

CANADA / JUDGMENT

R. v. Carroll et al.

1999 BCCA 65

COURT

British Columbia Court of Appeal

DECIDED

4 February 1999

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Citation: R. v. Carroll, R. v. Fortney, Date: 19990204 R. v. Mahal Docket: CA023261, CA023170, CA023171 1999 BCCA 0065 Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN: CA023261 REGINA RESPONDENT AND: CHRISTOPHER MICHAEL CARROLL
APPELLANT

BETWEEN: CA023170 REGINA RESPONDENT AND: RUBY ANN FORTNEY APPELLANT

BETWEEN: CA023171 REGINA RESPONDENT AND: JASWINDER SINGH MAHAL APPELLANT

Before: The Honourable Mr. Justice Donald The Honourable Mr. Justice Hall The Honourable
Madam Justice Proudfoot

J.R. Ray Counsel for the Appellant Carroll M.C. Smith and K.S. Chaggar Counsel for the Appellant
Fortney T.S. Diewolf Counsel for the Appellant Mahal

D. Ryneveld, Q.C. Counsel for the (Crown) Respondent

Place and Date of Hearing Vancouver, British Columbia November 12, 1998

Place and Date of Judgment Vancouver, British Columbia February 4, 1999

Written Reasons by: The Honourable Mr. Justice Donald

Concurred in by: The Honourable Mr. Justice Hall The Honourable Madam Justice Proudfoot

Reasons for Judgment of the Honourable Mr. Justice Donald:

- [1] The appellants were convicted by a jury of a number of offences relating to the prostitution of two young women.
- [2] The jury found Ruby Ann Fortney guilty of: (1) unlawfully living on the avails of prostitution of L.J., a person under the age of eighteen, contrary of s. 212(2);
(2) controlling, directing or influencing the movements of L.J. to aid, abet or compel her to engage in or carry on prostitution contrary to s. 212(1)(h);

- (3) procuring F.M. contrary to s. 212(1)(a);
 - (4) unlawfully living on the avails of prostitution of F.M., a person under the age of eighteen, contrary to s. 212(2);
 - (5) controlling, directing or influencing the movements of F.M. to aid her to engage in or carry on prostitution contrary to s. 212(1)(h);
 - (6) sexually assaulting F.M. contrary to s. 271; and
 - (7) keeping a common bawdy house contrary to s. 210(1).
- [3] The jury found Jaswinder Singh Mahal guilty of: (1) unlawfully living on the avails of the prostitution of L.J., a person under the age of eighteen, contrary to s. 212(2);
- (2) controlling the movements of L.J. so as to aid and abet her carrying on prostitution contrary to s. 212(1)(h);
 - (3) sexually assaulting L.J. contrary to s. 271;
 - (4) unlawfully living on the avails of the prostitution of F.M., a person under the age of eighteen, contrary to s. 212(2);
 - (5) controlling, directing or influencing the movements of F.M. to aid, abet or compel her to engage in or carry on prostitution contrary to s. 212(1)(h);
 - (6) sexually assaulting F.M. contrary to s. 271;
 - (7) keeping a common bawdy house contrary to s. 210(1); and
 - (8) touching, directly or indirectly, for a sexual purpose, the body of F.M., a person under the age of fourteen years, contrary to s. 151.
- [4] The jury found Christopher Michael Carroll guilty of:
- (1) procuring L.J. contrary to s. 212(1)(a);
 - (2) unlawfully living on the avails of prostitution of L.J., a person under the age of eighteen, contrary to s. 212(2);
 - (3) controlling, directing or influencing the movements of L.J. to aid, abet or compel her to engage in or carry on prostitution contrary to s. 212(1)(h).
- [5] The principal ground of appeal advanced by Fortney and Mahal is that the learned trial judge erred in his handling of the evidence of the complainant, F.M. In particular, they alleged that he improperly admitted the transcript of the preliminary hearing testimony and some audio tapes of that testimony as evidence in the trial.

- [6] Carroll takes two points on his appeal. The first is that he ought not to have been tried together with Fortney and Mahal and the learned trial judge was wrong in refusing to sever the trial. The second is that the learned trial judge failed to give the jury an adequate instruction on the parties section of the Criminal Code, s.21(2).

FACTS

- [7] The learned trial judge summarized F.M.'s evidence in his ruling on a voir dire. In very general terms, during Ms. [M.'s] evidence at trial before the jury, she testified that when she was 13 years of age in the summer of 1995 (her 14th birthday was August 17th, 1995) she was picked up one night at 2:00 or 3:00 in the morning near Kingsgate Mall by the accused Ruby Fortney and Jaswinder Mahal and was driven back to their home in Surrey where she was asked by the accused Ruby Fortney to work for her, that she later had oral sex with Jaswinder Mahal, that she resisted an effort by Jaswinder Mahal to have anal sex with her, that she performed tricks or sexual acts with customers who came to the house in Surrey, that she received money from Ruby Fortney and later from Jaswinder Mahal, that she had intercourse with Jaswinder Mahal while Ruby Fortney was in the hospital having a baby, and that she saw Jaswinder Mahal have or apparently have anal intercourse with [L.J.].
- [8] L.J. was 15 or 16 at the time of the alleged offences. Carroll's charges relate only to her. L.J. testified that Carroll and his girlfriend, D.G., picked her up when she was a resident of Oppal House, an adjunct of the Maples Adolescent Treatment Centre. She said they went to the apartment of Carroll and D.G. where Carroll offered her a job working for him in an escort service. She agreed to his offer and performed two acts of prostitution, one at the apartment and another at a client's home. Carroll drove her to that location. She turned over the money on both transactions to D.G.
- [9] She said that she later went to Fortney's apartment. Fortney and Mahal, accompanied by F.M., picked her up from the Carroll residence. While she was living with Fortney for about two weeks she participated in prostitution with a number of persons and shared the money with Fortney, as did F.M. Carroll and D.G. visited on one occasion. L.J. said that Mahal forced her to engage in anal intercourse.
- [10] Each of the appellants testified and denied the charges. Since the details of their evidence are not important to the issues they raise on appeal I will not set them out.

TRIAL PROCEEDINGS

- [11] During her examination-in-chief F.M. said that she had difficulty remembering certain events. The learned trial judge allowed her to refresh her memory from the transcript of her testimony at the preliminary inquiry. She referred twice to the transcript while under questioning by Crown Counsel. It is alleged on appeal that the learned trial judge erred in not ensuring that she exhausted her memory before refreshing her memory.

- [12] Under cross-examination by Mr. Diewolf for Mahal, F.M. said that she could not remember many of the salient details of the case and that her evidence before the jury was not from memory but from what she could recall having read the transcript and the statements she gave to the police. Before Mr. Diewolf completed his cross-examination, counsel for the Crown announced his intention to apply to have the witness's preliminary inquiry transcript entered as evidence in the trial. There was some discussion as to the timing of the application – whether it should be undertaken immediately or at the end of cross-examination. The learned trial judge directed counsel to complete their questioning of the witness. Both Mr. Diewolf and Mr. Chaggar, who represented Fortney, pursued the witness at some length on the point that she had little or no independent recall of the events implicating their clients. It is alleged on appeal that the learned trial judge should not have permitted further questioning beyond the point where F.M. revealed her memory problem; rather he should have embarked on a voir dire to determine what to do with her evidence.
- [13] The Crown made the application and a voir dire got under way. In the voir dire the Crown called Dr. Tim Oberlander, an expert in developmental paediatrics who said that F.M. has fetal alcohol syndrome, which could affect her memory. In the course of her cross-examination, F.M. admitted that she consumed drugs between the time of the alleged offences and the trial.
- [14] The learned trial judge granted the Crown's application to read in the preliminary transcript relying on the authority of *R. v. Khan*, [1990] 2 S.C.R. 531. He found that the evidence was necessary because the witness could not remember important details of the events in question. In so finding, he referred to the witness's young age, her drug consumption and fetal alcohol syndrome. He went on to hold that the preliminary inquiry testimony met the test of reliability because it was sworn and subject to cross-examination.
- [15] It is alleged that the learned trial judge erred in failing to make a crucial credibility finding going to necessity, namely whether F.M. honestly could not remember what happened. It is alleged in the alternative that if the learned trial judge found her to be credible he was wrong in doing so. Finally, given the witness's lack of credibility it is submitted that there was no reasonable basis for concluding that her testimony at the preliminary inquiry was reliable.
- [16] Carroll applied for a severance at the beginning of the trial. It was refused with liberty to reapply after F.M.'s evidence.
- [17] Carroll renewed the application after F.M.'s evidence was presented to the jury in various forms, some 8 days into the trial. In brief terms, the application for severance was based on the contention that Carroll would be dragged down by evidence admissible only against his co-accused.

[18] The learned trial judge refused the application again. He held that the jury would be able to ignore evidence that does not relate to Carroll. He further held that it would not be in the interests of justice for the young complainants to have to testify at another trial.

[19] In his charge to the jury, the judge gave a general instruction on parties. He did not relate the evidence to the issues on aiding and abetting nor did he delineate the circumstances as between the appellants. Carroll submitted that this is non-direction amounting to mis-direction.

DISCUSSION

The Evidence of F.M.

[20] As I have said, Fortney and Mahal allege a series of errors in connection with F.M.'s evidence:

- (1) F.M. was not required to exhaust her memory before referring to her evidence at the preliminary inquiry;
- (2) the voir dire should have been held earlier;
- (2) the learned trial judge failed to make a crucial finding on F.M.'s credibility;
- (4) the learned trial judge made the wrong decision on necessity;
- (5) the learned trial judge made the wrong decision on reliability;
- (6) even if no reversible error occurred as alleged, F.M.'s evidence became too confused for the jury to sort out.

1. Exhaustion of Memory

[21] It is a well established rule of practice that a witness's memory must be exhausted before refreshing her memory from a document: *R. v. Coffin*, [1956] S.C.R. 191 at 210; *Evidence*, Anthony F. Sheppard (Toronto: Carswell, 1988) at 295. Whether a proper foundation has been laid is a matter of discretion: *Sheppard*, supra.

[22] While F.M. was not specifically asked whether she was unable to recall anything else on the topic under discussion before referring to the preliminary inquiry transcript, she had a significant difficulty in remembering certain events. The degree of manifest difficulty was sufficient in my opinion for the learned trial judge to allow her to refresh her memory. I quote from that portion of F.M.'s evidence where she discusses her arrival at the apartment of Fortney and Mahal:

Q Okay. Now, after you got to the house did you or did you not have a conversation about working?

A Yeah.

Q With whom did you have the conversation with?

A Angel. [Fortney]

Q Where did you have this conversation with Angel?

A In the living-room.

Q Was there anyone else present when you had this conversation?

A No.

Q Now, when did you have this conversation with Angel?

A when we got to her house.

Q Okay. I'd like you to tell the jury about that conversation?

A I can't remember.

Q I beg your pardon?

A I can't remember what was all said.

Q Do you remember giving a statement to the police?

A Yeah.

Q Were you telling the truth to the police?

A Yeah.

Q Do you remember testifying at the preliminary hearing?

A Yeah.

Q Do you remember whether or not you told the judge at the preliminary hearing about that conversation?

A Yeah.

Q Would it assist you in giving your evidence now to refresh your memory by referring to either --

A I blocked it out.

Q I beg your pardon?

A I blocked it out.

Q I know. You can't remember it?

A Yeah.

Q Would it help you to refer to what you said at the preliminary hearing?

A Sure.

[23] A set formula need not have been followed; in my view it was enough that the witness was unable to move along in her narrative without looking at a prior record of what she said.

[24] I should observe that defence counsel below did not object that the witness's memory had not been exhausted. They were concerned that the witness had no memory at all and was simply relating what she got from reading police statements and the preliminary transcript. As will be seen, this became the real issue.

[25] The learned trial judge expressly gave consideration in his ruling to the leading case of Coffin, *supra*. He acted on what I think was a sufficient degree of difficulty in the witness's recall and I cannot say that his discretion was wrongly exercised.

2. Timing of the Voir Dire

[26] The Crown applied to have the preliminary inquiry transcript read in as F.M.'s past recollection recorded, and the judge chose to hold a voir dire on this issue after cross-examination of F.M. was completed. The appellants Mahal and Fortney argue that this voir dire should have commenced during F.M.'s testimony, as soon as she said she had no independent recall.

[27] There is no substance to this point. The problem arose on cross-examination after the Crown had put the witness's story before the jury. The cross-examination tended to bring out the faulty nature of her memory. The timing of the voir dire could not have done the appellants any harm.

[28] The learned trial judge had to make a judgment whether to interrupt cross-examination, a step usually to be avoided in criminal trials, or let the questioning continue and see how the witness responded. By taking the latter course the learned trial judge avoided interference with cross-examination and obtained an enhanced picture of the witness's ability to recall events. That the questioning occurred in front of the jury rather than in their absence during a voir dire caused no prejudice to the appellants. In fact, it is argued by them on another point that the cross-examination showed that F.M. was an untruthful or at least an unreliable witness.

3. Failure to Make a Crucial Finding

[29] The appellants Fortney and Mahal say that the learned trial judge failed to decide whether F.M. was credible in claiming that she could not remember the important details of the case. If she was lying in that regard the Crown could not establish that it was necessary to receive the preliminary transcript. It will be remembered that *R. v. Khan*, *supra*, laid down a two-pronged test for reception of hearsay on a principled basis: necessity and reliability.

[30] The learned trial judge was aware of the need to decide the credibility issue. In his ruling he framed the question in this way:

Is her evidence that she does not have a current recollection credible or is she just avoiding dealing with these matters, as was suggested on cross- examination, because she is unable to face up to lies? Although her credibility is obviously a question for the jury, not for me, I have to consider whether and why she is unable to give a complete picture of the alleged evidence because it is relevant to whether or not the admission of a previous statement is necessary.

[emphasis added]

- [31] I do not take him to mean that he deferred to the jury on all questions of credibility, as was argued by the appellants, he was referring to their assessment of her credibility in arriving at the final verdict. He recognized that he must decide on the voir dire whether the witness's memory had truly failed her.
- [32] The learned trial judge went on in his ruling to recount that F.M. was 13 years old at the material time and that Dr. Oberlander said that she suffers from fetal alcohol syndrome affecting her cognitive skills, including memory. He referred to the evidence of F.M.'s intervening drug consumption. Then he said:

It is apparent to me from reading the transcript of her evidence at the preliminary that she was more responsive then than she is now during her examination at trial. The reason for that may be that she has blocked out these events, if they occurred, because of the nature of them or may be due to drug consumption.

It was certainly obvious to me that there were times during the testimony at trial when she was extremely reluctant to discuss the subject matter at all. I am mindful in considering this matter that I am not dealing with a child of very tender years. She is not a young child but she is nevertheless a child.

- [33] While the learned trial judge did not make an express finding on credibility such a finding was implicit in his decision that the evidence was necessary. I say that because he asked himself the appropriate question at the outset of his analysis on the test of necessity, and it is most improbable that he would have disregarded credibility only a short time later.

4. Was the Evidence Necessary?

- [34] It is argued that the finding of necessity was wrong, for three reasons: F.M. gave inconsistent answers about what she remembered; she admitted lying to the police in her first statement; and in cross-examination she claimed extensive memory loss even though she required only two references to the preliminary inquiry transcript during examination-in-chief. All this is said to make her loss of memory incredible, looking like an obvious ploy to avoid hard questioning, and the learned trial judge should have so found.
- [35] I do not accept this argument. The learned trial judge carefully examined the evidence in his ruling. He had the benefit of observing the witness under questioning. His acceptance of the claimed memory loss was a finding based on the evidence and not unreasonable.

5. Was the Evidence Reliable?

[36] On reliability the learned trial judge said this in his ruling:

I think that in this case there is a strong safeguard as to reliability. The evidence on the preliminary was given under oath and was subject to contemporaneous cross-examination.

When one considers the understanding and the ability of [F.M.] to communicate, the fact that she is a person living with fetal alcohol syndrome and when one considers the reasonableness to the proposition that a person who was involved in the circumstances that the plaintiff alleges she was would block them out, attaches some reliability to an earlier under oath statement.

I examined the earlier statements in August of 1995 and in January of 1996 and although the first statement lacks detail, the statements are not inconsistent with the central evidence given at the preliminary trial.

I think the evidence given on the preliminary is sufficiently reliable to be admitted, particularly if protection is given to the accuseds by allowing them to cross-examine the complainant further if they wish.

Accordingly, the evidence of [F.M.] can be read to the jury after the transcript is edited for matters that are irrelevant or inadmissible.

[37] One of the subsidiary arguments advanced by Mr. Smith on behalf of Fortney was that the learned trial judge ought to have edited from the transcript anything that the witness remembered and discussed in her evidence. This is because the transcript passages on those matters are previous consistent statements, the admission of which amounts to oath helping. In my view, the learned trial judge was not required to undertake this task in order to conduct a fair trial. Defence counsel did not ask him to edit the transcript in this way. The jury would have understood that the core of her evidence was to be found in the transcript. Given the muddled nature of her trial testimony, it is not likely that the jury would have put much weight on consistency.

[38] The principal argument under this head is that there was no reason to expect her preliminary inquiry evidence to be any more reliable than her evidence at trial: she admitted lying on her first statement to the police and she was suffering from fetal alcohol syndrome when she testified at the preliminary inquiry.

[39] The test of reliability requires only a threshold determination of credibility by the judge, the ultimate decision belongs to the jury. Here the learned trial judge examined all the relevant features of the evidence and found that the witness was responsive and lucid at the preliminary inquiry. She was then under oath and cross-examined. This was enough to clear the threshold. It was for the jury to assess the credibility of her preliminary inquiry evidence having regard to the admitted false statement and fetal alcohol syndrome.

6. The Confused State of the Evidence

[40] Mr. Diwold for Mahal submitted that the jury faced too many difficulties in sorting out F.M.'s evidence. He argued that no one could determine what she remembered from the hodge-podge, and despite the best efforts of the learned trial judge in charging the jury, her evidence could not be clarified. In his contention there should be a new trial.

[41] Juries are often required to find facts from a melange of evidence. It is not uncommon for cross-examination to use prior statements of several kinds: police statements, testimony given in a previous trial, an inquest or a preliminary inquiry. We have to trust juries to use their common sense in sifting the evidence and to follow the guidance offered by the trial judge. This case did not present an extraordinarily difficult problem for the jury. F.M.'s story was a relatively simple one. Her memory failed her at trial and resort had to be made to previous sworn testimony given in the same case. In my opinion this was not beyond the ability of a properly instructed jury. I do not accede to this argument.

Carroll's Appeal

[42] Carroll advanced two grounds: (1) the refusal to sever him from the trial of his co-accused; and, (2) an inadequate charge on parties.

1. Severance

[43] In Mr. Ray's submission severance ought to have been granted for three reasons. First, he argued that there was simply too much evidence against Fortney and Mahal for the jury to ignore when they turned their minds to consider Carroll's case. Second, he submitted that F.M.'s credibility was unfairly bolstered by the inclusion of her evidence concerning the two other accused. Had there been separate trials, her credibility would have stood or fallen solely on evidence that related only to him; as it was, a jury finding that F.M. was credible in her evidence concerning Fortney and Mahal would naturally carry over into their assessment of the credibility of her evidence against him. Third, he argued that the learned trial judge erred in basing his decision on a desire to spare the complainants from testifying again when they would likely be required to testify at another trial in any event.

[44] Before discussing these points in turn, I wish to make some general observations. Severance is a matter of discretion for the trial judge. The standard of appellate review of this discretion was discussed in *R. v. Litchfield*, [1993] 4 S.C.R. 333 at 353-54 by Iacobucci J.:

The criteria for when a count should be divided or a severance granted are contained in ss. 590(3) and 591(3) of the Criminal Code. These criteria are very broad: the court must be satisfied that the ends or interests of justice require the order in question. Therefore, in the absence of stricter guidelines, making an order for the division or severance of counts requires the exercise of a great deal of discretion on the part of the issuing judge. The decisions of provincial appellate courts have held, and I agree, that an appellate court should not interfere with the issuing judge's exercise of discretion unless it is shown that the issuing judge acted unjudicially or that the ruling resulted in an injustice. See, for example, *R. v. Kestenberg and McPherson* (1959), 126 C.C.C. 387, 32 C.R. 1, [1960] O.W.N. 79 (Ont. C.A.), in which Porter C.J.O. stated, at p. 392, with regard to the

trial judge's refusal to order a severance:

Unless it is shown that he acted unjudicially in the exercise of his discretion or that an injustice might have resulted from the joint trial, his decision should not be disturbed...

[emphasis added]

- [45] The determination whether to grant severance in the midst of a trial depends very much on an appreciation of the dynamics of the case. The trial judge is uniquely situated to make that judgment and I would be reluctant to reach a different conclusion unless it was obviously wrong.
- [46] Regarding the present case, I find a joint trial was appropriate, as the complainants had to testify about all three accused. The overlap in the evidence as between Carroll and the others included the fact that F.M. was first at Carroll's apartment working as a prostitute then at Fortney's place, and Carroll and D.G. visited Fortney and Mahal and communicated with them by telephone. As well, the learned trial judge gave a fully considered ruling in rejecting Carroll's application for severance, listing the pertinent factors and articulating a rational basis for his decision.
- [47] I now address the appellant's specific points of argument. On the first and second points, while there was some risk that the jury would run the evidence of the accuseds together, that risk is often present in joint trials. The learned trial judge took that factor into account and weighed it in the balance. His charge that they should separately consider the evidence was satisfactory. We should not assume that the jury ignored his instructions. Moreover, the learned trial judge found that since the case was relatively uncomplicated, the jury should have no difficulty in keeping the evidence applicable to each accused separate in their minds. He said in his ruling:

I do not think that the jury will have difficulty not considering the evidence relevant to Mahal/Fortney to the counts involving Mr. Carroll. I say that because, in part, although the evidence of the witness was time consuming, it was, essentially, uncomplicated evidence. A properly instructed jury will not have difficulty ignoring that evidence in considering the case against Mr. Carroll. I do not think that there is a real danger that injustice to Mr. Carroll would occur.

- [48] It has not been shown to my satisfaction that the learned trial judge misread the situation.
- [49] Concerning the second point on credibility, I think that the learned trial judge's comments about separating the evidence answer that argument as well. His reasons reveal that he had the credibility arguments in his mind in ruling on the issue of severability. Also, like the general prejudice issue, the issue of credibility will often arise in joint trials, and must be considered as one of a number of factors that the trial judge must balance in considering the issue of severance. It appears that the trial judge properly incorporated that factor here.

- [50] Moving finally to the point about the complainants having to testify again, the learned trial judge discussed in his ruling the very argument put before us, namely, that they would probably have to testify again anyway in the trial against a man named Albert Ming-Bun-Mak. Mr. Mak was indicted along with the others but failed to show for jury selection. The Crown proceeded without him and postponed his case. It was argued here and below that if Carroll were severed he could be tried along with Mak. As it turned out, the Crown stayed proceedings on the charges against Mak but this did not happen until after the trial against these appellants was completed.
- [51] Facing the judge was the possibility that the complainants would have to testify again in a trial against Mak and the certainty of having to do so if Carroll were severed. I cannot say that he was wrong in avoiding that certainty out of consideration for the complainants. As I have said, with Mak's stay of proceedings they were spared any further court involvement in the manner.
- [52] Our attention was drawn by Mr. Ryneveld, to the oral remarks of Mr. Justice Stewart in the case of *R. v. Mark Walter Stewart* (9 September 1998), Campbell River Registry No. X42810 (B.C.S.C.) on the subject of disruption of witnesses' lives caused by multiple proceedings. They are apposite to this case:

What is of significance in the case at bar (and the Supreme Court of Canada touches on this in *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97) is the potential for additional disruption of the lives of witnesses, especially complainants in sexual cases, if more than one trial is required. Disruption of lives is not simply a matter, if severance is granted, of having to testify for a greater number of days than otherwise would be the case. Disruption encompasses the added stress to human beings of being caught up in a process that seems endless. It is a very real consideration. Here, in this case, the only certain thing is that the best chance for each complainant to only have to testify once is if there is but one trial, i.e., no severance. All else is a matter of speculation.

- [53] In the result I am unable to find any miscarriage of justice in the decision refusing severance.

2. The Charge on Parties

- [54] This is what the learned trial judge told the jury about parties:

Now, under section 21(b) an accused is liable as a party if the Crown proves that the acts were done or omitted for the purpose of aiding in the commission of the offence. It is not enough that the Crown shows that it had that effect. Under 21(c) abetting simply means encouraging. Merely being present is not enough unless presence is accompanied by such additional factors as the prior knowledge that the principal was going to commit the offence. Therefore, to find an accused guilty as a party under section 21(1)(b) or (c), the Crown must prove beyond a reasonable doubt that a person whom I will refer to as the principal offender committed the offence. Secondly, that the accused did something or omitted to do something that he or she she [sic] had a legal duty to do and this actually aided or abetted the principal offender to commit the offence

and the Crown must prove that the accused intended that his or her acts would aid or abet the principal offender to commit the offence. To establish that a person is a party, the Crown must prove that the accused intended to aid the person to commit the offence or intended to encourage the person to commit the offence.

- [55] The alleged defect lies not in what the instruction says but in what it does not say. Mr. Ray argued that in addition to what was actually done, the learned trial judge was obliged to relate the evidence to the issues. This additional step, he says, was required in order to avoid confusion between Carroll and D.G. (who was tried separately as a young offender) on the one hand and Fortney and Mahal on the other, and to focus the minds of the jurors on the specific evidence which was relevant to s.21(1).
- [56] The Crown concedes that it would have been better had he done so and I agree. However, I see this as a mere imperfection and not a non-direction amounting to a mis- direction requiring a new trial.
- [57] The jury would have had little difficulty in segregating the evidence relating to the two couples. The events associated with each were, in all important respects, separate as to time and place. It was not necessary to tell the jury that as far as Carroll was concerned the party section could only connect him with D.G. Ä that would have been obvious on the facts.
- [58] Nor do I think there was any realistic danger that the jury would apply inappropriate evidence to the question of whether Carroll aided or abetted D.G. The evidence was simple: they both picked up L.J. and provided her accommodation in their apartment; Carroll placed an ad in the buy and sell for the escort service; he drove L.J. to a customer's home; and D.G. received the money collected by L.J. from her prostitution. I would not accede to this ground of appeal.

CONCLUSION

- [59] For the foregoing reasons I would dismiss the appeals.

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Madam Justice Proudfoot"

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Prepared on 27 October 2026 · Esheria