Date: 20000407
Docket: CAC 158663

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. N.M.P., 2000 NSCA 46]

Chipman, Roscoe and Pugsley, JJ.A.

BETWEEN:		)	
		)	
N.M.P. (Young Offender)		)	Roger A. Burrill
		)	for the Appellant
	Appellant	)	
		)	
- and -		)	
		)	
HER MAJESTY THE QUEEN		)	James A. Gumpert, Q.C.
		)	and Mark A. Scott
	Respondent	)	for the Respondent
		)	
- and -		)	
		)	
STEPPING STONE		)	Anne S. Derrick
		)	for the Intervener
	Intervener	)	
		)	
		)	Appeal Heard:
		)	March 21, 2000
		)	
		)	Judgment Delivered:
		)	April 7, 2000

THE COURT: The appeal is dismissed as per reasons for jugdment of Chipman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

Publishers of this case please take note that s.38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication.

Section 38(1) provides:

> 38(1) No person shall publish by any means any report
>
> (a) of an offence committed or alleged to have been committed by a young person, unless or order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, is disclosed.

CHIPMAN, J.A.:

[1] This is an appeal by the appellant, a young person, from a conviction by Judge Castor Williams in Youth Court for communicating for the purpose of engaging in prostitution contrary to s. 213(1)(c) of the **Criminal Code**.

[2] The appellant, age 17 at the time, was charged following an encounter on July 31, 1998 on Maynard Street in Halifax with Sergeant Tim Moser of the Halifax Regional Police. The facts, agreed upon between the Crown and the appellant in written submissions filed with the trial judge, are:

> Members of the Vice Unit of the Halifax Regional Police were conducting a "prostitution sweep" on July 21, 1998. Sergeant Moser of the Halifax Regional Police was acting in an undercover capacity. The Applicant, [N.P.], was observed on the north corner of Cunard and Maynard Streets in Halifax at around 7:40 a.m. Sergeant Moser was in plain clothes and operating an unmarked vehicle. Constables Lannon and Mitchell-Haliday were acting in a back-up capacity.
>
> Sergeant Moser drove his vehicle onto Maynard Street. Just before Cornwallis Street he saw the Applicant. She waved and Moser pulled his vehicle over just ahead of her.
>
> Ms. [P.] walked over to the car and got inside. The following conversation ensued:
>
> [P.] "Are you a cop?"
>
> Moser: "No."
>
> [P.] "Can you prove it?"
>
> At this time, Ms. [P] opened the front of her pants and stated: "Touch me here."
>
> Sergeant Moser placed his right hand down to the Applicant's pubic hair and pulled his hand back. The following conversation ensued:
>
> [P.] "Go further."
>
> Moser: "Well, I don't have anything on my hands."
>
> [P.] "Okay - what do you want?"

Moser: “A blow job.”

[P.] “How much do you normally pay?”

Moser: “Twenty bucks.”

[P.] “Okay.”

Moser: “How much for a lay?”

[P.] “How much do you normally pay?”

Moser: “$40.00.”

[P.] “Okay.”

Sergeant Moser drove his vehicle up West Street and turned left. While he was driving the following conversation ensued:

Moser: “Do you have a spot?”

[P.] “Yes. Turn left onto Agricola.”

The vice unit cover team was behind the vehicle at this time as it travelled onto Agricola Street. The following conversation took place:

[P.] “Are you a cop because the guy behind us is?”

Moser: “Yes.”

[3] Additionally, the parties at trial agreed that:

> . . . the area in Halifax, Nova Scotia, that the prostitution sweep was conducted in was a place known to be frequented by prostitutes and that the investigation itself was a bona fide inquiry . . .
>
> - and -
>
> . . . the police officer did not actually intend carrying through with either the “blow” or the “lay”, which is the terminology used in the statement of facts after which the money was discussed.

[4] The appellant’s position at trial was that Sergeant Moser was, at the material time, communicating for the purposes of prostitution within the meaning of s. 213(1)(c) of the **Code**. From this, it was argued, it followed that the proceedings were an abuse

of process resulting in a violation of the appellant's s. 7 **Charter** rights. The appellant sought a stay of proceedings pursuant to s. 24(1) of the **Charter**.

[5] Judge Williams, in his decision dated July 30, 1999, declined to stay the proceedings and entered a conviction on the charge. I infer from the following passage in his decision that he did not consider that Sergeant Moser had committed an offence under s. 213(1)(c):

> The officer did not initiate the communication for the purpose of prostitution but it was done by the accused. He had reasonable grounds to believe that she was a prostitute and that if he stopped she might come and speak to him. He neither started a conversation nor encouraged her to discuss sex for sale. During the conversation he was not persistent. Here, in my view, it is not a case of virtue testing where the average person in the position of the accused would have been induced by the conduct of the officer to commit the offence . . . His duty was to detect a crime and that was what he was doing without manufacturing it. In short, he did no more than to provide an opportunity.

[6] The appellant's appeal to this Court is pursuant to s. 830 of the **Criminal Code** dealing with summary appeals, and the appellant is thereby required to show that Judge Williams' decision was erroneous in point of law.

[7] The appellant submits that Judge Williams should have found that Sergeant Moser was himself in violation of s. 213(1)(c) of the **Code** and that consequently he erred in not staying the proceedings.

[8] The intervener Stepping Stone, is an organization concerned with the welfare of disadvantaged females. It was not a party at the trial, but was permitted by order of a

judge of this Court in Chambers to intervene in this appeal on terms **inter alia** that Stepping Stone was bound by the appeal book filed by the parties, and would not address issues other than those arising from the grounds in the appellant's notice of appeal.

[9] Stepping Stone takes the position on this appeal that the trial judge did not take into account the appellant's rights under ss. 7 and 15 of the **Charter**, not to be sexually touched by an undercover officer in the absence of her providing informed consent, which, in the circumstances, she did not do.

[10] There is no question that unless these proceedings should have been stayed by reason of **Charter** violations or otherwise, the appellant committed the offence charged and was properly found guilty of it.

[11] Broadly stated, the issues before us underlying the claim that there was an abuse of process justifying the stay are:

(1) Whether Sergeant Moser committed an offence under s. 213(1) of the **Code**.

(2) Whether, in any event, the appellant's **Charter** rights were violated to the extent that a stay of proceedings ought to have been granted.

FIRST ISSUE - Whether Sergeant Moser committed an offence under s. 213(1)(c) of the Code:

[12] In **R. v. Campbell and Shirose** (1999), 133 C.C.C. (3d) 257 (S.C.C.), the Supreme Court of Canada restated the test for abuse of process. Where the fairness of the trial is not the issue, an applicant for a stay based on an abuse of process must first show that the fundamental principles of justice which underlie the community's sense of fair play and decency were violated. A stay is a drastic remedy. The power to exercise it arises only in the clearest of cases. Whether police illegality or other improper conduct is sufficient to warrant a stay of proceedings is to be determined on a case by case approach. See also **R. v. Regan** (1999), 179 N.S.R. (2d) 45 (N.S.C.A.).

[13] Section 213(1)(c) provides:

> 213. (1) Every person who in a public place or in any place open to public view
>
> . . .
>
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

[14] The word "prostitute" is defined in s. 197(1) of the **Code** as meaning "a person of either sex who engages in prostitution".

[15] Appellant's counsel submits that Sergeant Moser, in communicating with the

appellant, was doing so for the purpose of actually engaging in prostitution because, having proposed engaging her services, he was a party to her actions within the meaning of s. 21 of the **Criminal Code**.

[16] I do not accept this submission.

[17] As to s. 21 of the **Code**, Sergeant Moser was not, in my view, aiding or abetting the appellant in the communications she made to him. Each was acting independently of the other in their communications.

[18] I think it is clear that, in the context here, two offences are created by s. 213(1)(c):

(1) communicating by a prostitute; and

(2) communicating for the purpose of obtaining the sexual services of a prostitute.

These are offences when they take place in a public place as defined in s. 213(2) or in a place that is open to public view. I accept the appellant's argument that the legislation is aimed at the social nuisance that results from the disruption in public places resulting from attempts to buy and sell sex. The section does not address the commission of the act of prostitution itself or many of the other problems that arise therefrom, such as exploitation and degradation of persons who are pressured for various reasons, chiefly economic, to engage in prostitution. It is concerned with

preventing the disruption in the streets that results from the prostitution trade.

[19] It is useful to consider briefly the history of this legislation. Prostitution or being a common prostitute was itself an offence prior to 1972. Former s. 175(1)(c) of the **Code** provided:

> 175(1)(c) Every one commits vagrancy who being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself.

[20] In 1972, the legislation was amended and the following offence was created:

> 195.1 Every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction.

[21] Following the decision of the Supreme Court of Canada in **R. v. Hutt** (1978), 1 C.R. (3d) 164 (S.C.C.), and as a result of public representations and study by a parliamentary committee, the present s. 213 was enacted in 1985. In my opinion, it draws a clear distinction between engaging in prostitution on the one hand and obtaining the sexual services of a prostitute on the other. There would be no need for making this distinction if Parliament intended the phrase “engaging in prostitution” to embrace those who deal with prostitutes, as well as the prostitutes themselves. I agree with the reasoning of Devine, Prv. Ct. J. in **R. v. Kozier**, unreported, [1993] M.J. No. 505 at paras. 9 and 10:

> 9 The 1985 amendments were surely intended to provide greater clarity on the issue by specifically delineating two different and mutually exclusive methods of committing the offence, either by communicating for the purpose of engaging in prostitution or by communicating for the purpose of obtaining the sexual services of a prostitute. Clearly one mode of committing the offence applies to the prostitute, and the other to the customer. The definition of “prostitute” in section

> 197 as “a person of either sex who engages in prostitution”, a definition which was added to the Criminal Code in 1982, also supports this interpretation in my view. If the customer can be convicted of “communicating for the purpose of engaging in prostitution”, then the customer, by definition, becomes a “prostitute”. If we were to accept that the customer could be convicted of the offence as laid, then the second portion of the charging section “or for the purpose of obtaining the sexual services of a prostitute” becomes meaningless surplusage.
>
> 10 I prefer to adopt the interpretation which gives meaning to the entirety of section 213 and which, in my view, has the felicitous result of combining both common sense and precedent . . .

[22] It follows that if Sergeant Moser could be found to have committed an offence under s. 213(1)(c) of the **Code**, it would have to be shown that he communicated with the appellant for the purposes of obtaining her sexual services as a prostitute.

[23] There is a divergence in the authorities whether it must be shown that the accused, in stopping or communicating or attempting to do so, intended to engage the sexual services.

[24] The cases of **R. v. Kuipers**, [1994] A.J. No. 73 (Alta. Prov. Ct.) and **R. v. Archer** (1997), O.J. No. 1472 (Ont.Ct.Prov.Div.) support the proposition that s. 213(1)(c) does not require proof that the person making the communication intended it for the purpose of purchasing sexual favours.

[25] On the other hand, the following cases support the proposition that s. 213(1)(c) requires proof that the communication was for the purpose of purchasing sexual services: **R. v. McLaughlin**, [1992] A.J. No. 263 (Alta.Prov.Ct.); **R. v. Tweedale**, [1993] A.J. No. 174 (Alta.Prov.Ct.); **R. v. Ruest** (1991), 67 C.C.C. (3d) 476

(Que.C.A.); **R. v. Pake** (1995), 103 C.C.C. (3d) 524 (Alta.C.A.); **R. v. Collins**, [1996] A.J. No. 526 (Alta.P.C.); and **R. v. Hubic**, [1998] S.J. 461 (Sask.P.C.).

[26] In **Pake, supra**, Foisy, J.A. for the court reviewed the legislative history of s. 213, a section enacted for the purpose of abetting the nuisance of street prostitution. After stating the position of the Crown that mere communication with another in public with respect to obtaining sexual services of a prostitute was sufficient to make out the offence, Foisy, J.A. said at p. 123:

> It is trite law to say that the rules of statutory interpretation require the words of a statute to be given some meaning. In this case the question is, what meaning should be given to the words "for the purpose of engaging the sexual services of a prostitute . . ."? I think the meaning is clear. Without an intention to engage the sexual services, there is no offence. The Crown has argued that communication about prostitution should be caught by the section, but nowhere has Parliament seen fit to include the words "about engaging the sexual services of a prostitute".

[27] The "purpose" of the communication prohibited by the legislation is clear. It is the engaging in prostitution or engaging the sexual services of a prostitute. Such purpose on the part of an accused must be proven as part of the Crown's case. It is part of the **mens rea** necessary to be shown. Clearly, this intention or purpose can be inferred from all the circumstances in any given case.

[28] Applying s. 213(1)(c) to the facts, it is abundantly clear that Sergeant Moser did not communicate with the appellant either for the purposes of prostitution or to obtain her sexual services as a prostitute. Thus, even if the appellant's argument that he was communicating to engage in prostitution were accepted, the result would be the

same. Sergeant Moser was a police officer acting in the course of his duties, which were to detect and arrest persons violating s. 213(1)(c). That was his only purpose in joining in the encounter which was initiated by the appellant. It cannot, by any stretch of the imagination, be said that Sergeant Moser had the necessary **mens rea** to be found to have violated s. 213(1)(c) of the **Code**.

SECTION ISSUE - Appellant's Charter Rights:

[29] The only other manner in which the appellant's **Charter** rights might be engaged for the purposes of this inquiry is if Sergeant Moser sexually assaulted her or otherwise behaved in such a manner that prosecution of the charge against the appellant would bring the administration of justice into disrepute. It has not been suggested that any entrapment took place. Indeed, it was not a part of the appellant's case at trial that there had been a sexual assault committed upon her by Sergeant Moser. This point was raised by the intervener. I am prepared to assume that the point arises from the grounds in the appellant's notice of appeal in that the appellant contends that Sergeant Moser acted "illegally" in the manner described in the agreed statement of facts, as the foundation claim for **Charter** relief. I also agree with the intervener that even though appellant's counsel conceded in argument that there was consent, legal argument to the contrary arising out of the admitted facts is not precluded.

[30] Was there a sexual assault committed by Sergeant Moser on the appellant?

[31] The intervener's position is that the appellant, in an attempt to avoid arrest and its consequences, including disruption of her livelihood, sought to ascertain in advance whether Sergeant Moser was an undercover officer or a genuine potential client. Her consent to be touched sexually by him was predicated on the assumption that he was a potential client. He deceived her. She did not consent to be touched by a police officer. It is submitted that in view of Sergeant Moser's misrepresentation to the effect that he was not a police officer, her consent to the touching was obtained by fraud. The intervener says that permitting the appellant's conviction to stand is to permit the police in the course of undercover operations to sexually touch females who appear to be engaged in prostitution. It is submitted that the **Charter's** guarantees of equality and security of the person prohibit such sexual touching and mandate a stay where these **Charter** rights are violated.

[32] The appellant unequivocally permitted Sergeant Moser to touch her pubic area. Still unsure that he was not a police officer, she then asked him to quote "go further", which he refused to do. That was the extent of the touching and the circumstances under which it occurred. I accept the Crown's submission that the touching falls in the category of situational police conduct.

[33] In their submission to the court, the intervener and the Crown viewed the exchange as being sexual in nature and the argument proceeded on whether the consent of the appellant to it was obtained by fraud. I would therefore assume, without

deciding, that the touching was, in fact, such that it could, in the circumstances, be considered sexual in nature. See **R. v. Chase**, [1987] 2 S.C.R. 293 (S.C.C.); **R. v. Litchfield**, [1993] 4 S.C.R. 333 (S.C.C.).

[34] Section 265(3)(c) of the **Code** provides that no consent to an assault is obtained where the complainant submits or does not resist by reason **inter alia** of fraud. Prior to 1983, the indecent assault provisions in the **Code** provided that consent was vitiated where it was obtained by false and fraudulent misrepresentations "as to the nature and quality of the act". At common law, since the decision in **R. v. Clarence**, [1888] 22 Q.B.D. 23, fraud vitiated consent for sexual assault where it pertained to the nature of the act or the identity of the partner.

[35] Not every misrepresentation leading to consent to a sexual act constitutes the obtaining of consent by fraud. It appears from the majority opinion in **R. v. Cuerrier**, [1998] 2 S.C.R. 371 (S.C.C.) that fraud will vitiate consent when (a) it pertains to the nature or quality of the act; (b) it pertains to the identity of the sexual partner; or (c) in other cases where there is a risk of serious harm to the person giving consent.

[36] In **Cuerrier, supra**, the accused was charged with two counts of aggravated assault contrary to s. 268 of the **Code**. He had been previously explicitly instructed by a public health nurse to inform all perspective sexual partners that he was HIV positive and to use condoms whenever he engaged in sexual intercourse. Notwithstanding such

instructions, the accused had unprotected sexual relations with two complainants without informing them of his HIV status. Both complainants had consented to unprotected sexual intercourse with the accused, but they testified at the trial that had they known that he was HIV positive, they would not have done so. At the time of trial neither complainant had, as yet, tested positive for the HIV virus. The trial judge entered a directed verdict acquitting the accused which was upheld by the British Columbia Court of Appeal. An appeal to the Supreme Court of Canada was allowed and a new trial was ordered.

[37] Cory, J., writing for four of the seven judges, concluded that the principles which have historically been applied in relation to fraud in criminal law can be used in approaching questions of fraud arising under s. 265(3)(c) of the **Code**. A principled approach consistent with the plain language of the section and an appropriate approach to consent in sexual assault matters is to be preferred. The principles developed in addressing fraud in the commercial context, with appropriate modifications, can serve as a starting point in the search for the type of fraud which will vitiate consent to sexual acts. Cory, J. then addressed the kind of dishonesty that would be considered fraud in such cases, commencing at para. 133:

> 133 In the case at bar, the failure to disclose the presence of HIV put the victims at a significant risk of serious bodily harm. The assault provisions of the Criminal Code are applicable and appropriately framed to deter and punish this dangerous and deplorable behaviour. To say that any fraud which induces consent will vitiate consent would bring within the sexual assault provisions of the Code behaviour which lacks the reprehensible character of criminal acts. Let us consider some of the situations which would become criminal if this approach were followed.
>
> 134 In these examples I will assume that it will more often by the man who

lies but the resulting conviction and its consequences would be the same if it were the woman. Let us assume that the man lied about his age and consensual sexual act or acts then took place. The complainant testifies and establishes that her consent would never have been given were it not for this lie and that detriment in the form of mental distress, had been suffered. Fraud would then be established as a result of the dishonesty and detriment and although there had been no serious risk of significant bodily harm a conviction would ensure.

135 The same result would necessarily follow if the man lied as to the position of responsibility held by him in a company; or the level of his salary; or the degree of his wealth; or that he would never look at or consider another sexual partner; or as to the extent of his affection for the other party; or as to his sexual prowess. The evidence of the complainant would establish that in each case the sexual act took place as a result of the lie and detriment was suffered. In each case consent would have been obtained by fraud and a conviction would necessarily follow. The lies were immoral and reprehensible but should they result in a conviction for a serious criminal offence? I trust not. It is no doubt because of this potential trivialization that the former provisions of the Code required the fraud to be related to the nature and quality of the act. This was too restrictive. Yet some limitations on the concept of fraud as it applies to s. 265(3)(c) are clearly necessary or the courts would be overwhelmed and convictions under the sections would defy common sense. The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but which does not have that significant risk might ground a civil action. However, it should not provide the foundation for a conviction for sexual assault. The fraud required to vitiate consent for that offence must carry with it the risk of serious harm. This is the standard which I think is appropriate and provides a reasonable balance between a position which would deny that the section could be applied in cases of fraud vitiating consent and that which would proliferate petty prosecutions by providing that any fraud which induces consent will vitiate that consent.

136 Nor can prosecutorial discretion be used or considered as a means of restraining these prosecutions. In R. v. Nikal, [1996] 1 S.C.R. 1013, it was held that “the holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of [that] right” (p. 1063). This same principle is applicable in this situation. There is a healthy reluctance to endorse the exercise of prosecutorial discretion as a legitimate means of narrowing the applicability of a criminal section.

137 It follows that in circumstances such as those presented in this case there must be a significant risk of serious harm if the fraud resulting from non-disclosure is to vitiate the consent to the act of intercourse. For the purposes of this case, it is not necessary to consider every set of circumstances which might come within the proposed guidelines. The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm. However, the test is not so broad as to trivialize a serious offence.

[38] In separate concurring reasons, L’Heureux-Dubé, J. was of the view that an

interpretation of fraud that focuses only on the sexual assault context and which limits it to those situations where a significant risk of bodily harm is evident is unjustifiably restrictive. Also concurring in the result, Gonthier J. and McLachlin, J. (as she then was), took, if anything, a more restricted view than the opinion of Cory, J., holding that the common law rule, that fraud does not vitiate consent to a sexual act, except where the mistake goes to the nature of the act or the identity of the partner, prevails. However, the application of the rule can be extended incrementally as necessary to bring the law into harmony with the changing needs of society. Misrepresentation as to HIV status is deception going to the very nature of the sexual act.

[39] I have no difficulty in accepting that Sergeant Moser attempted to deceive the appellant as to the true nature of his occupation and his mission. Undercover police operations would be of little value if officers were expected to make full disclosure to all and sundry of their true purpose. Clearly, in determining whether consent was obtained by fraud, the nature and extent of the duty to disclose if any must be considered in the context of the particular case. The interests intended to be protected by the provisions of the **Criminal Code** relating to sexual assault are the dignity, bodily integrity and safety of the person. The legislation is not designed to make it easier for law breakers to circumvent legitimate undercover police operations. The type of harm to which the appellant was exposed by the deceit practiced here (i.e., apprehension by police for criminal behaviour) is not, in my view, the serious harm envisaged by the majority opinions of the Supreme Court of Canada in **Cuerrier, supra**.

[40] Nor do I regard this as a case of deceit respecting identity of the sexual partner. The situation is clearly distinguishable from such well-known cases as where the victim permitted sexual conduct thinking that the perpetrator was her husband. The appellant invited Sergeant Moser, a stranger, to touch her. Her request of him respecting his occupation was designed, as the Crown's submits, to thwart a police investigation. The misrepresentation went not to Sergeant Moser's identity but as to his purpose in responding to her solicitation.

[41] The intervener suggests that Sergeant Moser's misrepresentation of his occupation can be likened to a situation where a person representing himself to be a physician touches a female in what would clearly be a sexual manner were he not. I do not consider such a situation analogous to that with which we are dealing.

[42] In the first place, representations by the perpetrator that he/she is a physician goes to the nature or quality of the act. See **R. v. Maurantonio** (1968), 1 O.R. 145 (Ont. C.A.); **Bolduc and Bird v. R.** (1967), 63 D.L.R. (2d) 82 (S.C.C.). The misrepresentation by Sergeant Moser did not go to the nature or quality of the act. The appellant invited the touching and was fully aware of the nature and quality of Sergeant Moser's acts in response to her invitation.

[43] Secondly, as I have pointed out, the interests to be protected by the provisions of the **Code** relating to sexual assault are the dignity, bodily integrity and

safety of the victim. In the example given, in view of the interests intended to be protected, it is proper that persons are protected against misrepresentations that they are being subjected to a medical procedure whereas, in fact, they are not. Such a situation has no similarity to this case where, it is, in effect, suggested that the legislation protects the appellant's interest in gaining immunity from detection and prosecution for a criminal offence. In the context of this particular case, I am unable to agree that the nature and extent of Sergeant Moser's duty to disclose was such that his misrepresentation amounted to fraud, inducing the consent. His conduct lacked the "reprehensible character" of a criminal act. I am satisfied that he did not sexually assault the appellant.

[44] As well, I reject the suggestion that even if he did not act illegally, Sergeant Moser so misconducted himself that this prosecution would bring the administration of justice into disrepute. The appellant and the intervener characterized this situation as one where "state agents" in the person of Sergeant Moser and his backup team have employed resources and tactics disproportionate to the objective of obtaining a conviction against a 17 year old for a minor criminal offence. I do not agree. I do not believe that the undercover operation carried out here would offend the community's sense of fair play. In recognition of the interests of peaceful residents and users of the streets, Parliament made street solicitation for the purchase and sale of sex an offence. The police have a duty to enforce this law. Detection and conviction of offenders would be rare indeed if undercover operations such as that employed here were not available to combat this nuisance. I refer to the following passage from **Campbell and Shirose,**

supra, at p. 276:

> The effect of police illegality on an application for a stay of proceedings depends very much on the facts of a particular case. This case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation. The problem confronting the police was well described by the Alberta Court of Appeal in R. v. Bond (1993), 135 A.R. 329 (leave to appeal refused, [1993] 3 S.C.R. v), at p. 333:
>
> > Illegal conduct by the police during an investigation, while wholly relevant to the issue of abuse of the court's processes, is not per se fatal to prosecutions which may follow: Mack; supra 558. Frequently it will be, but situational police illegality happens. Police involve themselves in high speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess, and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary but, patently, illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotel room transoms and keyholes or waiting patiently at police headquarters to receive the confessions of penitent drug-traffickers.

[45] To the extent that the intervener challenges the constitutional validity of s. 213(1)(c) or of this particular prosecution of a charge thereunder on the basis that they violate s. 15 of the **Charter**, no application was made at the trial for relief on such a basis. No opportunity was afforded the Crown to adduce materials relative to this complex issue. Materials offered to this Court by the intervener in support of this submission should not be considered as they are not part of the original record.

[46] It is not necessary to deal further with the **Charter** arguments raised by the appellant and the intervener.

[47] The appeal should be dismissed.

Chipman, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.