up. "I slept in Camilla's bed with Camilla. When I
15 woke up next morning Emsley was in the room". She was asked
16 what he was doing. There was no reply. Then asked how close
17 he was and she said, "He was sitting right beside me on the
18 bed. He didn't say anything to me". She was asked if anything
19 was done to her and she said yes. And she was asked what.
20 She answered, "He was touching me", underneath her panties
21 with his hands. "He was touching my vaginal part. I don't
22 know if his hand was stationary or moving. After I had awoke
23 it seemed like he was touching me for five or ten minutes.
24 I was still wearing a nightgown. It was pushed up to my chest".
25 She gestured, I think, just below her neck. You remember
26 she was asked how old she was-- if she remember how old she
27 was and she said no. She didn't remember how old Camilla
28 was at the time. She said she stayed more than one night that
29 weekend. The next night she slept in a different bed. She
30 said she slept-- thought it was Colleen's bed but she shared
31 that bed with Camilla. And she didn't know who else was in
32 the bed. It was a girl. She said, "I went to sleep and during
33 the night I woke up. I was woken by Camilla. She turned
34 over. I got hit by her arm".

35
36 There is some evidence before you, members
37 of the jury, that I don't know if there's any use you can make
38 of it but I'm going to refer to it because I wish to make that
39 comment about I don't know what use you can make of it. There's
40 evidence that-- the kids sleeping on the floor and Jodina
41 Zettergreen is there. She was on the floor. And that she
42 saw Emsley Morgan there and he was in a bathrobe. It was a
43 blue bathrobe. She said she didn't know how Jodina was dressed.
44 She said, "He was still there when I went back to sleep".
45 And said she saw him touching Jodina. She didn't know how.
46 "His back was facing me. He was just sitting beside her.
47 I didn't do a thing". This, of course, does not confirm the

16

Charge to the Jury
Errico, C.C.J.

1 allegations that Jodina made because she didn't testify as
2 to anything like this. And I have some difficulty with that
3 evidence, members of the jury. I just don't think that it's
4 evidence that is probative but it is before you and I think
5 I should comment on it for that reason.
6

7 She referred to another occasion that she was
8 at Emsley Morgan's place and she said, "I was 11 or 12 at that
9 time. I don't remember the time of year". She said, "I slept
10 overnight". She was in the bed with Camilla. She thinks
11 Leslie slept in Colleen's bed. She was wearing a nightgown
12 and panties. "When I woke up Emsley Morgan was in the room.
13 He was right beside me. I was on the bed beside Camilla.
14 And he had his hand under my panties, touching my vaginal part.
15 I don't know how long he touched me there. I don't know how
16 he was dressed. I didn't say anything to him. He said he was
17 just waking me up". She was asked "Where was his other hand?"
18 She replied, "It was around me". She was asked, "Where was
19 it around you?" And there was no response. Said, "Yes, Cami-
20 lla was asleep. There were covers on the bed". Again she
21 said her nightie was pulled up to her chest. She was asked
22 if she stayed one more night on that occasion and she said
23 yes.
24

25 Again you had some evidence before you which
26 I am commenting on for the purpose that I think you can make
27 no use of it. It is the evidence that "The morning I saw
28 Bertha Ann. Emsley was near her. He was sitting beside
29 her and he was in a bathrobe". And that's it. There's simply
30 nothing there that, in my view, you can make any use of, when
31 you consider all of the evidence you have before you about
32 this being the home and this the room with all the children
33 in it.
34

35 She then testified to an occasion in which
36 she-- "I turned 14 in 1984". Then she corrected herself to
37 1985. On May 6th. "Just before my fourteenth birthday I stayed
38 overnight at Emsley's. I was asked to by Camilla". And she
39 described that "We were watching video. Just me and Camilla,
40 I guess. I was in my nightgown and panties. Nothing else.
41 I fell asleep on the couch. When I woke up Emsley was sitting
42 beside me on the couch. I didn't talk to him. He said some-
43 thing. I don't recall. I was half asleep. The radio woke
44 me up. Camilla was asleep on the other couch. The hem of
45 my nightie was pushed up above my chest again and Emsley put
46 it back in place". The question she was asked, when she deve-
47 loped breasts and there was no answer and counsel did not pursue

17

Charge to the Jury
Errico, C.C.J.

1 the question. Said that in November of-- No, I'm sorry.
2 She was now in grade 11. She was asked how old she was when
3 she started school and she didn't know.

4
5 She was cross-examined. She denied that in
6 the bedroom, Camilla's bedroom, there was only one bed. She
7 confirmed, "Yes, Camilla and I were in the one bed". She was
8 asked if she was 11 or 12 then. She said, "No, not the first
9 time. I was 9 or 10 then". Yes, she agrees that Camilla
10 has an older sister Gail. She said, "I don't know if Gail
11 was there on the first instance. I know Bertha Ann was not
12 there on the first instance". Then she was asked about the
13 second incident and if there was one large bed. She was asked,
14 "Were Camilla, Gail and you on the one bed?" She said, "I
15 know there were three of us. I know that Camilla was there.
16 I can't say whether Gail was there. I know three of us were
17 there". She denied-- She said, "No, I was not in the middle
18 of the bed". And she disagreed with the question put to her
19 that Gail was by the wall and Camilla was on the edge. She
20 said it was not true that all the time that she - that is Melanie
21 - ended up in the middle of the bed. She agreed on some occa-
22 sions she was in the middle. She said, "On the second occasion
23 Bertha Ann was there. She slept on the floor". She didn't
24 agree that there was no other furniture other than the beds
25 and foamies. She said there were a few tables in there.

26
27 On the occasion in the living room she said,
28 "Yes. Camilla was asleep on another couch. I was asleep
29 on a different couch". She said, "Yes, there were two separate
30 couches. It was just before my fourteenth birthday in 1985".
31 It was put to her that the room did not have two couches but
32 she said yes, it had two couches. She was asked whether a
33 number of young people were watching T.V. that evening into
34 the wee hours and she said, "There was just me and Camilla".
35 Said she agreed Emsley Morgan's children were all living there
36 then. She said, "No, the others were not watching T.V.". The
37 suggestion was put to her that five or six other people
38 were watching T.V. and she said no. It was put to her that
39 next morning there were five or six people in the room and
40 she said, "No. I do not remember that".

41
42 It was then put to her the questions on the
43 preliminary inquiry with respect to what are alleged to be
44 inconsistent or conflicting statements. I have already dealt
45 with those, members of the jury, so I won't review those again
46 with you.
47

18

Charge to the Jury
Errico, C.C.J.

1 She was asked-- It was put to her that she
2 didn't complain to anyone in authority about these assaults
3 until January or February of 1987. She said, "Yes, that's
4 true". And the alleged incidents had taken place 18 or 20
5 months before that time. She said, "I was brought to the
6 school counsellor and she started questioning me about it".
7 And she said, "Yes. I discussed this with Shawna Zettergreen
8 in January and February 1987." When asked if Shawna Zettergreen
9 appeared to be resentful to Emsley Morgan this witness answered
10 yes. She said no, it was not because of a drug and alcohol
11 problem that he lectured her about. She agreed that the accused
12 is a drug and alcohol counsellor and she agreed that he was
13 lecturing to her - that is Melanie and Shawna Zettergreen -
14 about drinking in 1986/87. She said yes, that was happening.
15 She said, "No. I was not angry about that". She was not
16 angry about that. She denied they were discussing getting
17 Emsley Morgan for lecturing them about drinking. She was
18 asked, "At any time did you and Shawna Zettergreen have a dis-
19 cussion of getting Emsley Morgan?" She said, "Well, we talked
20 about the problem. It was not about drinking". She disagreed
21 the problem was about the lectures they were getting. She
22 was asked questions if she had discussions with Camilla in
23 1986 or 87 about this. The answer was, "What are you trying
24 to get at?" The question was repeated a number of times and
25 there was a long pause and finally "No". Asked her if she ever
26 heard words to the effect "We didn't mean to hurt you. We
27 didn't mean for it to go this far". She said, "No, I didn't
28 say this". She said, "I never heard Shawna say this". She
29 denied. Said, "No. Shawna and I didn't make up this story".
30 "That's not the situation", she said. "I didn't discuss this
31 with Shawna Zettergreen during the break". That was during
32 the time that we had our break during her cross-examination.
33 "I sat with her. I did not discuss it with her". It was put
34 to her that it didn't happen at all, these things she testified
35 to didn't happen. She said, "Yes, it happened. It all happened".

36
37 She was re-examined about the complaint being
38 made in January, February of 1987 and she said "The reason
39 for that was I didn't want any more trouble in our family".
40

41 Shawna Zettergreen testified. She was sworn.
42 She told us she was 16 years of age and born June 18th, 1971.
43 Knows the accused. He is her uncle, her mother's brother.
44 And she was close friends with Camilla. She stayed overnight
45 at Emsley Morgan's. She said, "I was seven when I started
46 staying over in 1978. I would sleep with Camilla. We would
47 share a medium-sized room. There was one bed, a double bed.

19

Charge to the Jury
Errico, C.C.J.

1 "I would wear a nightgown and panties. I would on occasion
2 be assaulted by Emsley Morgan. He would come in and say it
3 was time to get up and he would come in and lie down beside
4 me either on my right side or my left side. Would not be very
5 close to me. Covers would be on top of him. He was dressed
6 in his underwear, one piece. He would touch me with his hands.
7 He would touch my vagina. Lift up my nightgown, would pull
8 down my panties. He would rub my vagina. Sometimes he would
9 put his finger in my vagina but not very often. I tried to
10 push him away. He would hold my hands together with one hand.
11 When I was seven I stayed over there very often, two or three
12 times a week. This happened about all of the time. He would
13 touch me maybe five or ten times a month. I never noticed
14 if the other persons in there woke up. He touched my chest
15 sometimes, my breast". She said, "He wouldn't say anything
16 and I didn't say anything to him. I stopped going over when
17 I was 11 or 12 in 1982 or 83. I stopped staying over because
18 I thought it was wrong". She said that he would sometimes
19 lie down beside Camilla. He would touch her. "His hand would
20 touch her vagina. He would lift her nightie up when she was
21 asleep".

22
23
24 Cross-examination. She confirmed that she
25 said she saw Camilla molested and that she was-- that is,
26 Camilla was asleep and stayed asleep. Said, "Yes. That moles-
27 tation took place for five or ten minutes and she didn't appear
28 to wake up". She said, "I don't recall a conversation with
29 Camilla in July, 1987". She was asked if-- directed to the
30 washroom in the Kitwanga community hall. She said, "No, I
31 don't recall that. And I don't recall Mrs. Morgan being there".
32 And the actual words that were allegedly said to have been
33 said were put to her. My note is as follows. Shawna said,
34 "I guess you're pretty mad at me now, eh?" And the answer
35 of Camilla was, "What do you expect, Shawna?" And the response
36 was, "Well, I'm sorry, Camilla. We were out to hurt you.
37 We didn't mean for it to go this far". After that was put
38 to this witness she said it did not happen. She said, "I
39 never at any point have had such a conversation with Camilla
40 and I don't recall ever saying I'm going to get Emsley Morgan.
41 It didn't happen". That is, that she said that. She said
42 to say that I said that, it just didn't happen. She said
43 these incidents happened in the bedroom over a five year period,
44 in the same room, in the same bed. Yes, it was a double bed.
45 "Camilla was always present. And Gail was often present.
46 Sometimes I was in the middle. Sometimes I was in between.
47 When I was in the middle I was assaulted by Emsley Morgan.
I don't recall Camilla and Gail ever waking up. Yes, there

Charge to the Jury
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1 would just be inches between us". And, yes, she confirmed
2 these assaults would take five or ten minutes. And she con-
3 firmed that sometimes she struggled. She said, "No. I don't
4 remember words ever being exchanged". And, yes, she agreed
5 that this happened on the average of 15 days a month. Then
6 there were some computations put to her by counsel, Mr. Byl.
7 I don't think she agreed that those computations were correct
8 but I think that's a matter of arithmetic that you yourselves
9 can use. "Yes, this happened for four or five years". She
10 said, "For the first year it happened more than the other years".
11 Said, "Yes. On occasion I would push him away". The question
12 was put to her whether she had any reasons to be resentful
13 with Emsley Morgan in January or February of 1987. She said,
14 "I wouldn't know if I had reasons to be resentful with Emsley
15 Morgan. Sometimes I was angry about him lecturing me about
16 drinking problems. He never lectured his kids". She agreed
17 he was a counsellor for alcohol and drugs. And sometimes
18 he discussed this with her parents. She said, "Probably got
19 me in trouble with my parents but not so that they would come
20 down on me and yell at me". "I was not resentful. I was
21 kind of angry". Then later this incident when she didn't
22 get a ride when she phoned Emsley Morgan. And she was not
23 very angry. She was upset. This was in January, February,
24 1987. Said, "No. I never complained once to Camilla or Gail".
25 She said, "Yes, I had a conversation with Melanie Morgan in
26 January, February, 1987. She told me about what happened
27 to her and I told her about me. The problem was not about
28 him lecturing me". And she was asked was she angry at Camilla
29 at that time and her response was "For what?" No, she wasn't.
30 She said, "I can't remember any disputes between myself and
31 Camilla in 1987". Asked "Did you tell Camilla you were going
32 to get her?", she responded "Not that I can remember".
33

34 Members of the jury, I don't know if I referred
35 to this passage when I dealt with prior inconsistent statements
36 or not. I'll go over it again in case I didn't. I may have
37 done. I may be repeating myself. She said here, "No, I
38 have not discussed this case before today with Jodina". And
39 the passage was put to her in the preliminary inquiry that
40 she spoke to her in January or February of 1987 and she said
41 that was true. Her response was "I didn't talk to her. I
42 heard her talking to Peter, the counsellor. No, I didn't talk
43 to her about the case". She agreed that the answer in the
44 transcript is not true. Yes, I did discuss that with you
45 earlier, members of the jury. She said, "Yes. There would
46 sometimes be four people on the bed. Some occasions I was
47 in the middle".

21

Charge to the Jury
Errico, C.C.J.

1 The next witness was Jodina Zettergreen. You
2 recall that I examined her before I directed the clerk of the
3 court to swear her. It was because of her age that I have
4 a duty to examine a young person to see if I am of the opinion
5 that she understands the nature of an oath and she is capable
6 of communicating evidence. That was the nature-- That examina-
7 tion was limited to the extent of my duties with respect to
8 that.
9

10 She said she was born November 13th, 1975.
11 Presently 12 years of age. She was in grade 7. She knows
12 Emsley Morgan. "He is my uncle on my mother's side". She
13 was a friend of the daughter Camilla. And she turned seven
14 on November 13th, 1982. When she was seven she would go to
15 Emsley Morgan's house to spend the night. Bertha Ann Stewart
16 would invite her. Bertha Ann was living in Emsley Morgan's
17 house at that time. She stayed there more than once. She
18 slept in Bertha's bed. Sometimes she had a bed to herself.
19 "Sometimes she would be in bed with me". "I was wearing pyjamas
20 and panties". She related how she would wake up in the morning
21 and "somebody would wake me" and it would be Camilla, Gail
22 or Bertha. She was asked some questions about how she got
23 along with her uncle, Emsley. There was no response. She
24 was asked some questions, "Was he a friendly guy?" "Yes, some-
25 times". Sometimes he would talk with her. Said, "No. He
26 didn't wake me in the morning". And the question was put
27 to her, "Did he do something to you?" and she to this responded,
28 "He sexually assaulted me. Touched my private parts. His
29 hands touched my vagina". "What were you wearing?" She
30 said, "I don't recall". "Where did it happen?" "In Bertha
31 Ann's room. Emsley's house". It was at night. "I was playing
32 on the floor. He called me to go to his lap and he touched
33 my vagina. I did nothing. I said nothing. He said nothing
34 to me. He did nothing else to me". "How many times did
35 he touch your vagina?" She answered "Once. I can't remember
36 how he was dressed. I was dressed in shirt and pants. He
37 touched me for a short time".
38

39 In cross-examination the first question she
40 was asked was that it was just the one time that he sexually
41 assaulted her and she said "No. It was not just one time that
42 he sexually assaulted me". Then she was cross-examined then
43 with respect to the statement she'd given to the police and
44 with respect to her evidence at the preliminary inquiry, which
45 I have already dealt with.
46

47 And then you had the evidence of the police

Charge to the Jury
Errico, C.C.J.

1 constable. His evidence relates to the taking of the state-
2 ment, Exhibit 1, from the accused. You'll recall generally
3 the circumstances. That he went to the accused's house and
4 ultimately brought the accused back from Kitwanga to New Hazelton
5 and took the statement after warning him, advising him he need
6 not give a statement. And you recall the circumstances how
7 how he took the statement and how it was signed and there were
8 some corrections made. He said there was conversation other
9 than contained in the statement about the corrections. He
10 said "especially about corrections". He said, "I wrote down
11 as best I could word for word". And he was asked about taking
12 a statement from Jodina Zettergreen and he did take that state-
13 ment and her statement was that there was only one sexual assault.
14 And this was taken in January 30th, 1987.

15
16 That concludes the crown's case.

17
18 Then the defence called evidence. As I recall,
19 firstly there was Gail Morgan, the older daughter of the accused.
20 She was 23. She's single and operates a business, a concession
21 stand. Except for being away at school she's always been
22 a resident of Kitwanga, home of her parents. Described her
23 education as being away for two years from the fall of 85,
24 sometime in 87, at school. Said, "Prior to 1985 Camilla
25 and I slept in the double bed in one room. There were two
26 sets of bunkbeds for the boys in the other room". She des-
27 cribed the number of children. I think there were six alto-
28 gether. During the period 1978 to 1982 in the girls' room
29 there was an old bed, a brass bed. An old warped mattress.
30 "An old beat-up dresser and my stereo. Two speakers. There
31 were no tables and chairs. It was a small sort of room. The
32 boys room there were two bunkbeds and a built-in bed. There
33 was no other furniture there". She knows the complainants,
34 Shawna, Melanie and Jodina. She said, "Yes. Shawna came
35 over off and on" for about ten times over the entire period
36 that she was being asked about. "Shawna always had to sleep
37 with us. My sister Camilla slept with her. There were argu-
38 ments as to who would sleep in the middle". And this witness,
39 Gail Morgan, said that Shawna always lost and always had to
40 sleep in the middle. She said "If anyone moved in that bed
41 you would all end up in the middle and it would squeak".
42 She said, "I'm a light sleeper and I wake if someone comes
43 in. In the morning dad would wake us. He would shake our
44 shoulders and tickle our toes or our knees. And I never saw
45 my father molesting Shawna Zettergreen". And she was asked
46 and said yes, she understood what was meant by sexual molesta-
47 tion. She never saw any sexual molestation. Nor did she

23

Charge to the Jury
Errico, C.C.J.

1 see Jodina Zettergreen molested sexually by her father, nor
2 Melanie Morgan. She said "I would have known about any sexual
3 molestations. He would have had to reach over me. I was on
4 the side by the bed. If he sat on the bed it would wake me".
5 Melanie Morgan also stayed over over the period of 1978 to
6 1983. Said, "No more than ten times. She would stay in our
7 room". And she repeated if Melanie Morgan stayed she would
8 sleep in the middle of the bed. And that she never observed
9 her father sexually molesting her; that she would have known
10 because the bed squeaks, or he would have had to reach over
11 her. She said she remembers the night of the T.V. party
12 when a number of people, including Melanie Morgan, were present.
13 She said "Our whole family was there". She described in the
14 living room the furniture was two-piece couch and armchair,
15 coffee tables and T.V. "That night everybody slept in the
16 living room. Dad came in the morning, told everybody to go
17 to the bedrooms. I never saw him sexually molest Melanie
18 Morgan". Said Jodina stayed from time to time. Ten or less
19 times. "When she slept with us she was in the middle of the
20 bed. She and Bertha would sleep in the middle with Camilla
21 and me. I never saw my father sexually molest Jodina Zetter-
22 green".

24 She was cross-examined. She acknowledged she
25 wasn't awake all night. She, of course, didn't know what
26 was going on when she was asleep. She agreed. She said,
27 "Yes, there were four or five people in the bed. Four or
28 five little girls". She said "That time I guess I was 13".
29 She said she didn't stay elsewhere overnight. Their family,
30 the girls were not allowed to sleep away from the home. She
31 said, "No, Shawna did not stay three or four times a week,
32 not for hundreds of times". She agreed that Shawna and
33 Camilla were very good friends. Said, "I graduated from school
34 1984 but I left in the fall of 1985". "Dad taught us to be
35 light sleepers in case of fire". She could hear people who
36 would get up and go to the bathroom at night. She said "Yes,
37 he would nudge us and tickle our toes. He would have his robe
38 on. It was maroon. And he never had a blue one". Said, "In
39 the mornings on the weekends he would shove us over and lie
40 on the bed beside me, talk to us. He would sit with one leg
41 up". And only once, when she was sick, would he actually
42 lie down right beside her. He never rubbed her tummy, nor
43 did she see him rub anyone else's tummy. She said, "I don't
44 recall the exact date of the T.V. party. I was still in school.
45 It was before 1984. It was not in April 1985". She was cross-
46 examined about the furniture and she said there were two items,
47 a couch and a chair. It was a one-piece couch.

24

Charge to the Jury
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1 Camilla Morgan was then sworn and testified
2 that she is 16 years old. Daughter of the accused. She was
3 in grade 9 and 10 combined at school. She described her home.
4 A three bedroom house with a master bedroom and two bedrooms
5 for the children; one for the boys and one for the girls.
6 She normally slept in the girls' bedroom across from the master
7 bedroom and that would be with her sister. "By 1978 I was
8 7 going on 8 and by 1983 I was about 12 years old. During these
9 periods I slept in the girls' room with my sister Gail. There
10 was a double bed, a stereo and a dresser and nothing else.
11 A rusty brown old bed, mattress warped in the centre." She
12 remembers Shawna and Melanie and Jodina coming over. "Shawna,
13 when she stayed, always slept with me and my sister Gail.
14 Would be in the bed with Shawna in the middle. It was always
15 that way. If anyone moved we would all roll to the centre
16 of the bed and the bed would squeak. In the morning I would
17 be awakened by father. He would shake one shoulder or grab
18 our stomachs". You recall the gesture she used that was
19 brought out by counsel. "Or tickle our feet. Sometimes
20 he would talk to us. He would either be sitting or semi-sitting
21 on the bed. He would lean his head back on the headboard".
22 And she denies that she ever saw her father sexually assaulting
23 any of the three complainants. She said, "He never sexually
24 assaulted me". She said she understood what those words mean.
25 She said Melanie Morgan didn't stay that many times, maybe
26 ten times in all. "She was in the centre of the bed with
27 Gail on the outside and me by the wall". Same thing as with
28 Shawna. She never saw or observed any sexual assaults. Her
29 evidence about the T.V. party is she doesn't recall when it
30 was. It was in the five years period 1978 to 1983. Said,
31 "My entire family was there. Dad came in and asked us to
32 move to the bedroom. Melanie was still there. He woke up
33 and asked the girls to go to the bedroom. I saw no molesting
34 of Melanie by my father at that time". With respect to the
35 bedroom incidents that were alleged to have taken place, she
36 said, "I would have known if anyone was sexually assaulted
37 by my father. We are all light sleepers". She said "I never
38 saw my father sexually molesting Jodina". She said, "If he
39 had, I would have known". And she relates the conversation
40 that she says she had with Shawna at the community hall in
41 the bathroom. "I was changing my niece. She came and asked
42 if I was mad. And I said 'Why not'. She said something like
43 she didn't mean it to go that far. She meant to hurt me.
44 My mum walked in and asked me to leave with her". She was
45 asked some questions about "Did you know why Shawna said that?"
46 And I didn't note any response. She was then asked "Was there
47 bad feeling between you and Shawna?" She said "Yes". Asked

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1 why. She said "Because I didn't quit school with her. That's
2 why she was mad at me".
3

4 During cross-examination she said "Shawna quit
5 school half way between grade 8". I take it that means--
6 I'm not sure. It's for you to say. But I think during grade
7 8 some time. "She was between 14 and 15. We were both 14
8 in 1985. It was after 14 when she quit. She was just turning
9 15. She never came around to our house after she quit school.
10 Before that she was my closest friend". Referring to the
11 T.V. party she said she agreed the T.V. party was in April
12 1985, just before Melanie's fourteenth birthday. The witness
13 was born July 28th, 1971. "Melanie had her birthday before
14 me". "On the weekend we sometimes brought videos". She said,
15 "Yes, I was in pyjamas that night and Melanie had her nightie
16 on. That's how we dressed when we watched T.V. We were all
17 asleep and father came in. Melanie came over a couple of
18 times after that and she sometimes stayed overnight". She
19 was asked some questions about being a light sleeper. And
20 she said yes, her father's presence in the room would wake
21 her up. And she was asked "Why did he have to tickle the chil-
22 dren?" and her answer-- I don't know if I have it fully but
23 these are my notes. "We wouldn't want to get out of bed".
24 "I don't remember him touching Gail's stomach". And he didn't
25 do that to Shawna or Melanie or Jody.
26

27 Mrs. Morgan was next to testify. She is the
28 wife of the accused. She related the history of the family
29 and the children. The three girls, Shawna, Jody and Melanie,
30 she agreed they came over to stay sometimes between 1978 and
31 the period 1983/85. She estimated they each came some five
32 to ten times. She didn't really count. They would stay
33 in Gail's bedroom. She confirmed that the three girls slept
34 together. Or that each of the three - Shawna, Melanie and
35 Jody - each slept with Gail and Camilla. Then she was asked
36 about the conversation in July of 87 at the community hall.
37 She said she recalled that she was working there, that Camilla
38 was there waiting for her. Shawna came in. "I thought I
39 should keep an eye on the girl because of the problem". This
40 is in July 1987. "Shawna saw me in the gym. She walked in
41 the bathroom. I went in after her. I heard the tail-end
42 of a conversation". She said that Shawna-- she heard Shawna
43 say she didn't mean to hurt her-- say to Camilla that she
44 didn't mean to hurt her dad; she was out to hurt her and she
45 didn't mean it to get this far.
46

47 In her cross-examination. Camilla was in

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1 the bathroom of the community hall changing a baby, one of
2 her grandchildren. She said they did have a practice of having
3 kids come up for T.V. They couldn't watch at home. "We rented
4 videos and let them watch at our house". She said, "There
5 was no risk of fire in our house. No reason to have any special
6 training for fire". Said, "I have smoke alarms in my house".
7 "I get up to check the children at night and Gail woke up when
8 I did that. Camilla too". She agreed that they had alarm
9 clocks. "Sometimes I would have to wake them. The boys you
10 would have to yell at". She sometimes tickled the girls on
11 their stomachs herself. Her husband sometimes gets up and
12 checks on the kids. Sometimes he would stand in the door
13 and sometimes he would go into the room.

14
15 Then we had the witness, Ms. Calhoun, who testi-
16 fied that she was a court recorder and she referred, as I
17 referred you to, to that passage in the preliminary inquiry
18 with respect to Jodina Zettergreen's statement to the police
19 as it was put to her by Mr. Byl. She confirmed that was an
20 accurate reproduction of what took place at the preliminary
21 inquiry. And that when Jodina was finally asked, "Did you
22 say that to the policeman?", she said "Yes". "Okay. Is what
you said to the policeman true?" "Yes".

24
25 Sorry to have been so long, members of the
26 jury, but I'm just about finished with my address to you.
27 It is now my duty to review with you what I perceive or under-
28 stand the position of defence and crown counsel to be. They
29 made submissions to you with respect to the evidence in this
30 case. Should my summary of their points of view conflict with
31 what either counsel has said to you, then you should rely on
32 what they said and not on my interpretation of their words.
33 It's better, really, that you deal with it first-hand than
34 second-hand. Again I review it with you in the hopes it may
35 assist you. You certainly should not ignore their comments
36 with respect to what their submissions are in preference to
37 mine. You should refer back to what their actual submissions
38 were if you think there is any conflict when I review their
39 positions. Of course, this is only my understanding of what
40 their positions are. You may have been more perceptive than
41 I or have a different perception than I do of their submissions.

42
43 With respect to the position of the crown.
44 As I understand it, Mr. O'Byrne says that the evidence should
45 be considered by you with your principal guide being your every-
46 day common sense from your life's experiences. He suggests
47 to you that the evidence of the complainants shows that the

27

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1 activity of the accused was the sneaking into these girls'
2 rooms at night or the early morning and sexually assaulting
3 them. And in those circumstances it is not surprising that
4 the other girls were not aware of what was going on. In
5 essence he made sure that they wouldn't. Mr. O'Byrne refers
6 to the defence suggestion of fabrication. He says there is
7 no suggestion in the evidence that Melanie Morgan and Jodina
8 Zettergreen had any reason to fabricate their evidence. And
9 he also points to the statement given by the accused in February
10 of 1987, that it did not make any reference there to any reason
11 for any fabrication. Mr. O'Byrne asks you to question closely
12 just how light sleepers these girls were - that is, Gail Morgan
13 and Camilla Morgan - in light of all the evidence. And asks
14 why the accused would have to tickle these girls to wake them
15 up if they were such that they would waken just by his mere
16 presence in the room. Mr. O'Byrne reminds you that the com-
17 plainants are all testifying about matters that are difficult
18 for them to testify to and that they were clearly frightened
19 and troubled when testifying. He says they had no reason
20 to make these allegations to seek revenge. And Mr. O'Byrne
21 clearly was suggesting that you should have no difficulty being
22 satisfied with their evidence beyond a reasonable doubt and
23 the evidence of the statement beyond a reasonable doubt that
24 the accused is guilty on each count in the indictment.

25
26 The position of the defence, as I understand
27 it, is this. Mr. Byl reminds you that if you have a reasonable
28 doubt of the guilt of the accused you have the duty to acquit
29 him. In this case he says it's one that is full of doubt.
30 He suggests that the three complainants all had one thing in
31 common, a propensity to exaggerate. He said that Jodina and
32 Melanie both exaggerated from what they had said at the pre-
33 liminary inquiry and that Shawna's evidence of the number of
34 assaults upon herself in the circumstances of the other girls
35 - that is Gail and Camilla - being present, was of itself an
36 unbelievable exaggeration. Mr. Byl asks you examine the com-
37 plainants' testimony-- or all the evidence, actually, as to
38 consistency, corroboration, credibility and common sense.
39 He made suggestions to you of examples in the evidence where
40 those factors were not present in the complainants' evidence.
41 He suggested to you that Shawna's evidence that there was no
42 conversation at all with Camilla in the community centre as
43 Camilla and Mrs. Morgan testified to, is certainly inconsistent
44 with their evidence. And he suggested her statement that the
45 accused assaulted his own daughter Camilla without Camilla
46 being aware of it should not be accepted by you out of common
47 sense. He suggests that persons being sexually assaulted

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1 for the length of time that this witness said that Camilla
2 was without being aware of it, just doesn't make sense. He
3 suggests to you that there is simply no corroboration of her
4 evidence; that is, any independent evidence to support her
5 story. He asks you to ask yourself, is Shawna Zettergreen
6 a credible witness who is attempting to tell you the truth.
7

8 He then goes on to refer to the evidence of
9 Melanie Morgan with respect to those factors. The four C's,
10 I think he put it. Mr. Byl points out to you what he says
11 are inconsistencies in her testimony with what she said at
12 the preliminary inquiry. He asks you to consider, from the
13 common sense point of view, was she even able to tell you whether
14 she struggled or not with respect to these sexual assaults.
15 And asks you to consider whether or not a complainant in her
16 circumstances would remember that. He asks you to remember
17 the manner in which she gave her evidence, the long pauses
18 and delays in her testimony. And, again, he suggests that
19 for her to say that she was sexually assaulted in the bed with
20 two other girls present without them knowing it was contrary
21 to common sense.
22

23 With Jodina's testimony, Mr. Byl also suggests
24 it was inconsistent with what she said at the preliminary in-
25 quiry as to the number of times she said she was assaulted.
26 He suggests to you that Jodina is under the spell of her older
27 sister. And points to her evidence of her being assaulted
28 in a chair was supposed to be in a room where defence witnesses
29 say there was no chair.
30

31 Mr. Byl asks you to compare the complainants'
32 evidence with the evidence of Mrs. Morgan, Gail Morgan and
33 Camilla Morgan. And with respect to demeanour, he suggests
34 the defence witnesses were straightforward and their evidence
35 was consistent with common sense. Mr. Byl asks you to consider
36 the accused's statement, which is a clear denial of what he
37 is accused of, and suggests to you that doesn't assist the
38 crown in any way. Mr. Byle concludes that in his view, and
39 it should be your view, that there's simply no case for the
40 crown but what there is is a ton of reasonable doubt.
41

42 Now I'll briefly speak to you about your duties
43 with respect to your deliberations in the jury room. It is
44 your duty to consult with one another and to reach a just verdict
45 according to the law and the evidence. Each juror should
46 have the opportunity of expressing his or her own points of
47 view without being unnecessarily repetitive. When you are

29

Charge to the Jury
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1 discussing the issues you should, of course, listen attentively
2 to the arguments of your fellow jurors. Approach your duties
3 in a rational way and put forward your own points of view in
4 a calm and reasonable manner. In our system of law the question
5 of penalty or sentence is the responsibility of the trial judge,
6 therefore you should not concern yourself with the consequences
7 of your verdict. Your sole duty is to determine whether the
8 accused is guilty or not guilty.

9
10 As this is a criminal trial you must be unani-
11 mous in whatever verdict you see fit to return. Each of you
12 must make your own decision whether the accused is guilty or
13 not guilty with respect to each count in the indictment.
14 You should only do so after consideration of the evidence with
15 your fellow jurors and you should not hesitate to change your
16 mind when you are convinced that you are wrong. Unless you
17 are unanimous in finding the accused not guilty you cannot
18 acquit him; nor can you return a verdict of guilty unless
19 you are agreed unanimously that he is guilty. This applies
20 to each count in the indictment. If you have a reasonable
21 doubt concerning the guilt of the accused you must give the
22 benefit of that doubt to the accused and find him not guilty.
23 You are doing him no favour by so doing. You are merely doing
24 the duty cast upon you by law. On the other hand, if you
25 do not have a reasonable doubt you must find him guilty as charged.
26 That too is your plain duty. The law requires no more from
27 you than that.

28
29 With respect to the verdicts open to you.
30 On each count there is the verdict of guilty or not guilty.

31
32 In a few minutes you may retire to the jury
33 room. When you do so I ask that you not commence your deli-
34 berations until the sheriff tells you to begin. As soon as
35 you leave the courtroom I must ask both counsel if they have
36 any submissions to make with respect to my charge. It may
37 be that both or either of them will want me to give you some
38 additional instruction or to alter or qualify what I may have
39 already said. If I agree, I will ask you to return to the
40 courtroom. If I do so, please do not attach any particular
41 significance to what I say then; treat it as if it was some-
42 thing I had said now. Otherwise I will tell the sheriff to
43 inform you that you may commence your deliberations.

44
45 If at anytime when you're deliberating you
46 should encounter a difficulty with respect to any matters I
47 have discussed with you, just give a note to the sheriff and

30

Charge to the Jury
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1 he or she will deliver it to me. You will then re-assemble
2 in court and I will try to help you by answering your question.
3

4 The evidence here in this trial was taken down
5 by the court reporter. If there is any conflict among your-
6 selves as to what was said by a witness, then the only safe
7 way to resolve it is to have the court reporter who took that
8 particular piece of evidence down read it back to you. Instead
9 of reading you the transcript of the evidence as taken by the
10 court reporter, you may be satisfied if I just again review
11 my own notes. If I do so I want to remind you that I am not
12 a court reporter and my notes will be far from a verbatim repro-
13 duction of what the witness said. If you should decide to
14 ask for me to review my notes again with you, it would still
15 be open to you to ask that the evidence be read by the court
16 reporter. Don't consider you have made some sort of election
17 because you have asked me to read my notes. If you do that
18 and are still not satisfied, we will certainly be happy to
19 have the reporter read the actual evidence. I do wish to
20 give you a caution with respect to the reporter reading back
21 evidence, though. It can be time-consuming for everybody,
22 particularly the reporter, and it all depends on the nature
23 of your enquiry and the testimony itself. Sometimes the
24 questions and answers relating to your question can easily
25 be separated from the rest of the evidence of a particular
26 witness. In that event it is no trouble at all. But usually
27 this cannot be done. And if you ask a question about the evi-
28 dence of a witness it's usually necessary that all of the evi-
29 dence, both in chief and cross-examination, be repeated.
30 In saying this I do not wish to discourage you from any request
31 that evidence be read back. Please understand that you have
32 every right to ask that the evidence be repeated, no matter
33 how long it takes.
34

35 Members of the jury, that now concludes my
36 charge to you. Would you please retire. It's very close
37 to the luncheon break and I've asked the sheriff to make arrange-
38 ments for your lunch. So I think probably you will have very
39 few minutes to deliberate before you commence your lunch break.
40 May I remind you not to commence your deliberations until I
41 send word for you to do so.
42

43 Would you please retire.
44

45 (JURY RETIRES)
46

47 THE COURT: Remember the jury is to have the one exhibit,

31

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1 which is Exhibit 1, and the indictment.
2

3 THE REGISTRAR: Yes, your honour.
4

5 THE COURT: Yes, Mr. O'Byrne?
6

7 MR. O'BYRNE: I have no comments on your honour's charge.
8

9 MR. BYL: Nor do I, your honour.
10

11 THE COURT: We should send word to the jury that they can
12 commence their deliberations. Mr. Sheriff, what arrangements
13 have you made for them?
14

15 THE SHERIFF: I've arranged for them to have lunch, your
16 honour, at 12:30.
17

18 THE COURT: So they'll be deliberating for ten minutes
19 or so.
20

21 THE SHERIFF: Yes. It will take us a few minutes to walk
22 up the street.
23

24 THE COURT: What I'm asking is, should we leave? Can
25 we leave now? Or should we wait ten minutes? You are pro-
26 posing on having them leave the jury room in ten minutes or
27 so?
28

29 THE SHERIFF: Well, probably in five minutes, your honour.
30

31 THE COURT: Well, I think we can safely adjourn. When
32 I say "adjourn", we will not come back into the courtroom.
33 We can leave and have our own lunch break and should return
34 -- When do you think the jury would be back? About two o'clock,
35 perhaps?
36

37 THE SHERIFF: We'll need an hour and a half, approximately,
38 your honour.
39

40 THE COURT: Very well, We will adjourn til two, but at
41 that time we won't reconvene but we will be present and wait
42 for the verdict of the jury.
43

44 THE REGISTRAR: This court stands adjourned to await the pleasure
45 of the jury.
46

47 (PROCEEDINGS ADJOURNED TO AWAIT THE PLEASURE OF THE JURY)

32

Charge to the Jury
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Jury Question

(JURY OUT)

1
2
3 THE COURT: I have received the following message through
4 the sheriff from the jury.

5
6 "Would it be possible to get the answer to the question:
7 Who initiated or set the charges in motion, that is brought
8 the charges against Emsley Morgan?"
9

10 I propose, subject to anything counsel might say, to advise
11 the jury that no, it's not really a matter for them to consider
12 in considering their verdict, how the charges got set into
13 motion. And remind them that there is some evidence before
14 them, which is properly before them, about when the complainants
15 first complained. I think that's the extent to which that
16 enquiry should go. Do you have something? It seems---
17

18 MR. BYL: I don't think I have anything to add to that.

19
20 THE COURT: Mr. O'Byrne?

21
22 MR. O'BYRNE: Only there is some evidence, too, that they
23 spoke to the police constable. That's the only---
24

25 THE COURT: Well, that's it. That when they complained
26 they spoke to-- They were asked when they first-- One of
27 them was asked, certainly---
28

29 MR. O'BYRNE: Two of them were asked.

30
31 THE COURT: I'm not proposing on reviewing the evidence
32 at this time. I'm just pointing out there was some evidence
33 before them and that goes to their assessment of the evidence.
34 And that's as far as it goes.
35

36 MR. O'BYRNE: I would agree with your honour.

37
38 MR. BYL: I would too.

39
40 THE COURT: Have the jury come in, please.
41

(JURY RETURN TO COURTROOM)

42
43
44 THE COURT: Mr. Foreman, I have your message, passed on
45 to me by the sheriff's officer. And it is as follows:
46

47 "Would it be possible to get the answer to the question:

33

Charge to the Jury
Errico, C.C.J.

Jury Question
Verdict of the Jury

1 "Who initiated or set the charges in motion, that is brought
2 the charges against Emsley Morgan?"

3
4 The short answer to you is no. The question of who made the
5 decision to pursue these charges is really not a matter that
6 should be part of your deliberations. I wish to remind you
7 that there is some evidence before you - I believe it was raised
8 on cross-examination of one or more of the complainants - about
9 when they first told their stories to the authorities. You
10 can consider that when you're considering their evidence.
11 But as to the workings or-- the inner workings of the prosecu-
12 torial process as to who made and why the ultimate decision
13 was made to bring the charges, is not a matter that you should
14 have to concern yourselves with. I think that you should
15 remember that you should be deliberating on the evidence that
16 you have heard before you. Thank you. Please retire.

17
18 (JURY RETIRES)

19
20 THE COURT: Unless counsel has further comments---

21
22 MR. O'BYRNE: No.

23
24 THE COURT: We'll retire.

25
26 (PROCEEDINGS ADJOURNED TO AWAIT THE PLEASURE OF THE JURY)

27
28 THE COURT: I have been advised by the sheriff that the
29 jury has reached a verdict. Would you have the jury return,
30 please?

31
32 (JURY RETURNS)

33
34 THE REGISTRAR: Mr. Foreman, have you reached a verdict?

35
36 THE FOREMAN OF THE JURY: Yes, we have.

37
38 THE REGISTRAR: Mr. Foreman, what is your verdict on count
39 1? You find Robert Emsley Moody Morgan guilty or not guilty
40 on count 1?

41
42 THE FOREMAN: Not guilty.

43
44 THE REGISTRAR: The jury finds the accused not guilty on count
45 1, your honour.

46
47 Mr. Foreman, how do you find Emsley Robert
Moody Morgan, guilty or not guilty on count 2?

34

Charge to the Jury
Errico, C.C.J.

Verdict of the Jury

1 THE FOREMAN: Not guilty.

2
3 THE REGISTRAR: The jury finds the accused not guilty on count
4 2, your honour.

5
6 Mr. Foreman, how do you find Emsley Morgan
7 on count 3, guilty or not guilty?

8
9 THE FOREMAN: Not guilty.

10
11 THE REGISTRAR: The jury finds the accused not guilty on count
12 3 of the indictment, your honour.

13
14 Mr. Foreman, how do you find Emsley Morgan,
15 guilty or not guilty on count 4 of the indictment?

16
17 THE FOREMAN: Not guilty.

18
19 THE REGISTRAR: The jury finds the accused not guilty on count
20 4 of the indictment, your honour.

21
22 Mr. Foreman, do you find the accused, Emsley
23 Morgan, guilty or not guilty on count 5 of the indictment?

24
25 THE FOREMAN: Not guilty.

26
27 THE REGISTRAR: The jury finds the accused not guilty on count
28 5 of the indictment, your honour.

29
30 Mr. Foreman, how do you find Emsley Morgan,
31 guilty or not guilty on count 6 of the indictment?

32
33 THE FOREMAN: Not guilty.

34
35 THE REGISTRAR: The jury finds the accused not guilty on count
36 6 of the indictment, your honour.

37
38 Members of the jury, harken to your verdict
39 as the court doth record it. You find the accused, Emsley
40 Robert Moody Morgan, not guilty on count 1 of the indictment,
41 not guilty on count 2, not guilty on count 3, not guilty on
42 count 4, not guilty on count 5, not guilty count 6. This is
43 your verdict, so say you all. Please stand to confirm your
44 verdict.

45
46 The verdict is unanimous, your honour.
47

Charge to the Jury
Errico, C.C.J.

Verdict of the Jury

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THE COURT: Thank you, members of the jury. You may be seated.

Members of the jury, this concludes your duties on this case and I wish to take this opportunity to thank you for your performance of your duty as jurors. These sorts of cases are always difficult and this was no exception and I find that you have performed your duties conscientiously. I at this time would like to remind you - I think I commented earlier in the trial - that although you are free to discuss the trial with anyone who wishes to discuss it with you, it is a criminal offence, actually, to discuss your deliberations in the jury room. This provision of the Criminal Code is in place to ensure the confidentiality of your deliberations in the jury room. So you should not discuss what took place in the jury room with anyone.

Your service as members of the jury panel will no longer be required and, in any event, your service on the jury would mean that you would not be required to perform further jury service at this time.

Again, may I thank you for your performance on this jury and for the sacrifice and inconvenience that service on the panel and on a jury have occasioned to you. You are now free to go. Thank you.

The accused is discharged. We can now adjourn.

(COURT ADJOURNED)

I hereby certify the foregoing to be a true and accurate transcript of the proceedings herein to the best of my skill and ability.

DOREEN M. WILLIAMSON
Official Court Reporter

