

CANADA / JUDGMENT

R. v. B.(A.D.)**1999 BCCA 105**

COURT

British Columbia Court of Appeal

DECIDED

23 February 1999

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COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

B.(A.D.) (Y.O.A.)

APPELLANT

Before: The Honourable Mr. Justice Esson The Honourable Madam Justice Newbury The Honourable Mr. Justice Braidwood

Leandre Rupert-Bailey Counsel for the Appellant

Ursula Botz Counsel for the Respondent

Place and Date of Hearing Victoria, British Columbia February 7, 1999

Place and Date of Judgment Vancouver, British Columbia February 23, 1999

Written Reasons by: The Honourable Mr. Justice Braidwood

Concurred in by: The Honourable Mr. Justice Esson The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Mr. Justice Braidwood:

- [1] On 10 February 1999, we dismissed the appellant's appeal with reasons to follow. These are those reasons.
- [2] This is an appeal from a finding that the appellant is guilty of procuring a young female to become a prostitute. The accused, at the time of the offence, was 15 years of age and was herself engaged in prostitution.

[3] Section 212(1)(d) of the Criminal Code reads, in part, as follows:

212.(1) Every one who

- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,

is guilty of an indictable offence . . .

[4] The grounds of appeal may be stated as follows:

1. Did the learned trial judge err in finding that Carl Corney was involved in the commission of the offence?
2. Did the learned trial judge err in finding that the appellant was a party to the procurement?
3. Did the learned trial judge err in considering and relying upon evidence given in a voir dire that was not made part of the trial proper?

BACKGROUND

- [5] The offence was alleged to have occurred between April 1, 1997 and May 31, 1997, at or near Victoria, British Columbia.
- [6] In April of 1997, the complainant, V.S., was 17 years of age and at the time of the offence was living with some acquaintances of her age in Victoria. She was trying to complete her schooling at Victoria High and was employed part-time in a McDonald's restaurant. She had never worked before as a prostitute.
- [7] The complainant testified, and this evidence was accepted by the learned trial judge, that one day near the beginning of April a small gold car with tinted windows pulled up to the drive-through window of the McDonald's where she was working the evening shift. There were two black males in front and a white female in the back. The complainant had no conversation with the female person, the appellant, but testified that the males were "really pleasant" and they struck up a conversation. The driver of the vehicle, Carl Corney, asked what time she got off work and made arrangements to meet her after the shift was finished. She found him to be attractive.
- [8] Carl and another male, named Brad, picked up the complainant at McDonald's shortly after midnight. They drove her to where she was living and waited outside while she changed into jeans and a jacket. She said "that evening there wasn't much to do, but we felt like doing something" and she accompanied Carl and Brad to a hotel room they had rented at the Travelodge on Douglas Street. They arrived there about 12:30 a.m. A third male, Dale, was lying on one of the two beds, sleeping, or trying to sleep. Brad laid down on the other bed and the complainant and Carl sat at a table and talked. Carl was smoking marijuana but the complainant, who was offered some, declined.

- [9] At about 1:30 a.m. the appellant came into the room. The complainant recognized her as the person she had seen in the back of the car earlier, at McDonald's. The complainant said that the appellant was wearing a short black dress with a pronounced red V-neck and, possibly, stiletto heels. It occurred to the complainant that the appellant looked like a prostitute, but she was not sure. The appellant paid no attention to the complainant. She talked to the men, showered, changed into casual clothes and then went to bed there.
- [10] Later, the complainant and Carl left the hotel, they went for a drive and talked for some time. She indicated that Carl was saying nice things to her and described the three companions as "friends travelling together". She said she thought Carl was "nice" and "good looking" and she wanted to get to know him. Carl told her that she was "a nice person". They made arrangements to see each other the following day and she was dropped off at her place of residence.
- [11] In the late afternoon of the following day, the complainant took a bus to the hotel. When she arrived Carl was in the room and they were joined thereafter by the appellant. The three of them went grocery shopping, after which Carl made dinner. There was talk of going to a nightclub, but the complainant decided against it as she was under-age. However, she and the appellant agreed to "go out, the two of them and just have fun, find something to do".
- [12] The complainant testified she returned to her house to get some clothing for the evening and the appellant helped her look through her clothes. The complainant picked out a dress with some shoes to go with it and said, "I just thought maybe if we don't go to the clubs we'll just go to a movie or do something and I want to look kinda nice". Back at the hotel she showered and put on her dress. However, the appellant told her, "No, no, I have something you can wear", and offered the complainant the short black dress which the appellant had worn the previous night, suggesting it would look better. The complainant agreed to try on the dress but felt awkward as she considered it to be too short. The complainant stated, "So I was pulling it down, and she pulled it up and said 'Oh, you should wear it, it looks good,' so I did." The complainant also borrowed one of the appellant's purses. Prior to leaving the hotel room, the appellant and the complainant had a conversation on the balcony during which the appellant told the complainant about her involvement in the sex trade. Although the complainant could not recall the details of the conversation, she confirmed that the appellant told her enough that she knew the appellant worked as a prostitute. She could not recall, however, whether it included any discussion regarding the amount of money the appellant made, nor could she remember the appellant ever warning her that prostitution was dangerous or suggesting she go home.
- [13] Carl, Brad and Dale offered to drive the women downtown. The whole group got into a car, with Carl driving. At the appellant's request, Carl stopped at a convenience store and the appellant purchased some condoms which she gave to the complainant. When asked what they were for, the appellant replied "Well, you'll find out later". Carl then dropped the women off on Government Street and the appellant told her, "We're going to make some money". The complainant then testified that "then I clued in what we were doing". She decided to go

through with it.

- [14] The appellant and the complainant stood on the street for some time. Eventually, two men walked up and had a discussion with the appellant. An arrangement was made to go to a hotel room. Once in the room, the men and the appellant argued about money, but the appellant "took care of it" by agreeing to a fee of \$200. The appellant and the complainant then performed oral sex on the men.
- [15] The complainant testified that one of the men paid the appellant in the hotel room and that the appellant kept the money. Later, they both returned to the street and one of the appellant's regular customers picked her up. At this time, after the appellant had left, the complainant said "I was feeling really awkward", so she took a taxi cab back to the Travelodge. Later, the whole group appeared at the Travelodge, the complainant showered and got changed, talked with the appellant for a while, and went to bed. She never did receive any of the funds.
- [16] The next morning the complainant agreed to go to Vancouver with the group and the appellant told her that they would take care of her and that she would only be working with the appellant. Further, once they got "settled down" she would no longer have to be on the streets. When they got to Vancouver, she and the appellant went to work as prostitutes. The appellant gave her advice regarding prices and other topics relative to the trade, and told her that she should be handing her income to a male, preferably a black one. She suggested that she give her money to Carl to show that she liked him. Carl became the complainant's pimp and over the course of the next few weeks took all her money. After several days in Vancouver, the whole group travelled to Calgary where the appellant and the complainant continued to work as prostitutes. Eventually, the complainant was arrested.
- [17] The complainant was cross-examined about her motivation for working as a prostitute the first night. She agreed that, at the time Carl dropped her off with the appellant in downtown Victoria, she assumed they would probably be working that night. She also agreed that no one had threatened her or forced her to work, and that the thought of large sums of money made her feel good. She said that she had "mixed feelings" about working. She explained that one of the reasons for going with the appellant that night was her "sense of belonging" to the group she had just met. The following is a brief excerpt from her evidence:

A Well, I didn't say, "That's it. I'm going home." I did it out of my free will. And because they made me feel wanted and I felt really good about myself when I was with them at that - - that time. And I guess I didn't turn around and say, "No, I'm not doing this."

.....

A It was the whole group, because they were nice to me too. They would talk with me. They would just seem as if they cared.

.....

A . . . And I felt a sense of belonging at that time in that group. Because nobody was saying anything that bothered me and they weren't being mean. They were making me feel kind of as a friend.

.

Q You felt like you were up for this because Carl made you feel so good, that you could do this?

A Well, I just went with what was going on, because - - I don't know why I did. That's a part of my life I just want to forget. I just went with it for the sake of going with it.

[18] The complainant further testified that through the next few weeks she spent with the group in Victoria, Vancouver and Calgary, that she was primarily interested in being with Carl. She was attracted to him and had sex with him the morning after their first night of work in Victoria.

[19] Detective Sikora was qualified as an expert relating to juvenile and other prostitution-related activities. He testified that, in his experience, juvenile prostitutes in Victoria did not work on their own; rather, they were part of an organizational hierarchy of a small number of criminal organizations controlling prostitution in the city. Control in these organizations devolved from young male pimps to "mains" (the pimps' "main girls"), to "wifies" (the next rank of prostitutes) and, ultimately, to "turnouts" (young girls recruited into the sex trade). According to Detective Sikora, recruitment in Victoria commonly took place in schools or nightclubs, and could be accomplished by either a pimp or a young prostitute. Detective Sikora testified that the movement of prostitutes between Victoria and other cities was controlled by pimps. He further explained that it was extremely difficult for young women to leave the sex trade due to intimidation and threats by members of the criminal organizations, and that young prostitutes wanting to get out of the trade would "fear for their lives".

THE EVIDENCE OF THE APPELLANT

[20] Briefly speaking, the basic circumstances outlined by the complainant of the events that occurred are agreed with by the appellant. However, the appellant added that during the conversation on the balcony, above described, the appellant explained that she worked as a prostitute and the complainant wanted to know how much money she made and appeared "really excited" when the appellant told her how much she earned in a night. She further said that she told the complainant that working as a prostitute was "scary and hard" and that, despite the money, it was not a "fun life". In addition, she denied purchasing the condoms, and said that the complainant herself selected and put on the black and red dress and the stiletto heeled shoes that the appellant had worn the night before and, because of this, she was extremely upset at the complainant's activities. Further, the appellant stated that it was the complainant who told her that she was coming to work with the appellant on the first night in question.

[21] Once they were on the street, the complainant then asked if the appellant had any condoms and the following conversation took place:

... And I said, "Do you have condoms," and I asked her. She said, "No. No, I don't. Can I get some? Do you have some?" And I said, "Yeah," I said, "come over here." So she walked down. I pulled out a couple out of my pocket, three or four, and I handed them to her, and I said, "Here, you should make sure you have these before you go to work." I said, "If you're going to work you've got to make sure you've got them with you."

[22] According to the appellant, there was a further conversation where the complainant said to her, referring to Carl, "Oh, we are going to live together, and are we going to be roommates and stuff like that, and we're going to stay here and we're going to be, you know, best friends for the rest of our lives?"

[23] The appellant testified that when they were getting ready to leave Victoria and go to Vancouver she was surprised to hear that the complainant would be accompanying them to Vancouver. She testified that she argued with Carl about this and asked him why he was ruining the complainant's life, whereupon Carl told her not to worry about it, it was his business not her's. Carl, Brad and Dale directed the appellant to help the complainant with her bags, which she did reluctantly.

[24] The appellant said that she had no pimp, although she did use a man's name on the streets. She knew that the men she was travelling with were all involved in the business of prostitution and pimping. She agreed that when she first found the complainant in the hotel room on the first night, it was clear to her that Carl was attempting to "get [the complainant] into the business of prostitution". She further testified that, on the second night, when she found the complainant in the hotel room dressed in her own working clothes, she knew it was Carl's intention to put the complainant out on the streets. She conceded that she did not tell the complainant to take off the dress which belonged to her and, when asked about the condoms, she did provide the complainant with them. Furthermore, she agreed that she essentially arranged for the sexual encounter on the second night in Victoria. She knew that that encounter was the first time the complainant had engaged in prostitution.

GROUND OF APPEAL

1. Did the learned trial judge err in finding that Carl was involved in the commission of the offence?

[25] The learned trial judge made the following findings of fact:

I think it is clear on the evidence that the accused was not the main protagonist in this matter. The evidence of [Ms. S.] and the accused both attribute that activity to Carl. The issue is whether words of advice, encouragement and reassurance are enough to support a finding of guilt as a principal or as a party to this offence.

And further:

I find in all the evidence here that [Ms. S.] was not engaged in any prostitution activity before she met Carl, the other males, and the accused, that the accused did provide advice, encouragement, reassurance, and in the process of that participated in the recruitment of [Ms. S.] into prostitution. There is no doubt that she was recruited into prostitution, and, as I have said, the sexual encounter between the two males and the accused and [Ms. S.] certainly took her across that line.

And further:

I am satisfied that what happened here was a recruitment of [V.S.] into the acts of prostitution. I am satisfied as well that the accused participated by giving assistance in that recruitment process and by giving encouragement to the witness [V.S.]. On those facts and those findings I must find that she was a party to the offence of procuring V.S. into prostitution and I would find her guilty under section 212 together with section 21 of the Criminal Code.

[26] It was the submission of counsel for the appellant that it was Carl who was the main protagonist in the case and it was him, rather than the appellant, who was responsible for the complainant becoming a prostitute. The following submission was made in closing argument: . . . It's my submission, Your Honour, that she was recruited by the man that she was so taken with, and it was his offers and inducements, which we know nothing in particular about, that was acting upon [V.S.].

[27] The words of Martin J.A. are apt, as stated in *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443 (Ont. C.A.) at 458:

I am of the view that it is also appropriate, where an accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, to direct the jury with respect to the provisions of s.21 of the Code, even though the identity of the other participant or participants is unknown, and even though the precise part played by each participant may be uncertain.

See also: *R. v. Thatcher*, [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481 at 507.

[28] Upon a review of the reasons for judgment of the learned trial judge, and the transcript, there was ample evidence to support the trial judge's finding that Carl was involved in the commission of the offence. On the evidence presented a jury, acting judicially, could reasonably come to this conclusion and accordingly this finding of fact should not be disturbed. (See *R. v. Yebes*, [1987] 2 S.C.R. 168 and *R. v. Burke*, [1996] 1 S.C.R. 474).

2. Did the learned trial judge err in finding that the appellant was a party to the procurement?

[29] In this regard, the learned trial judge made the following finding:

I find on the evidence before me that the accused did give advice to the witness on what to wear, how to conduct herself as a prostitute and to pay money to a man, specifically Carl. She also provided encouragement by advising her of the amount of money that the accused was making in the sex trade and providing certain assurances that she would be able to get off the street at some

point in the future. She provided clothing and was with the witness on the first evening that she was out engaged in the sex trade. She also provided some warnings designed to protect her or to give information, and gave information about the risks involved in prostitution.

I am also satisfied on the evidence given by the accused upon her cross-examination that she was aware that Carl was intending to solicit the witness [V.S.] as a prostitute and that [Ms. S.] had not engaged in that sort of activity previously.

In summary then I find that the accused gave encouragement and advice to [Ms. S.], knowing that Carl was actively trying to persuade her to become a prostitute, and these pages may be found at page 43 of the second transcript.

[30] Once again, I am of the opinion that a jury, acting judicially, could reasonably come to the conclusion of fact that the learned trial judge did in these circumstances and, accordingly, I would not interfere with this finding.

[31] By way of brief summary, the evidence disclosed that the appellant provided the complainant with clothes, lent her a purse, told the complainant how much money she made as a prostitute, offered the complainant condoms and advised her to use them, made the financial arrangement for the complainant's first paid sexual encounter, gave the complainant advice on how to deal with her customer during the encounter, gave further advice regarding prices and other aspects of the trade, and checked the area for the complainant prior to going home. She did all of the above, knowing that the complainant had never before engaged in prostitution and knowing, further, that Carl was actively working to put the complainant on the street.

[32] In these circumstances there is ample evidence upon which to base the judge's finding that the appellant provided "advice, encouragement and reassurance and in the process of that participated in the recruitment of the complainant into prostitution".

3. Did the learned trial judge err in considering and relying upon evidence given in a voir dire that was not made part of the trial proper?

[33] There is no merit to this ground of appeal for there is no indication that, when Detective Sikora gave evidence, this evidence was given during the voir dire and, accordingly, was not made part of the trial.

[34] For the above reasons, I would dismiss this appeal.

c "The Honourable Mr. Justice Braidwood"

I AGREE:

"The Honourable Mr. Justice Esson"

I AGREE:

"The Honourable Madam Justice Newbury"

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