C.A.C. No. 02927

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Beals, 1994 NSCA 241

Hallett, Chipman and Pugsley, JJ.A.

BETWEEN:

MICHAEL DANIEL BEALS	)	Mark T. Knox, Esq.
	)	for the appellant
Appellant	)	
- and -	)	
	)	Robert E. Lutes, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	
	)	Appeal Heard:
	)	September 26, 1994
	)	Judgment Delivered:
	)	November 15, 1994

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

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

PUGSLEY, J.A.:

Michael Daniel Beals appeals from the jury verdict convicting him of six of the seven offences, or included offences, of which he was charged He also applies for leave to appeal, and if leave is granted, appeals from his sentence of seven years. The counts and sentence dispositions are as follows:

Count one - not guilty of assault causing bodily harm, but guilty of the included offence of assault - one year

Count two - guilty of attempting to obstruct justice - one year concurrent to count one;

Count three - guilty of living off the avails of prostitution - judicial stay on sentence;

Count four - guilty of living off the avails of prostitution of a person under the age of 18 - five years;

Count five - guilty of exercising control over a person to engage in prostitution - five years, concurrent to count four

Count six - not guilty of attempted murder;

Count seven - guilty of aggravated assault - six years, concurrent to counts four and five.

FACTUAL BACKGROUND:

The Crown called 12 witnesses, including the complainant, N.M. No defence evidence was called.

N.M. testified:

- She returned to Halifax, age seventeen, in October, 1992, after working as a prostitute in a number of cities in Quebec and Ontario. Her seven month old daughter, A., accompanied her;
- She accepted an offer from Michael Beals, age thirty-six, to furnish her apartment, and in return agreed to work as a prostitute for him. Thereafter she normally worked six nights a week from 7:00 p.m. to 4:00 a.m., in the Hollis - Bishop Street area of Halifax averaging $200.00 per night. She used part of her earnings to purchase cocaine and the balance of the money was handed over to Mr. Beals;
- On December 3, 1992, while working the streets, she entered a police vehicle operated by Constables Bower and Gaudet, two members of the City of Halifax Task Force on juvenile prostitution. She was observed in the vehicle talking to the police, by one D.K., a prostitute who also worked for Mr. Beals;
- Some hours later, Mr. Beals and D.K. came to N.M.'s apartment, accused her of receiving money for setting them up with the police, and beat and kicked her "all over her face and body" for three quarters of an hour;
- N.M. continued to work as a prostitute for Mr. Beals until December 27th. He was looking after A. when she returned to the apartment at approximately 4:00 a.m. after a night of working the streets. He forced her into the bathroom and pushed her while fully clothed, into a bathtub he had filled with water. He attempted to hold her head under the water, punched her in the chest and said "you want a 30 second rush, I'll give

you one you will never come out of". While continuing to force her head under water, he shouted he wasn't as she put it "afraid to kill me like he did the guy in Calgary";

- After leaving A. in Mr. Beals' care the following night to resume her trade, N.M. went to stay at a residence for prostitutes in Halifax where she remained for the next week. On January 5th, N.M. phoned her social worker to request the assistance of the Department of Community Services in retrieving A. from Mr. Beals. She was then advised that Mr. Beals had already delivered A. that morning to the Department for care.

GROUNDS OF APPEAL:

Mr. Beals has raised nine issues which may be summarized as follows:

I. the trial judge failed to clearly explain the legal concept of credibility;

2. the trial judge failed to review the theory of the defence;

3. the trial judge failed to give an appropriate caution to the jury regarding the use that could be made of sections of the **Criminal Code** delivered to each of them;

4. the trial judge erred in failing to properly instruct the jury regarding the use of expert evidence;

5. the trial judge failed to give an appropriate warning to the jury with respect to Mr. Beals statement "I am not afraid to kill you like I killed that guy in Calgary".

6. the trial judge failed to properly instruct the jury regarding the legal concept of corroboration.

7. the trial judge failed to instruct the jury regarding the necessity of the Crown to establish that Mr. Beals was aware the complainant was less than 18 years of age;

8. the conviction for willfully attempting to obstruct the course of justice is perverse and cannot be supported on the evidence;

9. the sentences are excessive.

ISSUE NO. 1**:** - The trial judge failed to clearly explain the legal concept of credibility;

Counsel for Mr. Beals stresses that the primary issue to be determined by the jury was an assessment of N.M.'s evidence, and that it should be clearly instructed that before a conviction could be entered, N.M.'s evidence must be accepted as truthful and accurate on the basis of "proof beyond a reasonable doubt."

Counsel refers to the decision of the Alberta Court of Appeal in the **Queen v. Chan** (1990), 52 C.C.C. (3d) 184, and in particular the comments at p. 186:

> In a jury trial where credibility is a live issue, the charge to the jury should somehow explain that the rule of reasonable doubt also applies to credibility issues.

The trial judge after dealing with the legal issues concerning "presumption of innocence", "burden of proof", "reasonable doubt", and "credibility", instructed the jury as follows:

> Should you have a reasonable doubt about any of the evidence, you will give the benefit of that doubt to the accused with respect to such evidence. ... It is not necessary to find (N.M.) untruthful in order to render a verdict of not guilty on any particular charge. It is sufficient

> if you find the evidence, including that of (N.M.) is unreliable or inadequate or false or whatever and is short of satisfying you beyond a reasonable doubt of the guilt of the accused on a particular charge.

In the **Chan** case, the accused gave and called evidence, whereas the defence called no evidence from, or on behalf of, Mr. Beals. This, the Crown submits, removes the issue of "comparative credibility".

I am satisfied the instruction was adequate.

Counsel for Mr. Beals also submits that the trial judge failed to appropriately warn the jury of the danger of accepting N.M.'s evidence, in view of her life style as a prostitute, thief and acknowledged perjurer.

In circumstances where the worth or credibility of a witness may be impaired, the judge ought to consider warning the jury of the risk of accepting the testimony of the witness without supporting evidence (**Vetrovec v. The Queen**) (1982), 1 S.C.R. 8 11 at 823.

The warning is of particular importance in the situation where the case against Mr. Beals rests essentially upon N.M's credibility in light of her acknowledgment that she committed perjury at the preliminary. (**R. v. Crosby** (W.S.) (1994), 130 N.S.R. (2d) 61 at 65.

During the course of the instruction, the trial judge stated:

> the defence asks you that you question and look very carefully at the evidence of (N.M.) bearing in mind her lifestyle and her involvement in drugs and prostitution, her lying under oath, that is always serious, it is perjury, it is a criminal offence in itself; her lying to the social workers under nondisclosure for activities. ... discrepancies in trivial matters may be, and usually are unimportant. ... deliberate falsehood on the other hand is an entirely different matter,

> always serious, and one which may well taint a witnesses' entire testimony...

In my opinion, the trial judge thus cautioned the jury in appropriate language respecting N.M.'s credibility and fairly put the issues raised in the theory of defence to the jury.

ISSUE NO. 2: - The trial judge failed to review the theory of the defence.

The main thrust of this ground is based on the reading to the jury lengthy extracts from the transcript of N.M.'s examination - in chief at trial.

The judge's charge took approximately three hours to complete. It has been reproduced on 75 pages of transcript. A significant part of the transcript, (29 pages) consist of the trial judge reading to the jury excerpts from N.M.'s evidence.

This occurred on six separate occasions and on some of those occasions, the same evidence was reread.

Jury directions should include a "succinct but accurate summary of the issues of fact ... a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the emphasis which the jury are entitled to draw from their particular conclusions about the primary facts" (**R. v. Lawrence** (1982), A.C. 510 per Lord Hailsham at 519). (emphasis added)

While such a practice can place a disproportionate emphasis on the evidence given by the Crown's chief witness, and thus result in an unfair trial, in my opinion, it did not constitute a miscarriage of justice in this particular case:

1. the trial judge explained to counsel in the absence of the jury

> I have been able to get a transcript of the evidence of (N.M.) so I will go in some detail so that there will be a chance to be accurate. I rarely do that, but her voice dropped

> occasionally and I wanted to be absolutely sure, because I agree with Mr. Coady (defence counsel) that it is absolutely critical evidence to the jury and I wanted to be accurate so I have a transcript and I will be reciting it, so I will be longer than I usually am in my address.

It might have been more appropriate if the explanation was given in the presence of the jury.

2. the trial judge as noted in issue No. one, appropriately cautioned the jury concerning the acceptance of N.M.'s evidence;

3. the trial judge made it clear that the jury were

> the sole judges of the truthfulness of the witnesses and the weight to be given to the testimony to the each of them. ... You are the sole triers of fact. ... You are final judges on the issues of fact... In the course of my charge, I shall review to some of the evidence and in doing so I may fail to mention something which you believe to be important or, conversely, mention something that you believe to be unimportant. Should that occur, you must remember that my view as to the significance of any evidence is in no way binding upon you, nor is the opinion of counsel. It is your duty to make you own decision as to what is relevant and important in this case. You are the triers of fact.

4. Mr. Beals was charged with seven different offences.

It was essential for the trial judge to review the critical evidence on each charge.

Rather than reviewing the evidence of each witness in turn, the trial judge elected to review each count separately. He then instructed the jury on those points which required proof and the relevant evidence in support. N.M.'s evidence was critical with respect to each count.

If the defence had adduced evidence, the trial judge would have been obliged to refer to the main evidence of the defence's witnesses. No such evidence was called.

I would dismiss this ground.

ISSUE NO. 3: - The trial judge failed to give an appropriate caution to the jury regarding the use that could be made of sections of the **Criminal Code** delivered to each of them.

The trial judge gave members of the jury photocopies of various sections from the **Code**, all of which were related to the seven charges included in the indictment.

In so doing the trial judge stated:

> Once again, Mr. Foreman, ladies and gentlemen of the jury, I think it would be difficult for you to sit there and hear me read a great deal of extracts from the **Code** so I provided purely as assistance to you some sections I am going to refer to and again these are simply an aid to you to follow what I am saying. It is of no other significance whatsoever and it is for that purpose exclusively and they are to be left here in the court room not to be taken into the jury room when you deliberate... unless I otherwise direct you, you can give each of these words used in the various provisions of the **Code** not only when I refer to them now but when I refer to them at any time, their ordinary, everyday meaning.

Counsel for Mr. Beals acknowledged that the trial judge explained to the jury "that their domain is to determine what the facts are, and that the judge determines what the law is", but submits that the trial judge did not make it clear that the jury "must take the law from the Bench" (**The Queen v. Bawryk and Appleyard** (1979), 46 C.C.C. (2d) 290 (Man.C.A.))

A review of the charge however reveals that the trial judge made the point clearly:

> As I told you at the outset of the trial, our roles are quite different. You are final judges on the issues of fact. I on the other hand instruct you as to the applicable law. You must take the law as I give it to you, put aside any notions you might have as to the relevant, legal principles. It is your duty to be guided by my explanation of the law.

I would dismiss this ground.

ISSUE NO. 4: - The trial judge erred in failing to properly instruct the jury regarding the use of expert evidence.

Detective David Perry, an officer in charge of the Metropolitan Police Juvenile Prostitution Task Force of Toronto was called by the Crown

> for the purpose of offering expert opinion evidence in relation to a number of different issues including the nature of the relationship which exists between pimps and prostitutes, particularly the financial aspects of that relationship... the organization of pimps and prostitutes into economic groups or units called "families"... and the types of assaultive behaviour normally employed by pimps against prostitutes. In order to ensure their continued compliance....
>
> The qualifications were accepted by defence counsel.

The defence submits that the trial judge failed to warn the jury that the acceptance of Detective Perry's evidence was "totally contingent and dependant upon their acceptance of M.N.'s evidence... in short the facts upon which the opinion was based must be found to exist".

The brief, but effective cross-examination of Detective Perry, by defence counsel must have made this point abundantly clear to the jury:

> Q. You are a member of the Metropolitan Toronto Police Department?
>
> A. That is correct.
>
> Q. That is your employer. And the purpose you are in Halifax today and the sole purpose for your attendance in Halifax today is to provide this court with expert opinion evidence in relation to prostitution and pimping and affairs such as that?
>
> A. Yes sir, that's correct.
>
> Q. You have not been involved in any aspect of investigation of this case?
>
> A. No sir.
>
> Q. Have you ever met the complainant, the alleged complainant, (N.M.) prior to becoming involved in this case?
>
> A. No I haven't.
>
> Q. Have you ever met my client Mr. Beals before coming to court here today?
>
> A. No sir I haven't.

The instruction of the trial judge to the jury on this point was entirely adequate:

> Mr. Foreman and ladies and gentlemen of the jury, we had expert evidence in this matter. Ordinarily, witnesses are permitted to give evidence on only the facts they themselves have seen or heard or otherwise preceived with their senses. They're not permitted to give opinions when testifying in court. However, duly qualified experts are permitted to give opinions in matters in controversy at trial and to assist you in deciding the issues you may consider such opinions and the reasons given for them. But just

> because these opinions are given by an expert, you are not bound to accept them if in your own judgment they are unsound. You're entitled to give such weight as reasonably and justly belongs to an expert's opinion evidence. That opinion evidence is not necessarily binding upon you if it's against your judgment. Please recall my earlier instructions that you are the sole judges of fact and when determining what are the facts, you may believe all or none or only part of the evidence of a witness and there is no distinction when applying that general principle to evidence given by experts and evidence given by ordinary witnesses. The testimony of experts must be appreciated and weighed in the same manner as any other witnesses.

I would dismiss this ground.

ISSUE NO. 5: - The trial judge failed to give an appropriate warning to the jury with respect to Mr. Beals' statement "I am not afraid to kill you like I killed that guy in Calgary".

During the course of her evidence in chief, the complainant was asked:

> Q. When this was going on, in addition to the comment about the 30 second high that you will never come out of, did he say anything else to you?
>
> A. He wasn't afraid to kill me like he did the guy in Calgary.

Reference was made to this response in the Crown's address to the jury, as well as in the trial judge's charge.

Counsel for Mr. Beals submits that the jury "was presumably left with the impression that the appellant had previously killed someone. This was not proven during the Crown's case... the failure of the trial judge to direct the jury that it had not been proven is a serious error amounting to misdirection."

It is important to understand the context in which the statement was made. N.M. was asked about the incident in relation to the charge of attempted murder by drowning on December 27, 1992. The statement was introduced not for the truth, but

only for the fact that it was said, and to show why (N.M.) had concluded that Mr. Beals was attempting to kill her.

The issue, in my opinion, has no merit. It is eliminated in view of the acquittal of Mr. Beals on the attempted murder charge.

ISSUE NO. 6: - The trial judge failed to properly instruct the jury regarding the legal concept of corroboration.

The theory of the defence, developed during cross-examination of the Crown's witnesses, and in summation to the jury, was that the complainant had fabricated her evidence in retaliation for Mr. Beals' decision to deliver A. to the Department of Community Services on January 4th, 1993.

After a *voir dire,* held in the absence of the jury, the trial judge permitted the Crown to lead evidence from witnesses concerning prior statements made by the complainant consistent with the evidence given at the time of trial, in order to rebut the allegation that the evidence given at trial was a recent fabrication.

In my opinion the trial judge was correct in concluding that the prior consistent statements made by the complainant were admissible.

McIntyre, J. on behalf of the court (**Regina v. Simpson and Ochs** (1988), 38 C.C.C. (3d) 481 (S.C.C.)) referred with approval to the following quotation from McWilliams in **Canadian Criminal Evidence** 2nd ed. (1984) p. 355:

> If, on cross-examination a witness' account of some incident or set of facts is challenged as being a recent invention or concoction, this raises an issue which the party calling the witness is permitted to rebut by showing that at some earlier time, the witness made an earlier statement to the same effect.

As a result of submissions from both counsel after the initial charge to the jury, the trial judge had the jury return to the courtroom and carefully warned the jury that "the other evidence, exclusively, so that the Crown could combat the theory of the defence with respect to fabrication and that's the sole reason for that evidence and that's the only light that you should assess that evidence". (emphasis added)

I would dismiss this ground.

ISSUE NO. 7: - The trial judge failed to instruct the jury regarding the necessity of the Crown to establish that Mr. Beals was aware the complainant was less than 18 years of age.

Section 212(2) of the **Criminal Code** provides:

> Notwithstanding paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen (18) years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen (14) years.

The trial judge instructed the jury with respect to this issue as follows:

> THE COURT: Mr. Foreman, ladies and gentlemen of the jury, we're now down, if you look at the indictment, to the fourth charge:
>
> "**AND FURTHER AT THE SAME TIME AND PLACE AFORESAID**, did live partly on the avails of prostitution of (N.M.), a person under the age of 18 years, contrary to Section 212 (2) of the Criminal Code;"
>
> You will readily see that the only variation between that and the preceding, the third charge is the factor of her age. It constitutes a separate offence if it's somebody under 18 years of age. Now, I could go over it again but I think you are very attentive and absorbed what I said on the third charge, and everything I said on the third charge applies to the fourth charge. In other words, you must be satisfied beyond a reasonable

> doubt that the offender was Mr. Beals, the date time and place, and he did live partly on the avails, the rewards if you will, the money that she earned and it was earned in prostitution. You must be satisfied of all of those things plus the added feature that she was under 18 years of age. You have before you, I think it's Exhibit No. 3, the admission that she is under 18 years of age and her birth certificate and her own evidence of her age. So, it seemed to follow that if you found a verdict of not guilty on three, that you have to find a verdict of not guilty on four and it seems to follow, and again I'm not tying to usurp your jurisdiction because you are the sole triers of fact, it seems to necessarily follow that if you found a verdict of guilty on three, that you'd find a guilty verdict on four, because the only difference is the age of 18 and that is admitted as before you in Exhibit 3. Everything I've said, of course, has always the requirement of the Crown to establish all the essential ingredients beyond a reasonable doubt and I simply satisfied myself that you followed everything I said in the previous one and don't need to repeat it.

Counsel submits that it was incumbent on the Crown to establish not only N.M's age, but that Mr. Beals knew that N.M. was under the age of 18.

It was initially the position of the Crown, that, in the absence of proof, of this knowledge, that it would be appropriate to enter an acquittal on count four but also appropriate to lift the conditional stay on count three, and impose sentence on that count.

At the time of the hearing of the appeal, however, the Crown directed the Court's attention to s. 150(1)(5) of the Code which reads:

> It is not a defence to a charge under s. 153,159,170,171 or 172 or subsection 212(2) or (4) that the accused believed that the complainant was 18 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

Accordingly the Crown argued that the conviction on count four should be upheld.

Section 150(1)(4) like subsection (5) limits the circumstances under which a mistake of fact regarding the complaint's age will be an excuse. To rely on subsection (5), Mr. Beals must have taken all reasonable steps to ascertain the age of the complainant.

Section 150(1)(4) was considered by the Appeal Division of the Newfoundland Supreme Court in **R. v. Osborne** (1993), 17 C. R. (4th) 350.

Chief Justice Goodridge on behalf of the Court in considering the **Charter** issue had these comments.

> the judgments of the Supreme Court of Canada make it abundantly clear that in the legislation that imposes a burden on the accused in a criminal matter to establish his innocence on a balance of probabilities is void under the Charter unless it is "saved" by s. 1 thereof. There is nothing in s. 150.1(4) that expressly places any obligation on an accused to establish anything. ... there is no argument before the court that this subsection is invalid for any reason. It allows a due diligence defence and that can do nothing more than place an evidentiary burden on the accused to show that he used due diligence or, more particulary in this case, that he took all reasonable steps to ascertain the age of the complainant.

In this case there was no direction by the trial judge on the point in issue, nor was there any reference to s.150.1(5).

Should the trial judge's failure to direct the jury that the onus was on the Crown to establish that Mr. Beals knew N.M. was under the age of 18 constitute a sufficient non direction as to justify the ordering of a new trial on this charge?

In my opinion it should not.

If the initial direction had been made, the trial judge would have been obliged to advise the jury of the evidentiary burden on Mr. Beals to demonstrate that he took all reasonable steps to ascertain the age of the complainant.

In fact there was a complete absence of evidence on the point. Mr. Beals did not testify and accordingly there was no evidence to place before the jury that he had satisfied the onus.

The record, in short contains no factual basis to justify any inference that the burden was satisfied I therefore conclude that the non-direction did not amount to a miscarriage of justice (**Regina v. MacGregor** (1982), 64 C.C.C. (2d) 353 at 359.

ISSUE NO. 8: - Conviction for wilfully attempting to obstruct the course of justice which is perverse and cannot be supported by the evidence.

The trial judge in the course of his charge regarding this count in the indictment stated:

> It seems to me the limited evidence in this charge may fall short of satisfying you beyond a reasonable doubt that Michael Beals is guilty of obstructing justice. It is difficult to draw that inference that the beating was intended as an obstruction of justice.

Counsel for Mr. Beals suggests these comments support his submission that the verdict of the jury was perverse.

I agree with the Crown's contention that the beating was inflicted to prevent further contact with the police.

In this case, the beating constituted an obstruction of justice for two reasons:

(a) the complainant was endeavouring to give information about the prostitution trade to the police;

(b) the complainant was communicating with the Task Force on prostitution in order to assist her own escape from prostitution.

While the jury took a different view from the trial judge with respect to the evidence on this point, they were justified in so doing. The verdict in my opinion was not unreasonable within the meaning of the **Yebes** test (1987) 36 C.C.C. (3d) 417 (S.C.C.).

ISSUE NO. 9: - The sentences are excessive.

Counsel for Mr. Beals points out that his client served eight months of pre-trial custody and that the trial judge failed to consider the concept of totality in sentencing him to seven years. He further submits that an absence of previous involvement in the prostitution trade should render excessive, a sentence of six years for aggravated assault, and five years for the prostitution related charges.

Mr. Beals was born on April 2, 1957, and at the time of sentencing was 36 years of age.

His criminal record is substantial.

While he has not been found guilty of any previous prostitution related offences, he has twice been convicted of obstructing justice, once for assault, once for

aggravated assault, theft under $200.00, theft over $200.00, attempted theft over $200.00, trafficking in a narcotic, and an abduction of a person under 16 years.

The trial judge properly characterized the offences as having two elements:

"The element of greed and the element of exploitation of another human being in what can only be described as the degrading conduct of having a child selling herself for his financial gain.

This was achieved by the exercise of control and domination of a child already suffering from a lack of self-esteem and self-worth. (N.M.) was at the time of these offences, the same age approximately as Mr. Beals' own daughter."

While leave to appeal against sentence should be granted, in my opinion, the trial judge applied the proper principles and did not err in the terms of the sentence imposed.

The sentence is fit, both in its totality and in its parts. It is not manifestly excessive.

DISPOSITION:

I would, accordingly, dismiss the appeal.

J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.