C.A.C. No. 114572

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A.

Cite as: R. v. Carignan, 1995 NSCA 192

BETWEEN:	)	
	)	
JOSEPH TIMOTHY CARIGNAN appeared	)	Appellant
	)	in person
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	September 19, 1995
	)	
	)	
	)	Judgment Delivered:
	)	September 22, 1995

Editorial Notice

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

THE COURT: The appeal from the convictions is dismissed, leave to appeal the sentences is granted, but the sentence appeal is dismissed as per reasons for judgment of Chipman, J.A.; Clarke, C.J.N.S. and Roscoe, J.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted in Provincial Court on charges that between

July 22, 1994 and October 1, 1994 he:

> "Did for the purpose of gain exercise control or direction or influence over the movements of L. B. in such a manner as to show that he was aiding or abetting or compelling L. B. to carry on prostitution generally, contrary to Section 212(1)(h) of the **Criminal Code**;
>
> AND FURTHER AT THE SAME TIME AND PLACE AFORESAID did live partly on the avails of prostitution of L. B., contrary to Section 212(1)(j) of the **Criminal Code**;
>
> AND FURTHER AT THE SAME TIME AND PLACE AFORESAID**,** between the 1st day of October and the 20th day of October, 1994, did have in his possession a weapon, to wit: a hatchet, for a purpose dangerous to the public peace, contrary to Section 87 of the **Criminal Code**;
>
> AND FURTHER AT THE SAME TIME AND PLACE AFORESAID, did in committing an assault on the person of L. B. carry a weapon, to wit: a hatchet, contrary to Section 267(1)(a) of the **Criminal Code**;
>
> AND FURTHER AT THE SAME TIME AND PLACE AFORESAID, did knowingly utter a threat to L. B. to cause death to L. B., contrary to Section 264.1 of the **Criminal Code**."
>
> The appellant was, at the same time, acquitted of four related charges.

Following submissions to the Court, the appellant was sentenced to incarceration for a period of three years on count 1; three years to be served concurrently on count 2; one month to be served consecutively on count 3; four months to be served consecutively on count 4 and one month to be served consecutively on count 9, making a total of three years and six months incarceration.

The appellant appeals and applies for leave to appeal to this Court raising three issues:

(1) that he was not given an opportunity to call evidence on his behalf resulting in a miscarriage of justice;

(2) that the verdict was unreasonable or unsupported by the evidence; and

(3) that the sentences were manifestly excessive.

ISSUE ONE:

The appellant was represented at trial by experienced and competent defence counsel. After the Crown closed its case, counsel for the appellant was asked whether the defence elected to call evidence. He was granted a recess for the purpose of consulting his client. Following the recess, counsel for the appellant advised the Court that his client elected to call evidence. The appellant testified as the only witness on his behalf. At no time did he or his counsel indicate to the Court that there were other witnesses to be called, nor was any adjournment requested for that purpose. There is nothing in the record to indicate that the appellant was deprived of any opportunity to call evidence on his behalf.

ISSUE TWO - UNREASONABLE VERDICT:

Section 686 of the **Criminal Code** states in part:

> "686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence."

In **R. v. Yebes**, [1987] 2 S.C.R. 168 MacIntyre, J. stated at 186:

> "The function of the Court of Appeal, under s. 613(1)(a)(i) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or

direct evidence."

In **R. v. W. (R.)**, [1992] 2 S.C.R. 122 McLachlin, J. speaking for the Supreme Court of Canada pointed out at pp. 131-132 that in applying this test the Court of Appeal should show great deference to findings of credibility made at the trial, and observed that the Court had repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility.

In his decision, the Provincial Court judge referred to the evidence of L. B., the principal witness on behalf of the Crown who testified respecting the relationship between herself and the appellant as that of prostitute and pimp. She testified respecting the appellant's conduct towards her which gave rise to the charges. The Provincial Court judge summarized her evidence, referred to the conflicting evidence of the appellant and made a finding accepting the evidence of the complainant and rejecting that of the appellant. He said:

"Well Mr. Carignan, I don't believe you for one minute."

In his decision, the Provincial Court judge clearly alluded to the burden upon the Crown to prove the charges by a proof beyond a reasonable doubt.

I have reviewed the record for the purpose of reweighing and considering the effect of the evidence. I am satisfied that the Provincial Court judge reached a verdict that a properly instructed jury acting judicially could reasonably have rendered.

ISSUE THREE - FITNESS OF SENTENCES:

The appellant has a lengthy record. The Provincial Court judge in handing down sentence spoke of him as follows:

> "The accused has a record which dates back to 1988. As counsel pointed out, mostly for matters involving property matters of theft, some fraud charges, break and enter, violation of probation and also making false statements to the authorities to which he has served some periods of time and given probation and given fines and, as I say, served some period of time as a young person and as an adult in provincial correctional establishments. This court and many

> other courts in this province have dealt with numerous cases involving pimps and prostitution relationships and have indicated that this type of - I think other courts have indicated as well that this type of relationship is almost, depending upon the situation, akin to a form of slavery where one person is abusing and using the body and labours of another, not a question of employment, but a question of exploitation. . ."

I refer to the oft quoted passage of the decision of Macdonald, J.A. in **R. v. Cormier** (1974), 9 N.S.R. (2d) 687 at p. 694:

> "Thus it will be seen that this Court is required to consider the 'fitness' of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the principles a sentence should be varied only if the court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused."

A number of cases were drawn to our attention dealing with sentences imposed upon pimps for offences committed in connection with the prostitution trade. It is clear to me that having regard to these authorities and to the clearly demonstrated need for emphasizing deterrence to those who would take such unfair advantage of persons involved in that trade, that the sentences crafted by the Provincial Court judge in this instance are eminently fit.

I would dismiss the appeal from the convictions, grant leave to appeal the sentences, but dismiss the sentence appeal.

Chipman, J.A.

Concurred in:

Clarke, C.J.N.S.

Roscoe, J.A.