

CANADA / JUDGMENT

R. v. Downey

[1992] 2 SCR 10

COURT

Supreme Court of Canada

DECIDED

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R. v. Downey

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Date

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Report

[1992] 2 SCR 10

Case number

21874

Judges

La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Alberta

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 21874 On February 7th, 1997, the Parole Board of Canada awarded Corrine Louise Reynolds a criminal record suspension (formerly called a "pardon") for the convictions mentioned in this decision.

Decision Content

R. v. Downey, [1992] 2 S.C.R. 10

Kenneth Dale Downey Appellant

v.

Her Majesty The Queen Respondent

and

The Attorney General of Canada and

the Attorney General of Quebec Interveners

Indexed as: R. v. Downey

File No.: 21874.

1991: November 1; 1992: May 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Constitutional law -- Charter of Rights -- Presumption of innocence -- Reverse onus provision -- Accused convicted of living on avails of prostitution -- Whether evidential burden placed on an accused by s. 195(2) of Criminal Code infringes s. 11 (d) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Criminal Code, R.S.C. 1970, c. C-34, s. 195(1)(j), (2).

Criminal law -- Prostitution -- Living on avails of prostitution -- Escort agency -- Presumption of innocence -- Accused convicted of living on avails of prostitution -- Whether evidential burden placed on an accused by s. 195(2) of Criminal Code violates his right to be presumed innocent under s. 11 (d) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C. 1970, c. C-34, s. 195(1)(j), (2).

The accused was jointly charged with his companion, the owner of an escort agency, with two counts of living on the avails of prostitution pursuant to s. 195(1) (j) of the Criminal Code . Clients would call the agency and an escort would go on a date with them. They were charged an introduction fee which was turned over to the agency. The escorts kept any money they received for sexual services which were provided in 85 to 90 percent of the dates. The accused was aware of this sexual activity. At the agency, the accused answered the telephone, made up the receipts and did the banking. He had no other employment. On one occasion when his companion was away he ran the agency for a month. During the trial, an application was made for a declaration that s. 195(2) of the Code was of no force or effect because it violates s. 11 (d) of the Canadian Charter of Rights and Freedoms . Section 195(2) provides that "[e]vidence that a person lives with or is habitually in the company of prostitutes . . . is, in the absence of evidence to the contrary,

proof that the person lives on the avails of prostitution". The application was dismissed and the accused was convicted. His appeal to the Court of Appeal was dismissed. This appeal is to determine whether the evidential burden placed on an accused by s. 195(2) infringes the right to be presumed innocent set forth in s. 11 (d) of the Charter and, if so, whether the infringement is justifiable under s. 1 of the Charter .

Held (La Forest, McLachlin and Iacobucci JJ. dissenting): The appeal should be dismissed. Section 195(2) of the Code infringes s. 11 (d) of the Charter but is justifiable under s. 1 .

Per L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.: The presumption contained in s. 195(2) of the Code infringes s. 11 (d) of the Charter since the statutory presumption can result in the conviction of an accused despite the existence of a reasonable doubt in the mind of the trier of fact as to his guilt. The fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on avails.

Section 195(2) of the Code constitutes a reasonable limit on the presumption of innocence. When the presumption set out in s. 195(2) is reviewed in the context of s. 195(1) itself, it is apparent that the objective of the impugned provision is of sufficient importance to warrant overriding s. 11 (d). The majority of offences outlined in s. 195(1) are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1) (j) is specifically aimed at those who have an economic stake in the earnings of a prostitute. Its target is the person who lives parasitically off a prostitute's earnings -- namely, the pimp. Pimps control street prostitution and, along with customers, are the major source of violence against prostitutes. From a review of Canadian and foreign studies and the current literature pertaining to the problem of prostitution and pimps, it is obvious that s. 195(2) , in assisting in curbing the exploitive activity of pimps, is attempting to deal with a cruel and pervasive social evil.

Further, s. 195(2) meets the proportionality test. First, the section is a measure carefully designed to respond to the objective. Evidence of pimps living on avails is difficult, if not impossible, to obtain without the cooperation of the prostitutes, who are often unwilling to testify for fear of violence against them by their pimps. Section 195(2) enables a prosecution to be instituted without it being necessary for the prostitute to give evidence. With the presumption, Parliament has focussed on those circumstances in which maintaining close ties to prostitutes gives rise to a reasonable inference of living on the avails of prostitutes. There is no real danger that the section will result in innocent persons who have non parasitic legitimate living arrangements with prostitutes being inculpated. A description sufficient to constitute evidence to the contrary will generally be included in the Crown's case. If not, such evidence can easily be led. In either event, the presumption will be displaced. Second, s. 195(2) represents a minimal impairment of the presumption of innocence. All that is required of the accused is to point to evidence capable of raising a reasonable doubt. That can often be achieved as a result of cross-examination of Crown witnesses. The section does not necessarily force the accused to testify. In enacting s. 195(2), Parliament has chosen a reasonable and sensitive position. To eliminate the presumption completely would reward the accused for the intimidation of vulnerable witnesses in a situation where such intimidation is widespread. To provide a reverse onus which would cast a heavier

legal burden on the accused would constitute a more serious infringement of s. 11 (d) than the evidential burden imposed by s. 195(2). Third, when one balances the societal and individual interests, it is clear that the extent of the infringement is proportional to the legislative objective. In view of the social problems flowing from prostitution, the successful prosecution of pimps is very important. Pimps encourage and enforce often through violence the activities of prostitutes -- a particularly vulnerable segment of society. Section 195(2) is aimed not only at remedying a social problem but also at providing some measure of protection for prostitutes by eliminating the necessity of testifying. The infringement of the presumption of innocence by s. 195(2) is minimal.

Per La Forest J. (dissenting): For the reasons given by Cory J., s. 195(2) of the Code infringes the presumption of innocence guaranteed by s. 11 (d) of the Charter . Section 195(2) , however, is not justifiable under s. 1 of the Charter . While the presumption may well be rationally connected to the objective of securing the convictions of the parasites who control street prostitutes without evidence from the complainant prostitute, the basic facts contained in s. 195(2) are not intrinsically blameworthy and simply cast too wide a net. The section catches people who have legitimate non-parasitic living arrangements with prostitutes. No evidence was advanced to show that it was necessary to cast the net so wide.

Per McLachlin and Iacobucci JJ. (dissenting): The mandatory presumption contained in s. 195(2) of the Code infringes the presumption of innocence guaranteed by s. 11 (d) of the Charter , in that proof of the substituted fact that the accused person lives with or is habitually in the company of a prostitute does not lead inexorably to proof of the statutorily required or essential element of living on the avails of prostitution.

Section 195(2) is not justifiable under s. 1 of the Charter . While the legislative objective is sufficiently important to warrant overriding a constitutional right, the impugned section does not meet the proportionality test. A presumption, like any other challenged legislative provision, must be externally rational, in the sense that it must evince a rational connection to the legislative purpose behind its enactment. But in the case of a presumption, it must also be "internally rational" in the sense that there must be a rational connection between the substituted fact and the presumed fact. The fact that in some cases one can infer the presumed fact from the proven fact is insufficient to establish the internal rational connection required under s. 1 . At a minimum, proof of the substituted fact must make it likely that the presumed fact is true. Further, the rationality test also has a fairness aspect. An irrational presumption operates unfairly in that it unduly enmeshes the innocent in the criminal process by arbitrarily catching within its ambit those who are not guilty of the offence. In the case of s. 195(2) the required logical link is lacking, rendering it both irrational and unfair. It cannot be said that it is likely that one who lives with or is habitually in the company of a prostitute is parasitically living on the avails of prostitution. It is a possible inference, reasonable only in some cases. Spouses, lovers, friends, children, parents or room-mates may live with or be habitually in the company of a prostitute, which is not a criminal offence, without living on the avails of prostitution. Any presumption which has the potential to catch such a wide variety of innocent people in its wake

can only be said to be arbitrary, unfair and based on irrational considerations.

Finally, the irrational and unfair effects of the presumption extend to the prostitutes themselves and bring into question the external rationality of the presumption. By this presumption prostitutes are put in the position of being unable to associate with friends and family, or to enter into arrangements which may alleviate some of the more pernicious aspects of their frequently dangerous and dehumanizing trade. The predictable result is to force prostitutes onto the streets or into the exploitive power of pimps, thereby undercutting the very pressing and substantial objective which the presumption was designed to address. Because it exacerbates the very exploitation it purports to prevent, s. 195(2) cannot be said to possess the degree of rationality necessary to justify the violation of a right guaranteed by our Charter .

Cases Cited

By Cory J.

Referred to: R. v. Appleby, [1972] S.C.R. 303; R. v. Proudlock, [1979] 1 S.C.R. 525; R. v. Oakes, [1986] 1 S.C.R. 103; Dubois v. The Queen, [1985] 2 S.C.R. 350; Schuldt v. The Queen, [1985] 2 S.C.R. 592; R. v. Vaillancourt, [1987] 2 S.C.R. 636; R. v. Whyte, [1988] 2 S.C.R. 3; R. v. Kowlyk, [1988] 2 S.C.R. 59; R. v. Keegstra, [1990] 3 S.C.R. 697; R. v. Grilo (1991), 64 C.C.C. (3d) 53; R. v. Celebrity Enterprises Ltd. (1977), 41 C.C.C. (2d) 540; Shaw v. Director of Public Prosecutions (1961), 45 Cr. App. R. 113; R. v. Chaulk, [1990] 3 S.C.R. 1303; R. v. Clarke, [1976] 2 All E.R. 696.

By McLachlin J. (dissenting)

R. v. Oakes, [1986] 1 S.C.R. 103, aff'g (1983), 40 O.R. (2d) 660; Re Boyle and The Queen (1983), 5 C.C.C. (3d) 193; R. v. Whyte, [1988] 2 S.C.R. 3; County Court of Ulster County v. Allen, 442 U.S. 140 (1979); R. v. Grilo (1991), 64 C.C.C. (3d) 53.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 11 (d).

Criminal Code, R.S.C. 1927, c. 36, ss. 216(1)(i), 238(j), 239.

Criminal Code, R.S.C. 1970, c. C-34, s. 195(1)(j) [ad. 1972, c. 13, s. 14; rep. & sub. 1980-81-82-83, c. 125, s. 13], (2) [rep. & sub. idem].

Criminal Code, R.S.C., 1985, c. C-46, s. 212(1) (j), (h), (2) [ad. c. 19 (3rd Supp.), s. 9], (3) [idem].

Criminal Code, S.C. 1892, c. 29, ss. 207(l), 208.

Criminal Code, S.C. 1953-54, c. 51, s. 184.

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United Kingdom. Criminal Law Revision Committee. Working Paper on Offences relating to Prostitution and allied Offences. London: H.M.S.O., 1982.

Weisberg, D. Kelly. "Children Of The Night: The Adequacy Of Statutory Treatment Of Juvenile Prostitution" (1984), 12 Am. J. Crim. L. 1.

APPEAL from a judgment of the Alberta Court of Appeal (1990), 105 A.R. 351, dismissing the accused's appeal from his conviction for living on the avail of prostitution contrary to s. 195(1) of the Criminal Code . Appeal dismissed, La Forest, McLachlin and Iacobucci JJ. dissenting.

Terence C. Semenuk and Mitchell C. Stephensen, for the appellant.

Jack Watson, for the respondent.

Robert J. Frater, for the intervener the Attorney General of Canada.

Monique Rousseau and Gilles Laporte, for the intervener the Attorney General of Quebec.

The following are the reasons delivered by

//La Forest J.//

La Forest J. (dissenting) -- I have had the advantage of reading the reasons of my colleagues. I agree with Justice Cory that s. 195(2) (now s. 212(3)) of the Criminal Code, R.S.C. 1970, c. C-34, infringes the presumption of innocence guaranteed by s. 11 (d) of the Canadian Charter of Rights and Freedoms for the reasons he gives. I, however, agree with Justice McLachlin's conclusion that s. 195(2) cannot pass muster under s. 1 of the Charter, though I approach the matter somewhat differently.

No one can deny the importance of the objective under s. 195(1)(j) of the Code, which makes it an offence to live on the avails of prostitution of another person. It is aimed at the parasites who control street prostitutes. The presumption in s. 195(2) is there to encourage reporting and to facilitate prosecutions without the need for the prostitutes involved to testify. In other words, because of the parasitic and coercive nature of the pimp-prostitute relationship, prostitutes, often young girls, are extremely reluctant to come forward and testify against their pimps; see the Report of the Committee on Sexual Offences Against Children and Youths (the Badgley Committee), *Sexual Offences Against Children* (1984), vol. 2, at pp. 1057-58. I think the presumption may well be rationally connected to the objective of securing convictions without evidence from the complainant prostitute. However, the basic facts contained in s. 195(2) are not intrinsically blameworthy and simply cast too wide a net. It catches people who have legitimate non-parasitic living arrangements with prostitutes. No evidence was advanced to show that it was necessary to cast the net so wide.

I would, therefore, allow the appeal, quash the conviction and order a new trial.

The judgment of L'Heureux-Dubé, Sopinka, Gonthier, and Cory JJ. was delivered by

//Cory J.//

Cory J. -- Section 195(1) (j) (now s. 212(1) (j)) of the Criminal Code, R.S.C. 1970, c. C-34, makes it an offence to live wholly or in part on the avails of another person's prostitution. Section 195(2) (now s. 212(3)) provides that "[e]vidence that a person lives with or is habitually in the company of prostitutes. . . is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution". At issue on this appeal is whether the evidential burden thus placed on an accused contravenes the right to be presumed innocent set forth in s. 11 (d) of the Canadian Charter of Rights and Freedoms. If the impugned section does infringe s. 11 (d) of the Charter it must be determined whether it can be justified pursuant to s. 1 of the Charter.

Factual Background

The appellant, Kenneth Downey, was jointly charged with his companion, Corrine Louise Reynolds, with two counts of living on the avails of prostitution. They were both convicted at trial and their appeals to the Court of Appeal of Alberta were dismissed.

From September 1985 to May 1986, Corrine Reynolds owned and operated an escort agency. When the agency received calls for escorts either Elizabeth Wilson or Sherry Siegel, both of whom testified at trial, would go on dates with the callers. The callers, referred to as clients by the accused, were then charged an introduction or agency fee. The fee charged was the same for all clients and was turned over to the agency. The agency in turn deposited the money in a bank account maintained by Corrine Reynolds in the name of CLR Holdings. Any money that was paid to Wilson or Siegel in respect of sexual services was kept by them. Corrine Reynolds also went out with clients on the same basis as Wilson and Siegel. Wilson and Siegel had sexual relations of one kind or another with 85 to 90 percent of the clients that they dated. There is no question that both Reynolds and Downey were aware of this sexual activity. Indeed they knew of the particular sexual preferences of many of the clients of the agency.

During the time Wilson and Siegel worked at the agency, Downey answered the agency's telephones, made up the receipts and did the banking. Throughout this period he had no other employment. On one occasion when Reynolds was away Downey ran the agency for a month. It was then that he "suspended" or fired Siegel.

This is not a case of pimps manipulating young girls. Both Wilson and Siegel were mature women. Strangely enough they did not consider themselves prostitutes in spite of receiving payment for their sexual activities with clients of the agency.

During the course of the trial an application was made for a declaration that s. 195(2) of the Criminal Code was of no force or effect because of s. 11 (d) of the Charter . The application was dismissed and the trial judge ruled that the section was constitutionally valid.

Courts Below

(a) The Court of Queen's Bench

The trial judge found that s. 195(2) was not a true reverse onus provision. Rather he found it created an evidential presumption or inference which could be rebutted by raising a reasonable doubt as to its validity. He expressed the opinion that requiring an accused to raise a reasonable doubt as to guilt did not require the accused to give evidence. He noted that the required fact in the presumption (living with or habitually in the company of a prostitute) might not be proven by the Crown. In any event the accused could introduce a reasonable doubt through the cross-examination of Crown witnesses.

(b) The Court of Appeal (1990), 105 A.R. 351

The Court of Appeal dismissed the appeal from the bench without hearing from the respondent. Kerans J.A. expressed the view that the impugned section should be understood as merely directing the jury that the fact of living with prostitutes and consorting with them was to be considered in deciding the question of guilt or innocence. A jury which had any doubt as to the appropriateness of the inference would give effect to that doubt.

Does Section 195(2) Infringe Section 11(d) of the Charter ?

Pre-Charter Classification of Presumptions

At the outset it may be helpful to review briefly some pre-Charter considerations of statutory presumptions.

In *R. v. Appleby*, [1972] S.C.R. 303, this Court considered a presumption which required the accused to establish a state of affairs. There the presumption provided:

[W]here it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion;

It was held that the word "establishes" required the accused to prove on a balance of probabilities that he did not enter the vehicle for the purpose of setting it in motion. The presumed fact must be disproved on the balance of probabilities rather than by the mere raising of a reasonable doubt.

In *R. v. Proudlock*, [1979] 1 S.C.R. 525, the accused was charged with breaking and entering with intent to commit an indictable offence. Section 306(2)(a) (now s. 348(2)(a)) of the Criminal Code provided that the intent to commit an indictable offence was to be presumed when, in the absence of any evidence to the contrary, proof was adduced of having broke and entered. Under this section, the trier of fact is required to draw the conclusion from proof of the basic fact in the absence of evidence to the contrary. This mandatory conclusion results in an evidential burden whereby the accused will need to call evidence unless there is already evidence to the contrary in the Crown's case. Pigeon J. for the majority concluded that evidence which is disbelieved by the trier of fact is not "evidence to the contrary" for the purposes of discharging the evidential burden. At pages 549 and 551 he wrote:

The accused does not have to "establish" a defence or an excuse, all he has to do is to raise a reasonable doubt. If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt.

...

If the prima facie case is made up by the proof of facts from which guilt may be inferred by presumption of fact, the law is clear on the authorities that, because the case in the end must be proved beyond a reasonable doubt, it is not necessary for the accused to establish his innocence, but only to raise a reasonable doubt. This he may do by giving evidence of an explanation that may reasonably be true, and it will be sufficient unless he is disbelieved by the trier of fact, in which case his testimony is no evidence. In any case, the evidence given by himself or otherwise, has to be such as will at least raise a reasonable doubt as to his guilt; if it does not meet this test the prima facie case remains and conviction will ensue.

The passage of the Charter led to a review of the intrinsic meaning of the presumption of innocence.

Section 11 (d) of the Charter provides that:

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

In order to determine whether there has been an infringement of s. 11 (d) it must be decided whether or not the presumption under attack could lead to the result that an accused person would be found guilty even though a reasonable doubt existed as to that guilt.

The nature of presumptions was first considered post-Charter in *R. v. Oakes*, [1986] 1 S.C.R. 103. There Dickson C.J. noted that they could be classified in two categories. He expressed his view in this way at pp. 115-16:

Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact. . . .

Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or a persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" . . . while the former involve actual legal rules. [Emphasis in original.]

A very useful analysis of presumptions that can be utilized in this case can be found in the writing of T. A. Cromwell in "Proving Guilt: The Presumption of Innocence and the Canadian Charter of Rights and Freedoms " in W. H. Charles, T. A. Cromwell and K. B. Jobson, eds., *Evidence and the Charter of Rights and Freedoms* (1989), 125, at pp. 130ff. (which in turn is based on the analysis favoured by Professor Cross in *Evidence* (5th ed. 1979), at pp. 122ff., approved in Oakes). The presumptions can be summarized in this way:

- 1) Presumptions which operate without the requirement of proof of any basic facts.
- 2) Presumptions which require proof of a basic fact.
 - (a) **Permissive Inferences:** Where the trier of fact is entitled to infer a presumed fact from the proof of the basic fact, but is not obliged to do so. This results in a tactical burden whereby the accused may wish to call evidence in rebuttal, but is not required to do so.
 - (b) **Evidential Burdens:** Where the trier of fact is required to draw the conclusion from proof of the basic fact in the absence of evidence to the contrary. This mandatory conclusion results in an evidential burden whereby the accused will need to call evidence, unless there is already evidence to the contrary in the Crown's case.
 - (c) **Legal Burdens:** Similar to the burden in (b) except that the presumed fact must be disproved on a balance of probabilities instead of by the mere raising of evidence to the contrary. These are also referred to as "reverse onus clauses".

The nature of the right to be presumed innocent set out in s. 11 (d) of the Charter was first considered in *Dubois v. The Queen*, [1985] 2 S.C.R. 350. There Lamer J. (as he then was) was concerned with the nature of the right in connection with s. 13 which provides protection against self-incrimination. In that case he stated (at p. 357):

Section 11 (d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or by calling other evidence.

Thus there is implicit in the right to be presumed innocent an obligation on the Crown to make out a case for the accused to meet before a response can be called for from the accused.

In *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, this Court once again considered the presumption that had come before it in *Proudlock*, *supra*. Eventually the case turned upon whether an acquittal in the face of such a presumption constituted a question of law or a fact. Nonetheless the decision is helpful in its qualification of the presumption. It was held at p. 610 that:

But when the burden has been shifted (as is the case for proof of intent when a person is found in a place which he or she has broken into), it can be said, absent any evidence to the contrary, that there is no evidence upon which a reasonable doubt could exist as regards the intent of the accused, and an appeal against the ensuing acquittal raises a question of law alone.

In other words the presumption required the trier of fact to convict in the absence of any evidence to the contrary. This presumption would come within category 2(b).

In *R. v. Oakes*, supra, the Court considered s. 8 of the Narcotic Control Act which provided that if the Crown was able to prove beyond a reasonable doubt that the accused had been in possession of a narcotic, then the accused was to be "given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking". The section in effect required the accused to establish on a balance of probabilities that he did not have possession of the narcotics for purposes of trafficking. It was held that s. 11 (d) required that an individual must be proven guilty beyond a reasonable doubt; that the State must bear the burden of proving this; and proof of guilt must be accomplished "according to law in a fair and public hearing by an independent and impartial tribunal".

Dickson C.J. applying this basic principle to the reverse onus provision contained in s. 8 of the Narcotic Control Act concluded at pp. 132-33 that:

In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11 (d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

The Chief Justice went on to note that even though a rational connection might exist between the established fact and the presumed fact this may not be sufficient to render the presumption constitutional. On page 134 he stated:

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

Contrary to the decision of the Ontario Court of Appeal, Dickson C.J. stressed that the rational connection between the proven and the presumed fact is better taken into account when analyzing the effect of s. 1 of the Charter on the impugned legislation, rather than in the process of determining whether s. 11 (d) had been violated.

The principles set forth in *Oakes* were applied in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, where s. 213 (d) of the Criminal Code was questioned. The section provided that the offence of murder was committed if the accused used a weapon or had it on his person at the time he commits or attempts to commit an offence or during flight after committing or attempting to commit the

offence. Thus a conviction of murder was possible although the accused had neither an objective nor subjective intent to kill the victim. Lamer J. speaking for the majority of the Court concluded that the Crown was required to prove all elements of the offence together with those required to satisfy s. 7 of the Charter . He found that any provision which created an offence which allowed for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringed s. 7 and s. 11 (d). He wrote at pp. 654-55:

These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the Charter . Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11 (d).

Clearly, this will occur where the provision requires the accused to disprove on a balance of probabilities an essential element of the offence by requiring that he raise more than just a reasonable doubt. It is for this reason that this Court struck down the reverse onus provision in s. 8 of the Narcotic Control Act. . . .

Sections 7 and 11 (d) will also be infringed where the statutory definition of the offence does not include an element which is required under s. 7 .

He then cited the words of Dickson C.J. in *Oakes*, supra, set out earlier and continued:

It is clear from this passage that what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element.

. . .

Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond a reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11 (d).

In *R. v. Whyte*, [1988] 2 S.C.R. 3, the accused was charged with having the care and control of a motor vehicle while impaired. The accused was found in the driver's seat of an automobile, slumped over the steering wheel. The keys were in the ignition but the engine was not running. The Crown relied on the same presumption considered in *Appleby*, supra, which placed the burden on an accused found in the driver's seat of establishing the absence of an intention to enter the vehicle for the purpose of setting it in motion. The presumption was challenged and it was found that it did in fact infringe s. 11 (d). It was held that the word "establishes" required proof on a balance of probabilities. The Crown argued that the section only required proof of an excuse rather than a disproof of any essential element of the offence. That argument was not

accepted. Dickson C.J. for the Court stated at p. 18:

The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

He then continued:

If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

. . .

In the passage from Vaillancourt quoted earlier, Lamer J. recognized that in some cases substituting proof of one element for proof of an essential element will not infringe the presumption of innocence if, upon proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element. This is another way of saying that a statutory presumption infringes the presumption of innocence if it requires the trier of fact to convict in spite of a reasonable doubt. Only if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid.

It was held that the presumption in that section did not have that required "inexorable" character and thus failed the test proposed in Oakes and Vaillancourt.

In *R. v. Kowlyk*, [1988] 2 S.C.R. 59, the validity of a conviction based solely on the doctrine of recent possession was questioned. McIntyre J. held that the provision created no more than a permissive presumption from which the trier of fact may, but not must, draw an inference of guilt of theft from the possession of recently stolen property. He put his position in this way at pp. 71-72:

. . . where an explanation is offered for such possession which could reasonably be true, no inference of guilt on the basis of recent possession alone may be drawn, even where the trier of fact is not satisfied of the truth of the explanation. The burden of proof of guilt remains upon the Crown, and to obtain a conviction in the face of such an explanation it must establish by other evidence the guilt of the accused beyond a reasonable doubt.

In *R. v. Keegstra*, [1990] 3 S.C.R. 697, the presumption of innocence was again considered. The appellant was charged under a section which provided for relief from conviction if it could be established "that the statements communicated were true". Once again the section was challenged as contravening s. 11 (d). Dickson C.J. confirmed that the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt. He reviewed the reasons in *Whyte*, supra, and then put forward his position in these words (at p. 790):

As is evident from the above quotation, the categorization of a factual finding as forming an element "essential" to the offence is of no consequence when determining whether s. 11 (d) has been breached.

Applying the approach taken in *Whyte* to this appeal, it is obvious that s. 319(3)(a) runs afoul of the presumption of innocence. Contrary to the arguments of those who would find s. 319(3)(a) compatible with s. 11 (d), it matters not that the defence of truth may be intended to play a minor role in providing relief from conviction. What is of essence is not the "essential nature" of the crime, but that the trier of fact will have to convict even where there is a reasonable doubt as to the truth of an accused's statements.

Perhaps it may be helpful to summarize the principles to be derived from the authorities.

I - The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

II - If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11 (d). Such a provision would permit a conviction in spite of a reasonable doubt.

III - Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

IV - Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11 (d) if it requires the trier of fact to convict in spite of a reasonable doubt.

V - A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11 (d).

VI - A provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the Charter if the provision (such as the truth of a statement) must be established by the accused (see *Keegstra*, *supra*).

VII - It must of course be remembered that statutory presumptions which infringe s. 11 (d) may still be justified pursuant to s. 1 of the Charter . (As for example in *Keegstra*, *supra*.)

It is now necessary to apply these principles to the presumption set out in s. 195(2) to determine whether it contravenes s. 11 (d) of the Charter .

Application of the Principles Pertaining to Section 11 (d) to the "Living on Avails" Provision

The presumption contained in s. 195 infringes s. 11 (d) of the Charter since it can result in the conviction of an accused despite the existence of a reasonable doubt. For example consider the situation of a spouse or companion of a prostitute, who is working, self-supporting and not dependent or relying upon the income garnered by the spouse or companion from prostitution. There is nothing parasitical about such a relationship. Neither being a prostitute nor being a spouse of a prostitute constitutes a crime. Yet as a result of the presumption, the spouse could be found guilty despite the existence of a reasonable doubt. The fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on avails. The presumption therefore infringes s. 11 (d).

Can the Presumption Be Justified Pursuant to Section 1 of the Charter ?

The Nature of the Offence

Section 195(1) (now s. 212(1)) of the Criminal Code provides as follows:

195.(1) Every one who

- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
- (b) inveigles or entices a person who is not a prostitute or a person of known immoral character to a common bawdy-house or house of assignation for the purpose of illicit sexual intercourse or prostitution,
- (c) knowingly conceals a person in a common bawdy-house or house of assignation,
- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
- (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
- (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house or house of assignation,
- (g) procures a person to enter or leave Canada, for the purpose of prostitution,
- (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,

(i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or

(j) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and is liable to imprisonment for ten years.

This section had its roots in the old offence of vagrancy which was in force in the Criminal Code from 1892 (S.C. 1892, c. 29, s. 207) until the revision of the Code in 1955 (S.C. 1953-54, c. 51).

Vagrancy was defined as follows:

Every one is a loose, idle or disorderly person or vagrant who,

...

having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

The Code made that conduct an offence in the following terms:

Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both:

In the 1953-54 revision of the Code, prostitution offences were consolidated in the Procuring section, then s. 184. Vagrancy and disorderly conduct appeared separately and without any reference to prostitution. Moreover, the language of the Procuring section in the English version was modified from living on the "earnings" to living on the "avails" of prostitution, the latter being the terminology of the original vagrancy provision. It is that provision which now appears as s. 212(1) (j).

The old s. 216(1)(i) (R.S.C. 1927, c. 36), which dealt with exercising control or influence remained practically unchanged in s. 184(1)(h) of the 1953-54 Code and today appears as s. 212(1) (h).

It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1) (j) is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1) (j) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. See *R. v. Grilo* (1991), 64 C.C.C. (3d) 53 (Ont. C.A.); *R. v. Celebrity Enterprises Ltd.* (1977), 41 C.C.C. (2d) 540 (B.C.C.A.); and *Shaw v. Director of Public Prosecutions* (1961), 45 Cr. App. R. 113 (H.L.).

A reading of the reports such as those of the Fraser Committee (Pornography and Prostitution in Canada (1985)) and the Badgley Committee (Sexual Offences Against Children (1984)) emphasizes the tragedy and the gravity of the social problem posed by prostitution. As well, they carefully document the cruel, pernicious and exploitative evil of the pimp. In its report to Parliament, the Special Committee on Pornography and Prostitution (the "Fraser Committee") found that most

prostitutes in Canada were independent operators. However, in some cities, pimps control street prostitution. The activities of pimps were described in this way:

It appears that pimps do not run large "stables" of prostitutes but usually control two to six women within a well-defined territory. Pimps, along with customers, are the major source of violence against prostitutes. Women who would talk about their pimps indicated that physical violence, forced acts of sexual degradation and subtle forms of coercion, were used by the pimps to keep them on the streets. In some ways the relationship is most closely analogous to slavery. Prostitutes have no control over their lives, they are subject to constant exploitation and there are accounts of prostitutes being traded to another pimp to pay off debts or for money.

(Fraser Committee, vol. 2, at p. 379)

The findings of the Committee on Sexual Offences Against Children and Youths (the "Badgley Committee") make particularly sad and disturbing reading. There it was stated that:

Many girls who work on the streets believe that a prostitute who gives evidence against a pimp is almost certain to be murdered, if not by her own pimp, then by his fellow pimps. These murders are purported to be extraordinarily brutal and the prostitutes claim that they are accomplished by severe beatings of head and face. Another palpable fear of female prostitutes which suffices to dissuade many of them from giving information about their pimps is that of being ostracized by the other prostitutes in whose company they work. Furthermore, the Committee's survey indicates that many of the young prostitutes either were "in love" with their pimps, or were psychologically dependent upon them to such an extent that they could not conceive of functioning without them. As a result, many girls adopted a highly protective attitude toward their pimps and were unwilling to divulge information which might have proved damaging to them, or which portrayed them in a negative light.

(Badgley Committee, vol. 2, at pp. 1057-58.)

The reports of these committees echo the result of studies carried out in England. See:

Criminal Law Revision Committee, Working Paper on Offences relating to Prostitution and allied Offences (1982), at pp. 15-18;

Criminal Law Revision Committee, Seventeenth Report, Prostitution: Off-street activities (1985), at pp. 5-12.

American research has detailed the threats, exploitation and violent physical abuse suffered by prostitutes at the hands of pimps. See:

M. H. Silbert and A. M. Pines, "Occupational Hazards of Street Prostitutes" (1981), 8 Crim. Just. Behavior 395, at p. 397;

N. Erbe, "Prostitutes: Victims of Men's Exploitation and Abuse", (1984), 2 Law & Inequality 609, at p. 613;

D. K. Weisberg, "Children Of The Night: The Adequacy of Statutory Treatment Of Juvenile Prostitution" (1984), 12 Am. J. Crim. L. 1.;

B. Milman, "New Rules for the Oldest Profession: Should We Change Our Prostitution Laws?" (1980), 3 Harv. Women's L.J. 1, at p. 33.

Strangely, despite the abusive and corrosive relationship that exists between the pimp and prostitute, many prostitutes are strongly attached to their pimps and truly believe that they are in love with them. See:

Fraser Committee, *supra*, at p. 379;

Badgley Committee, *supra*, at pp. 1057-58;

Weisberg, *supra*, at p. 9;

New South Wales, Report of the Select Committee of the Legislative Assembly upon Prostitution (1986), at pp. 26-48 (the "Rogan Committee").

Whether pimps maintain control by the emotional dependence of prostitutes upon them or by physical violence, prostitutes have exhibited a marked reluctance to testify against their pimps. The Fraser Committee comments on the difficulty of successfully prosecuting pimps in this way:

Although the successful prosecution of this offence does not require corroboration, police authorities are agreed that enforcement is difficult; the activities of pimps are sufficiently clandestine in most instances that it is only when a complaint is lodged by a prostitute who has been badly mistreated and is willing to testify, that there is any chance of securing a conviction.

...

The reality then, is that it is normally only in the case of an ongoing saga of violence and its threat that conditions are created in which the police are likely to act.

Fraser Committee, *supra*, at pp. 417-18; see also:

Weisberg, *supra*, at p. 60;

D. Sansfaçon, Prostitution in Canada: A Research Review Report (Department of Justice, 1984), at pp. 109-10.

The problem of the prostitute as a reluctant witness is not confined to Canada. A study by a Legislative Committee in New South Wales (the Rogan Committee) found that enforcement of anti-pimping laws was rendered virtually impossible in several countries for the same reason. The United Nations has repeatedly urged all the member nations to protect prostitutes from exploitation:

D. Sansfaçon, Agreements and Conventions of the United Nations with respect to Pornography and Prostitution (Department of Justice, 1984).

With that background, it is now necessary to consider the principles and factors pertaining to the possible justification of s. 195 under s. 1 of the Charter .

The procedure which should be followed in order to determine whether a statutory provision which infringes a Charter right is nevertheless justified under s. 1 has been stated in *R. v. Oakes*, supra, and restated many times since. In *R. v. Chaulk*, [1990] 3 S.C.R. 1303, it was put forward in this way (at pp. 1335-36):

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as "little as possible", and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

When the presumption set out in s. 195(2) is reviewed in the context of s. 195 itself, it is apparent that the objective of the impugned provision is of sufficient importance to warrant overriding s. 11 (d). From a review of Committee Reports and the current literature pertaining to the problem it is obvious that the section is attempting to deal with a cruel and pervasive social evil. The pimp personifies abusive and exploitative malevolence.

The Proportionality Test

Rational Connection

In order to be valid the measures taken must be carefully designed to respond to the objective. Yet the proportionality test can and must vary with the circumstances. Parliament is limited in the options which it has at hand to meet or address the problem. Rigid and inflexible standards should not be imposed on legislators attempting to resolve a difficult and intransigent problem. Here, Parliament has sought, by the presumption, to focus on those circumstances in which maintaining close ties to prostitutes gives rise to a reasonable inference of living on the avails of prostitutes. This is not an unreasonable inference for Parliament to legislatively presume, as it cannot be denied that there is often a connection between maintaining close ties to prostitutes and living on the avails of prostitution. Evidence of pimps living on avails would ordinarily be expected to come from prostitutes, yet the reluctance of prostitutes to testify against pimps is well documented. By enacting this section, Parliament has recognized that evidence of this type was difficult if not impossible to obtain without the cooperation of prostitutes which is seldom

forthcoming. The section recognizes both the social evil of pimps and prostitutes' fear of violence at their pimps' hands. I have no concern that the section will result in innocent persons who have non parasitic legitimate living arrangements with prostitutes being inculpated. A description sufficient to constitute evidence to the contrary will generally be included in the Crown's case. If not, such evidence can easily be led. In either event, the presumption will be displaced.

Minimal Impairment

It has been determined that Parliament is not required to choose the absolutely least intrusive alternative in order to satisfy this branch of the analysis. Rather the issue is "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified the objective as effectively". (See Chaulk, *supra*, at p. 1341.)

It is of some significance that similar reverse onus provisions pertaining to living on the avails of prostitution presently exist in Britain and some Australian jurisdictions.

Sexual Offences Act, 1956 (U.K.), 4 & 5 Eliz. 2, c. 69, s. 30(2); *R. v. Clarke*, [1976] 2 All E.R. 696 (C.A.);

Prostitution Act, 1979, No. 71 (N.S.W.), s. 5; Prostitution Regulation Act 1986, No. 124 (Vict.), ss. 4 and 12(3).

Parliament has chosen a reasonable and sensitive position which carefully avoids either of the two extreme positions. One extreme position would eliminate the presumption completely. This would reward the accused for the intimidation of vulnerable witnesses in a situation where it has been demonstrated that just such intimidation is widespread. The other extreme would provide a reverse onus which would cast a heavier legal burden on the accused. This would constitute a more serious infringement of the presumption of innocence than the evidential burden imposed by s. 195(2).

It is noteworthy that in the United Kingdom the Criminal Law Revision Committee stressed the necessity of just such a provision as it appears in s. 195(2). In its working paper on prostitution, *supra*, this appears (at p. 16):

All those with practical experience of these matters agree that only in a very exceptional case would a prostitute testify in open court against her ponce, even a woman determined enough to rid herself of him. The presumption in subsection (2) of section 30 (against a man habitually in the company of a prostitute, etc.) is of great value in that it enables a prosecution to be instituted without it being necessary for the prostitute to give evidence that she had handed over some of her earnings to the defendant. Comparable offences in the law of some other countries that we have examined similarly avoid the need for the woman to give testimony. It must be accepted, we consider, that any offence to replace section 30 which was drafted in such a way as to depend upon evidence being available from prostitutes would be largely unenforceable. [Emphasis added.]

(In its final report written three years later, the committee favoured an overhaul of the offence provisions but did not deal with the presumption: see Criminal Law Revision Committee, Seventeenth Report, *supra*, at pp. 12-13.)

Proportionality

I agree with the position taken by the intervener the Attorney General of Canada that the determination as to whether the extent of the infringement is proportional to the legislative objective involves a balancing of societal and individual interests. The section is aimed at those who parasitically live on the avails of prostitution. The accused need only point to evidence capable of raising a reasonable doubt on this issue. The infringement is relatively minor and the objective is fundamentally important. In so far as the societal interests are concerns, the Fraser Committee Report starkly outlines the social problems flowing from prostitution including drug abuse and violence. In my view there cannot be any question of the importance of successfully prosecuting pimps. It is the pimp that has the parasite's interest in the prostitute's earnings. It is the pimp that encourages and enforces the activities of the prostitute. The same violent behaviour which forces street prostitutes to remain in their line of work can be used and has been used to thwart prosecutions by depriving the Crown of essential witnesses.

Prostitutes are a particularly vulnerable segment of society. The cruel abuse they suffer inflicted by their parasitic pimps has been well documented. The impugned section is aimed not only at remedying a social problem but also at providing some measure of protection for the prostitute by eliminating the necessity of testifying. It would be unfortunate if the Charter were used to deprive a vulnerable segment of society of a measure of protection. The nature of the infringement of s. 11 (d) by s. 195(2) is minimal. All that is required of the accused is to point to evidence capable of raising a reasonable doubt. That can often be achieved as a result of cross-examination of Crown witnesses. The section does not necessarily force the accused to testify. In my view s. 195(2) is justified under s. 1 of the Charter and is valid.

In the result the appeal should be dismissed.

The reasons of McLachlin and Iacobucci JJ. were delivered by

//McLachlin J.//

McLachlin J. (dissenting) -- I have read Cory J.'s reasons and agree with him that the mandatory presumption contained in s. 195(2) (now s. 212(3)) of the Criminal Code, R.S.C. 1970, c. C-34, infringes the presumption of innocence guaranteed by s. 11 (d) of the Canadian Charter of Rights and Freedoms, in that proof of the substituted fact that the accused person lives with or is habitually in the company of a prostitute does not lead inexorably to proof of the statutorily required or essential element of living on the avails of prostitution.

I cannot, however, agree that the presumption is demonstrably justified under s. 1 of the Charter.

I agree with Cory J. that the first stage of the test for justification under s. 1 of the Charter prescribed in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39 -- demonstration of a pressing and substantial object capable of outweighing the right -- is established. I share his view that the presumption is directed to the evil of pimps who parasitically exploit prostitutes and live off their earnings, and I agree that the conviction of such persons is an important objective.

The difficulty, as I see it, lies with the second branch of the *Oakes* test, proportionality. The presumption is so broad that it catches many people who are innocent of the exploitive activity at which it is aimed. This overbreadth renders it "arbitrary, unfair" and ultimately "irrational", to use the language of *R. v. Oakes*, *supra*, at p. 139.

The guarantee of the right to be presumed innocent until proven guilty according to law contained in s. 11 (d) of the Charter confirms that the Crown has the burden of proving all elements of an offence beyond a reasonable doubt. The effect of a mandatory presumption is to relieve the Crown of that burden. Upon proof beyond a reasonable doubt of the substituted facts the presumption arises, putting the accused in a position where if "he fails to adduce evidence (through the Crown witnesses or defence witnesses) which raises a reasonable doubt with respect to [the essential] elements, conviction will ensue": *Re Boyle and The Queen* (1983), 5 C.C.C. (3d) 193 (Ont. C.A.), at p. 211.

The first aspect of the proportionality enquiry asks whether the presumption is rational. A presumption, like any other challenged legislative provision, must be externally rational, in the sense that it must evince a rational connection to the legislative purpose behind its enactment. But in the case of a presumption external rationality alone does not suffice. As this Court held in *Oakes*, *supra*, at p. 141, the presumption must be "internally rational" in the sense that there must be a rational connection between the "basic fact" and the "presumed fact". Otherwise, as Dickson C.J. put it, "the reverse onus clause could give rise to unjustified and erroneous convictions. . .". In so holding, this Court affirmed the judgment of Martin J.A., *R. v. Oakes* (1983), 40 O.R. (2d) 660 (Ont. C.A.), at p. 681, who after citing various criteria relevant to the justification of a presumption under s. 1, stated:

Great weight must be given to Parliament's determination with respect to the necessity for a reverse onus clause in relation to some element of a particular offence. Certainly, reverse onus clauses exist in other free and democratic societies; cf., for example, s. 30(2) of the Sexual Offences Act; Prevention of Corruption Act, 1916 (U.K.), c. 64, s. 2; *R. v. Carr-Briant*, [1943] K.B. 607, 29 Cr. App. R. 76. However, a reverse onus provision, even if otherwise justifiable by the above criteria, cannot be justified as a reasonable limitation of the right to be presumed innocent under s. 1 of the Charter in the absence of a rational connection between the proved fact and the presumed fact. In the absence of such a connection the presumption created is purely arbitrary. [Emphasis added.]

What Martin J.A. said there with respect to reverse onus clauses is equally applicable to mandatory presumptions as in the case at bar: *Re Boyle and The Queen*, *supra*, at p. 212.

Cory J., as I read his reasons, focuses exclusively on the external rationality of the presumption, arguing that the presumption assists in curbing the exploitive activity of pimps. But Oakes requires us to ask the preliminary question of whether the presumption is internally rational in the sense that there is a logical connection between the presumed fact and the fact substituted by the presumption.

This case, as I see it, requires us to consider the degree of internal rationality required to justify a presumption under s. 1. In Oakes, this Court held that there was insufficient rational connection between the substituted fact of being in possession of a narcotic, and the presumed fact of being in possession for the purposes of trafficking. The reverse onus clause in issue there was held to be irrational despite the obvious fact that in some cases an inference could be made from proof of possession that that possession was for the purposes of trafficking. The fact that there would be some cases, for example where the possession was of only a small quantity of narcotics, where the inference would be unreasonable, was sufficient to render the reverse onus clause irrational and therefore incapable of being saved with reference to s. 1 of the Charter.

This holding in Oakes suggests that s. 1 requires a very high degree of internal rational connection between the substituted and presumed facts. The fact that the existence of the presumed fact would be a rational inference in some cases is not enough -- the connection between the substituted and presumed facts must be more certain than that in order to pass constitutional muster. An example of a sufficiently close connection can be found in the decision of this Court in *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 21. In that case it was held that the connection between the substituted fact of a person being in the driver's seat and the presumed fact that that person was in care or control of the vehicle was sufficiently close to meet the rational connection test. As Dickson C.J. said at pp. 21-22:

... there is plainly a rational connection between the proved fact and the fact to be presumed. There is every reason to believe the person in the driver's seat has the care or control of the vehicle. ... It is true that a vehicle can be occupied by one who does not assume care or control, but a person in this state of mind is likely to assume a position in the vehicle intended for a passenger rather than the driver. In my view, the relationship between the proved fact and the presumed fact under s. 237(1)(a) is direct and self-evident, quite unlike that which confronted the Court in Oakes.

I note that the United States Supreme Court has taken a similar position with respect to the constitutionality of presumptions under the Fourteenth Amendment. The leading case would appear to be *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). Stevens J. delivered the judgment of the majority of the Court and, at p. 156, recognized that:

Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an 'ultimate' or 'elemental fact' -- from the existence of one or more 'evidentiary' or 'basic' facts. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular

basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. [Citations omitted.]

Stevens J. distinguished between permissive presumptions, which although they may violate the Due Process guarantee, will only be held to do so if there is no rational way the trier of fact could make the inference permitted by the presumption, and mandatory presumptions as in the case at bar. The latter were said by Stevens J. to be

a far more troublesome evidentiary device. For it may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier of fact that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases. [Emphasis in original; citations omitted.]

As the presumption in issue in *Ulster County* was held to be merely permissive, Stevens J. did not have to decide what level of rational connection he would have required in the case of a mandatory presumption. Nonetheless, he went on to say at p. 167 that in the case of a mandatory presumption, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt".

The foregoing authorities lead me to the following conclusions. The fact that a presumption fails the inexorable connection test and is therefore found to violate s. 11 (d) is by no means determinative of the issue of whether such a presumption will pass the internal rationality test under s. 1. While the probity of the link between proven fact and presumed fact remains the focus of the inquiry, the balancing of the rights of the accused against deference to the democratic will of the legislature may mandate a less rigorous level of examination at the s. 1 stage. This may mean that the American requirement that the substituted fact must prove the presumed fact beyond a reasonable doubt will not prove appropriate in the Canadian context. However that may be, it is clear that the fact that in some cases one can infer the presumed fact from the proven fact is insufficient to establish the internal rational connection required under s. 1. I am satisfied that, at a minimum, proof of the substituted fact must make it likely that the presumed fact is true. Any lesser degree of probability must be fatal under the rational connection branch of the proportionality enquiry.

The rationality test from *Oakes* also has a fairness aspect. An irrational presumption operates unfairly in that it unduly enmeshes the innocent in the criminal process by arbitrarily catching within its ambit those who are not guilty of the offence. Of course, any presumption may occasionally catch an innocent person, leaving it to him or her to establish or raise a reasonable doubt with respect to innocence. But where the presumption is so broadly cast that it catches persons whom it is unlikely were engaged in the prohibited crime, it goes too far.

In the case of s. 195(2) the required logical link is lacking, rendering it both irrational and unfair. It cannot be said that it is likely that one who lives with or is habitually in the company of a prostitute is parasitically living on the avails of prostitution. It is a possible inference, reasonable in some cases, but not in all or even in most. Spouses, lovers, friends, children, parents, room-mates, business associates, providers of goods and services -- all of these may live with or be habitually in the company of a prostitute. In *R. v. Grilo* (1991), 64 C.C.C. (3d) 53, at p. 61, Arbour J.A., speaking for the Ontario Court of Appeal, discussed examples of relationships which ought not to be seen as living on the avails:

For example, when a prostitute financially supports a disabled parent or a dependent child, she clearly provides an unreciprocated benefit to the recipient. However, in light of her legal or moral obligations towards her parent or child, the recipient does not commit an offence by accepting that support. The prostitute does not give money to the dependent parent or child because she is a prostitute but because, like everybody else, she has personal needs and obligations. The true parasite whom s. 212(1) (j) [as the provision is now numbered] seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. Being a prostitute is not an offence, nor is marrying or living with a prostitute. A person may choose to marry or live with a prostitute without incurring criminal responsibility as a result of the financial benefits likely to be derived from the pooling of resources and the sharing of expenses and other benefits which would normally accrue to all persons in similar situations.

The unfairness caused by this irrational presumption is arguably much worse than it was in *Oakes*. There, at least, the onus to establish that one was not in possession of narcotics for the purposes of trafficking was placed only on those who had already been proven to be guilty of a criminal offence, namely possession of a narcotic. In the case of s. 195(2), the evidential burden of raising a reasonable doubt with respect to whether one is living on the avails of prostitution is placed on those who have been proven only to be habitually in the company of a prostitute, which is not a criminal offence. Yet the presumption applies to these innocent people, placing on them the burden of raising a reasonable doubt as to whether they have been living on the avails of prostitution. Any presumption which has the potential to catch such a wide variety of innocent people in its wake can only be said to be arbitrary, unfair and based on irrational considerations.

At a minimum, the effect of this presumption on the innocent people it catches may be that they have to bear the expense, indignity and stigma of undergoing a criminal prosecution for living on the avails. In the course of an eventual trial, if the evidence adduced in the Crown's case does not raise a reasonable doubt as to whether the innocent person was parasitically living on the avails of prostitution, the innocent person will have herself to adduce evidence which raises such a

doubt. At its worst, where the innocent person is unable or perhaps unwilling to adduce evidence which does raise a reasonable doubt, this presumption will have the effect of mandating the conviction of an innocent person. While there may be circumstances in which the presumption of innocence may be justifiably infringed, the line must be drawn short of the point at which persons, who have not been proven guilty of any offence, are forced to defend themselves merely on the basis that a fact has been proven by the Crown which does not make it even likely that they are guilty of any criminal offence.

The irrational and unfair effects of the presumption extend beyond those who innocently keep company with prostitutes, to prostitutes themselves. In so far as the object of the presumption is the suppression of pimping and the protection of prostitutes from the evil of being subject to the malevolent control of pimps, these effects on prostitutes are such as to bring into question the external rationality of the presumption -- i.e. whether the legislation furthers its purported objects. While few in our society approve of prostitution and most regard it as an unfortunate fact of life, a fact of life it remains, and one which Parliament has not seen fit to sanction by making it a crime. The effect of the presumption is to compel prostitutes to live and work alone, deprived of human relationships save with those whom they are prepared to expose to the risk of a criminal charge and conviction and who are themselves prepared to flaunt that possibility. By this presumption prostitutes are put in the position of being unable to associate with friends and family, or to enter into arrangements such as those evidenced in this case, arrangements which may alleviate some of the more pernicious aspects of their frequently dangerous and dehumanizing trade. The predictable result is to force prostitutes onto the streets or into the exploitive power of pimps, thereby undercutting the very pressing and substantial objective which the presumption was designed to address. Where legislation has the actual effect of operating to preserve and exacerbate the very exploitation the amelioration of which is its purported objective, it cannot be said to possess the degree of rationality necessary to justify the violation of a right guaranteed by our Charter .

Section 195(2) can be seen as one of the network of laws which the Special Committee on Pornography and Prostitution was referring to when it said:

The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second class citizens.

...

Although, as we have pointed out, the law on prostitution is only enforced in a perfunctory way, it is nevertheless enforced from time to time, even in relation to activities in private. The result is that there is just enough in the way of uncertainty about the prostitute's legal status whether on the street, using a private residence, or while employed in an escort service or massage parlour, that the individual concerned has the sense of being a legal outcast.... In the result, while we talk

of prostitution being free of legal sanction, we in reality use the law indirectly and capriciously to condemn or harass it, providing no safe context for its operation except that which can be bought by the prostitute of means, or, as is more likely, the well-heeled sponsor or sponsors.

The law on prostitution, as presently constituted, has not achieved what is presumably its theoretical object, that of reducing prostitution (or even of controlling it within manageable limits). Moreover, it operates in a way which victimizes and dehumanizes the prostitute. [Emphasis added.]

(Pornography and Prostitution in Canada (1985), vol. 2, at pp. 392 and 533.)

This Court, unlike the Special Committee, is not charged with the task of recommending a comprehensive revision of the criminal law as it pertains to the control of prostitution. But where, as here, an element of that labyrinth of laws which have as their object the control of prostitution violates a principle so fundamental to our society as the presumption of innocence, and does so in a manner which is so manifestly capricious, unfair and irrational, then we must fulfil our constitutional duty and declare that law to be of no force or effect.

I add this note. Since the appellant was charged the relevant provisions of the Criminal Code have been amended: S.C. 1987, c. 24, s. 9 (now R.S.C., 1985, c. 19 (3rd Supp.), s. 9). Section 195(1) (j), which did not differentiate between living on the avails of juvenile and adult prostitution, has been amended to create two distinct offences: living on the avails of prostitution (s. 212(1) (j)), and the more serious offence of living on the avails of prostitution of a person who is under the age of eighteen years (s. 212(2)). I would not wish these reasons to be read as precluding the argument that a rational connection sufficient to justify s. 212(2) under s. 1 of the Charter can be established between the facts substituted by the presumption and the essential element of living parasitically on the avails of juvenile prostitution.

I would allow the appeal.

Appeal dismissed, La Forest, McLachlin and Iacobucci JJ. dissenting.

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