C.A.C. No. 02889

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Beals, 1993 NSCA 215

Hallett, Roscoe and Pugsley, JJ.A.

BETWEEN:

EDMOND WADE BEALS	)	Colin M. Campbell
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Robert C. Hagell
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	September 28, 1993
	)	
	)	
	)	Judgment Delivered:
	)	November 15, 1993
	)	

EDITORIAL NOTICE

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

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Roscoe and Pugsley, JJ.A. concurring.

HALLETT, J.A.

The appellant was convicted of living wholly or partially from the avails of prostitution of A.D., a female person under the age of 18, contrary to **s. 212(2)** of the **Criminal Code**; a charge of confinement of A.D. was dismissed. Section 212(2) provides:

> " 212.(2) 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 years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

The two grounds of appeal as follows:

> " 1. That the Appellant was denied unfairly his right to counsel and the learned trial Judge erred in law in allowing the trial to proceed over the Appellant's objections where he did not have counsel;
>
> 2. That the Learned trial Judge erred in law in finding the Appellant guilty and that the evidence adduced at trial was not sufficient to support a conviction."

The history of the proceedings is relevant to the first issue. The appellant elected to be tried in the County Court and a preliminary hearing was set for the 15th of October, 1992. The appellant was represented by legal aid counsel at the preliminary hearing; he was committed to stand trial. On October 22nd, 1992 a trial date was set for May 3rd and 4th, 1993.

On November 12, 1992, the appellant discharged his counsel. On February 4th, 1993, in the presence of the appellant, his counsel requested the court's permission to withdraw as solicitor of record; the motion was granted. The justice presiding on that date clearly stated to the appellant that the trial dates would be adhered to; he instructed the appellant to obtain counsel.

Apparently the appellant made contact with a legal aid office as on February 25, 1993, the Dartmouth office of Nova Scotia Legal Aid sent a letter to the appellant in the following terms:

> " I have received an application form from you requesting legal aid representation for a charge of living off the avails of

> prostitution for court on May 3, 1993. I need to know which court you are scheduled to appear in before arrangements can be made for your representation. I have checked with the court administration office at 277 Pleasant Street and they have no record of you coming to court in the near future. Please advise."

On May 3, 1993, at the start of the trial the appellant, through new counsel, applied for an adjournment. In a statutory declaration signed by the appellant in support of the application he stated that after trying for several months to get a lawyer through various legal aid offices he was finally informed on Wednesday, April 28, 1993, that he could find a lawyer through the yellow pages and that Metro Community Law Clinic would issue a certificate authorizing the lawyer to act. He further stated that on April 29th, 1993, he made his first contact with Mr. Campbell who represented him on the application for the adjournment. The appellant testified on the application that he had made numerous contacts with legal aid offices but that he had been given the run around. The application was refused by the trial judge.

The facts which resulted in the conviction of the appellant are relevant to the second issue raised on the appeal that the evidence did not support the guilty verdict. A.D. testified that she met the appellant in the summer of 1991. She testified that she worked as a prostitute in Halifax in company with C. S. in the Hollis Street area. In follow-up questions under direct examination she was asked how it came about that she worked in the Hollis Street area with C. S. She replied:

> " A. Well she was working for Wade [the appellant] and I was so we were to go to the same place."

The transcript of her direct testimony continues as follows:

> " Q. Okay, you say working for him, what .. did you get paid money when you were a prostitute by the customers?
>
> A. Yes.
>
> Q. Okay, what would you do with the money?
>
> A. I'd give it to Wade.

Q. What about C. .. what would she do?

A. She would give it to Wade.

Q. Do you remember when this was now that this happened that you worked as a prostitute and gave it for Wade Beals and gave him the money?

A. Well it started when I was fifteen and it was just mostly in the summertime and some part of winter.

Q. Okay, so what year or years would that be .. like if you were fifteen, when would that be now?

A. '91, '92.

Q. Okay, '91/'92 ...Were you ever arrested when you worked as a prostitute?

A. Yes."

She further testified that she advised the appellant of her age when she was 15 years old.

The Trial Judge's Decision Refusing the Motion for an Adjournment

In her oral decision, after reviewing the history of the proceedings up to February 4, 1993, Justice Bateman quoted from the transcript of the remarks made by the motions' judge on February 4th as follows:

" 'What do you have to say Mr. Beals? Well there is a trial May 3rd and 4th. Now that date will stay unless counsel moves and if you don't have counsel by that time we will be proceeding. I'll allow you to withdraw Mr. Newton.'"

The learned trial judge continued as follows:

" At that point the Crown Attorney pointed out that the Crown's position was that they would be opposed to a change in date for the trial. After February 4th, or indeed, even on February 4th, that there were a substantial number of witnesses subpoenaed and the Crown would be expecting the trial to go ahead. The Court says again:- it was Justice Palmeter and I quote -- "Quite frankly there have to be very good reasons why we would have to adjourn this long.. we've got four months in advance .. all right sir, we'll be going ahead and I would request that you get counsel right away sir and they can advise the Court. Thank you." On Friday, just past, which was April 30th, I received a letter from Mr.

Campbell on behalf of Mr. Beals indicating that he had just been retained on the matter and was seeking an adjournment. The letter dated April 30th reads:

> 'My Lady, I was contacted yesterday and I emphasize yesterday by Mr. Beals requesting that I act on his behalf on Monday, May 3rd, 1993. I am in the process of working out my retainer with the Metro Law Clinic and because of my late involvement I am not in a position to go ahead on Monday. I have been in contact with the Crown and I understand they are not opposed to this adjournment. Please contact me if you have any concerns.'

The Crown responded with a fax indicating that the position was that the Crown would not object to the defence request if Mr. Beals had made some effort to obtain counsel prior to yesterday's date. Not being familiar with the file I responded that I required an affidavit as to the efforts Mr. Beals has made and I would deal with the adjournment today. I subsequently reviewed the transcript which I've referred to. I've heard Mr. Beals' evidence; it's vague at best .. he apparently had Legal Aid representation; had a certificate from Nova Scotia Legal Aid; fired that attorney on November 12th..between that time and February did nothing to put counsel in place nor did he advise the Court on February 4th that he was having any difficulty arranging counsel. There is a further letter as Exhibit 1 in this proceeding this morning that indicates that the Dartmouth office, Legal Aid, has received an application for funding or for a certificate. ..."

After quoting the February 25th letter the learned trial judge continued:

> "There is no evidence before me that Mr. Beals responded to that letter and as well, that letter is in somewhat direct contradiction to Mr. Beal's testimony this morning that he couldn't get legal aid to respond that they were putting him off and not having any time for him. It is apparent from that letter that the onus was on Mr. Beals to make contact with legal aid again and advise us to this particulars..He hasn't..or he apparently didn't do so or he has not testified that he did so. We now have a certificate issued from Metro Clinic rather than the Halifax Legal Aid Clinic where Mr. Beals indicates he was having his contact. I'm not satisfied that he has made efforts to retain..timely efforts to retain alternate legal counsel and I am not prepared to grant the adjournment. The matter will go ahead this morning."

The transcript of the trial shows that moments after making this ruling, in discussions with counsel for the appellant, the learned trial judge stated:

" It's clear that Mr. Beals never intended this matter to go ahead today and counted on that."

The trial proceeded with the appellant representing himself; he cross-examined witnesses, testified and made submissions to the trial judge. The learned trial judge, in rendering her decision at the conclusion of the trial, elaborated on her reasons for refusing the adjournment; she stated:

" ...I'm in a position now to render my decision on this matter. ...I rejected Mr. Beals' application for an adjournment. That matter has been raised again by him, and I will now provide more detailed reasons for refusing that request.

I was not satisfied on the evidence before me that Mr. Beals had made reasonable efforts to retain counsel since discharging his lawyer in November of 1992. Indeed, I did not accept, and do not accept Mr. Beals' evidence that he had made many calls to the various legal aid offices and spoken with lawyers who, in his words, just gave him the run around and rejected his case. On February 4th, 1992, Mr. Newton, a lawyer who had been discharged by Mr. Beals, made formal application to the court to withdraw, as he had received no instructions subsequent to the telephone call in November discharging him.

Mr. Beals was present before the court for that application by Mr. Newton, and took no objection. He was told twice by the court to make immediate and serious efforts to put counsel in place and was told, as well, that the trial would go ahead as originally scheduled, failing some unusual event. Mr. Beals did not advise the court that he was having difficulty retaining counsel, not at any time during that February 4th hearing, nor has he since, until the commencement of this trial.

He presented the court with a letter from Nova Scotia Legal Aid dated February 25th from the Dartmouth office advising that he had again requested legal aid, that they needed to know what court in which he was scheduled to appear, that they had no record of him coming to court out of the Dartmouth office. There is absolutely no evidence presented before me that Mr. Beals responded to that request, and indeed, the letter is in direct contradiction to Mr. Beals' assertion that he was given the run around by legal aid. The letter appears to be an attempt by legal aid to assist Mr. Beals in retaining counsel. The only concrete information before me as to Mr. Beals' effort to retain counsel, is that Thursday last, which was April 29th, 1993, he was authorized by the Metro Clinic to retain a lawyer on certificate.

> The Crown gave notice at the February 4th hearing that they would oppose any request for adjournment. The Crown opposed the request for adjournment at this time, and the Crown, in its submission, indicated that Mr. Beals is no stranger to the legal system. He, in thus, has some familiarity with how these matters proceed.
>
> As a result of all of the above, I determined to refuse the motion to adjourn, and concluded that Mr. Beals had not made any real effort between November 12th and April 29th to retain counsel. In my view, there must be some balancing between the public interest in having matters proceed in a timely fashion, and the right of the accused to counsel. Mr. Beals has chosen not to retain counsel, for whatever reason, until the last possible moment. In my view, the interests of justice would not be served by granting an adjournment. While reasonably motivated requests for counsel or for an adjournment should be accommodated, and will be accommodated by the court, it's my view this was not a reasonably motivated request."

The Law Re Adjournments and The Right to Counsel

In **Barrette v. R.**, [1977] 2 S.C.R. 121 the Supreme Court of Canada ruled that a trial judge was wrong in refusing the accused's request for an adjournment because his counsel was not present for the trial. The appellant had been charged with assaulting a police officer. The trial judge refused his application for adjournment because that case dated back some six months and that his counsel, who was occupied elsewhere, had not justified his absence. The learned trial judge directed the appellant to proceed without the assistance of counsel. On appeal the Quebec Court of Appeal held that the appellant, even though not represented by counsel, was given the opportunity to make a full defence and received a fair trial. In allowing the appeal Pigeon J., writing for the majority in the Supreme Court of Canada, after reviewing the record of the proceedings before the trial judge, stated at p. 124:

> " There is nothing in the record which could legally support the presumption that counsel's absence was a premeditated scheme in complicity with the accused. It was the first time the case was being called and there was nothing to justify such inference rather than mere suspicion. The accused has the right "to make full . . . defence personally or by counsel" (s. 577(3) *C. C.*). An adjournment necessary for the exercise of this right may be refused only for a reason based on

established facts.

> Here the reason given by the trial judge is legally unavailable against the accused. He cannot be held responsible for the fact that "too many cases are postponed when lawyers . . . absent themselves". When the learned judge adds that the accused "may not delay cases of his own accord", he is without any evidence laying the blame for the fault of counsel on the accused. The situation is quite different from that dealt with by this Court in *Spataro v. Regina*, [1974] S.C.R. 253, where after the jury was sworn in, the accused without any valid reason claimed the right to dismiss his counsel, and thus obtain an adjournment.
>
> It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings."

Mr. Justice Pigeon went on to review some of the English authorities from which it appears that if the case is a simple one and that the absence of counsel could not have caused any prejudice to the accused the denial of a motion for an adjournment may be justified. On the other hand, Justice Pigeon recognized that requiring an accused to proceed without counsel can be unreasonable. He stated:

> " ...I cannot be satisfied that appellant here is manifestly guilty, when the evidence for the defence is incomplete and imperfect as a result of the absence of counsel and of a witness. It appears to me that in the case at bar, the principle to be followed is as stated by the Court of Appeal of Quebec in *Talbot v. Regina*, [1965] Que. Q.B. 159:
>
> > 'though our courts have not yet gone as far as to hold that the fact that the accused was not represented by an attorney, for reasons other than his own choice, means *per se* that he has not had the opportunity to make a full answer and defence, it appears that, if the offence was serious enough to warrant a sentence of six months imprisonment, it was serious enough to warrant that the appellant be allowed to be defended by a lawyer if he so wished.'
>
> For these reasons, I would reverse the decision of the Court of Appeal, quash the conviction against appellant and order a new trial."

This decision would indicate that, as a general rule, the sins of an accused counsel should not be visited upon the accused and that if the accused is not at fault himself and is likely to suffer prejudice if he proceeds unrepresented at trial an adjournment should be granted.

Three years later in **Manhas v. R.** (1980), 17 C.R. (3d) 331 at p. 348 Martland, J. restated the well known legal principle that the power to grant or refuse an adjournment is one which can be exercised at the discretion of the trial judge. It is, of course, a discretion which must be exercised judicially, that is, for proper and sound reasons. In that case, the Supreme Court of Canada agreed with the views expressed by the majority of the British Columbia Court of Appeal that in the circumstances of that case that the trial judge did not err in refusing the accused's motion for an adjournment. The facts of that case have some similarity to the facts of the case we have under consideration in that the accused had been warned, long before the trial date, that the case would be proceeding with or without counsel. Hinkson J.A., writing for the majority of the British Columbia Court of Appeal, stated at p. 336:

> " It is clear on the record of the proceedings leading up to the events of 28th November that the appellant was given ample opportunity to obtain counsel to represent him at his trial. This is not the first occasion on which the appellant has been before a court. He has a record of 11 previous convictions, going back to 1960.
>
> On 18th November the appellant informed the presiding judge that he would be prepared to proceed to trial on 28th November. When that date arrived the appellant once again appeared without counsel. On the basis of the statement of Crown counsel on that occasion, it was open to the learned trial judge to conclude that on 18th November, despite the assurance of the appellant that he was ready to proceed, he had not then retained Mr. MacDonald. Further, it was open to the learned trial judge to conclude that Mr. MacDonald had informed the appellant subsequent to 18th November that he would not be available to appear on his behalf at trial on 28th November.
>
> On 28th November the appellant sought to convey the

> impression to the learned trial judge that he was without counsel because Mr. MacDonald had let him down on the eve of trial. However, in my view, it was open to the learned trial judge to conclude that the appellant at no time had retained Mr. MacDonald and that his efforts were directed to causing a further delay on his trial.
>
> In those circumstances, I find no error of law in the decision of the trial judge to decline a further adjournment on 28th November."

In short, the majority concluded that in view of the appellant having been given ample opportunity to retain counsel and having failed to do so that it was open to the trial judge to find that his failure to retain counsel was directed to causing a delay in the trial. By adopting the views of the majority the Supreme Court of Canada apparently rejected the views of the dissenting judge who, after reviewing the statements made by the trial judge as to why the motion for an adjournment was refused stated at p. 346:

> " Those statements contain the expressed reasons of the trial judge for declining to grant the adjournment. They are eloquent of the difficulties of making justice swift and sure and of the expense and inconvenience involved in making justice excessively deliberate. But they are not, in my opinion, reasons of the type contemplated by Pigeon J. in *Barrette v. R.*, supra, as justifying the denial of an adjournment so that the accused might avail himself of his right to make his defence by counsel.
>
> There may have been reasons for the trial judge refusing the adjournment in addition to those reasons that he expressed, but this court cannot speculate about the existence of those reasons nor make a decision based on the result of that speculation. If the reason for the refusal of the adjournment was a conclusion that the accused was improperly delaying the trial by not retaining counsel but pretending to have done so, then it was open to the trial judge to make such a finding and refuse an adjournment. That was not the reason expressed by the trial judge and, in my opinion, that reason should not be implied when other reasons are expressed.
>
> Accordingly, it is my opinion that the trial judge made a wrong decision on a question of law when, on 28th November 1977, he refused an adjournment and denied to the accused the opportunity to renew his efforts to make his defence, as he had done from the outset, by counsel."

The unanimous decision of the Supreme Court of Canada stated:

> " I agree with the view expressed by the majority of the Court of Appeal [ante, p. 332] that, in the circumstances of this case, there was no error of law in the decision of the trial judge in declining to grant a further adjournment of the trial on 28th November 1977. The power to grant or refuse an adjournment was one which could be exercised at the discretion of the trial judge. The appellant has not established that in the exercise of his discretion the trial judge failed to act in accordance with proper legal principles."

The decision of the Supreme Court of Canada would indicate that a trial judge need not express himself with precision as to why the adjournment was denied if the evidence can support a finding by an appeal court that it was open to the trial judge to infer that the accused's failure to have counsel's assistance at the trial was to delay the proceedings. The decision is authority for the proposition that on appeal from a refusal to grant an adjournment the burden is on the appellant to prove the trial judge failed to exercise his or her discretion in a judicial manner.

In **R. v. Casey** (1988), 80 N.S.R. (2d) 247 at paragraph 8 Macdonald J.A. referred to a statement of Lord Halsbury to explain what is meant by the judicial exercise of a discretionary power:

> " In **Sharp v. Wakefield et al.**, [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):
>
> > 'An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: **Rooke's Case** (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.'"

Various factors impact on whether an adjournment should be granted. In **R. v. B. (J.E.)** (1990), 52 C.C.C. (3d) 224 this court recognized that the public interest in the

orderly and expeditious administration of justice is a factor that may be considered by a trial judge when determining whether an adjournment should be granted (see p. 229).

MacDonald J.A. stated at p. 229:

> " The appellant now contends that his fundamental right to make full answer and defence to the charges was infringed or denied by the refusal of Mr. Justice MacDonald to grant the adjournment.
>
> Whether an adjournment ought to be granted in any given case is a matter of discretion for the trial judge. Here he was obviously not persuaded that the public interest in the orderly and expeditious administration of justice (to use the words of Crown counsel on appeal) should give way to the request of the appellant for a one-day delay. Trial counsel had been seized of the case for at least two weeks and did not give any cogent reason why a delay of the trial for what amounted to only a few hours was necessary.
>
> In my opinion, the trial judge did not err in exercising his discretion as he did and I would, therefore, reject this ground of appeal."

The right to counsel is not absolute; there are limits. In **Re Regina and Speid** (1984), 8 C.C.C. (3d) 18 Dubin J.A. stated at p. 20:

> " The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right. It has been carried forth as a singular feature of the Legal Aid Plan in this province and has been inferentially entrenched in the Charter of Rights which guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay. However, although it is a fundamental right and one to be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations. ..."

In **R. v. Rowbotham** (1988), 41 C.C.C. (3d) 1 the Ontario Court of Appeal considered whether a person accused of a crime had a constitutional right to counsel at the expense of the state pursuant to **ss. 10(b)**, **7** and **11(d)** of the **Canadian Charter of Rights and Freedoms**. The Court stated at p. 65:

> " The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at

> the expense of the state are not the same thing. The Charter does not *in terms* constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, legal aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, *in cases not falling within provincial legal aid plans*, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial."

I would infer the Ontario Court of Appeal recognized that it is not always essential to a fair trial that an accused be represented by counsel. In the **Rowbotham** case the accused was charged with an offence of some complexity - conspiracy. The court concluded that the particular accused could not have a fair trial in the circumstances of the case without representation by counsel.

In **R. v. McGibbon** (1988), 45 C.C.C. (3d) 334 the Ontario Court of Appeal stated that a trial judge has a duty to see that an accused has a fair trial and where an accused expressly desires to be represented by counsel at trial that unless the accused deliberately failed to retain counsel or discharged counsel with the intention of delaying the process of the court, the trial judge should afford the accused an opportunity to retain counsel either at his expense or through the services of Legal Aid. The Court, following its earlier decision in **R. v. Rowbotham**, supra, stated that the right to counsel at trial may be inferred from the provisions of **ss. 7** and **11(d)** of the **Charter** guaranteeing the right not to be deprived of liberty except in accordance with the principles of fundamental justice and the right to a fair and public hearing. (See also **R. v. Smith** (1989), 52 C.C.C. (3rd) 90).

It is apparent from the case law that an accused, although he has a right to be

represented at trial by counsel in accordance with the principles of fundamental justice nevertheless does not have a constitutional right to require the state to provide counsel at its expense. Furthermore, his right to be represented by counsel at trial can be lost if he fails to obtain counsel in a timely manner so as to delay the trial; the intention to delay may be inferred from the facts.

In **R. v. Richard and Sassano** (1992), 55 O.A.C. 43 the Ontario Court of Appeal upheld a decision of the trial judge not to grant an accused an adjournment of the trial; the relevant facts are set out in the following quotation from the judgment of the Court:

> " The appellants were arrested on August 16, 1989. After a preliminary hearing on September 25, 1989, they were committed for trial. The first trial date was set for February 12, 1990. The Crown was prepared to proceed but three days before trial Sassano's first counsel, a partner of counsel for Richard, removed himself from the record. On March 2, 1990, a second trial date was set for September 17, 1990, the first free date for Sassano's second counsel. An earlier date was available but counsel for Richard was agreeable to the September 17 date. On September 10, 1990 the court was advised by Sassano's third counsel that Sassano's second counsel was no longer acting for him. He stated that he had not yet been retained for the trial. On September 14, the third trial date was set for January 28, 1991 and, at the request of Sassano's third counsel, the court told Sassano that his trial would proceed on that date with or without counsel.
>
> On the morning of January 28, 1991, Sassano appeared without counsel and asked for an adjournment to permit him to obtain another counsel. The trial judge denied his request saying:
>
> > '[T]his man has been through the same little game twice, at least twice, before.'"

The court's reasoning in that case was as follows:

> " The second main issue was raised by Sassano's counsel, namely that the verdict against him should be set aside because he had no counsel at trial. The right to counsel at trial is not absolute: **R. v. Speid** (1983), 37 C.R. (3d) 220 (Ont. C.A.); it must be exercised with reasonable diligence: **Leclair and Ross v. The Queen**, [1989] 1 S.C.R. 3; 91 N.R. 81; 31 O.A.C. 321; 46 C.C.C. (3d) 129, and, in the case of joint trials, it cannot be exercised to dictate the date of trial so as to inconvenience other parties and prevent issues being

> dealt with fairly and efficiently: **R. v. Chimienti** (1980), 17 C.R. (3d) 306 (Ont. H.C.), and **R. v. Sixto and Simon C.**, Ont. H.C., released January 16, 1990, affd. Ont. C.A., June 18, 1990.
>
> In this case, Sassano's right to counsel must be balanced against Richard's right to be tried within a reasonable time, which would unquestionably have been jeopardized had there been a further adjournment. In view of Sassano's extensive criminal record, he must be taken to be familiar with criminal trials and the employment of counsel. Here he had the benefit of the advice of the three counsel referred to above, all prominent members of the Ottawa criminal bar. In addition, he was represented by another counsel in the summer of 1990, when he was convicted in Ottawa on an unrelated matter. Moreover, he was warned in September 1990 that the trial would proceed in January 1991 with or without counsel. On the record as a whole it is reasonable to infer that the appellant had deliberately failed to exercise his right to counsel with the intent of delaying the proceeding. While it would have been preferable for the trial judge to have given more careful reasons for proceeding, we are of the view that it was proper for the trial to proceed with Sassano unrepresented by counsel."

This decision confirms that the right to counsel at trial is not absolute; that the right must be exercised with reasonable diligence and that an accused's criminal record is a relevant factor to consider on the adjournment application as is the fact that an accused has been forewarned by the court that the case would proceed on the dates fixed for trial with or without counsel. It also supports the view that it is not fatal if the trial judge did not give careful reasons for refusing to adjourn the trial.

In refusing the adjournment, in the appeal we have under consideration, the learned trial judge deprived the appellant of his counsel's assistance. The question becomes whether she exercised her discretion in a judicial manner. The burden, of course, is on the appellant to prove on a balance of probabilities that by refusing the adjournment the trial judge violated the appellant's right to counsel and his right to make full answer and defence as provided by both **s. 650(3)** of the **Criminal Code** and the **Canadian Charter of Rights and Freedoms**.

In summary the following propositions emerge from the cases to which I have

referred:

1. The decision whether to grant or refuse a request for an adjournment because an accused is not represented by counsel in a criminal trial is a discretionary one but one that must be based on reasons well-founded in the law. (**Barrette v. R.**, [1977] 2 S.C.R. 121).
2. An accused has a constitutional right to a fair trial. Representation by counsel at trial is generally essential to a fair trial if an accused is charged with a serious offence and a complex trial can be anticipated. (**R. v. Rowbotham** (1988), 41 C.C.C. (3d) 1).
3. The right to counsel at trial is not absolute. (**R. v. Richard and Sassano** (1992), 55 O.A.C. 43); there is no constitutional right to be represented by a state funded counsel at trial. (**R. v. Rowbotham**, supra, and **R. v. Prosper** (1992), 113 N.S.R. (2d) 156 N.S.C.A.
4. The right of an accused to retain counsel to represent the accused at trial must be exercised honestly and diligentlty so as not to delay a scheduled trial. (**R. v. Richard and Sassano,** supra).
5. Each application for an adjournment on the ground that the accused will not have counsel at trial must be decided on its facts. Relevant facts to be taken into account by the trial judge are: (a) whether or not there have been prior adjournments due to the unavailability of counsel and the accused was warned well in advance of trial that the trial would be proceeding on the scheduled date with or without counsel. (**R. v. McGibbon** (1988), 45 C.C.C. (3d) 334); (b) the accused's criminal record which reflects on the accused's degree of familiarity with the criminal justice system and legal aid programmes **R. v. Richard and Sassano**, supra (c) whether the charge against the accused is simple or complex which fact impacts on the critical question whether or not the accused can get a fair trial without counsel

Barrette v. R., supra (d) the public interest in the orderly and expeditious administration of justice. (**R. v. B.(J.E.)** (1990), 52 C.C.C. (3d) 224 and **R. v. Richard and Sassano**, supra); (e) if the accused has been refused legal aid and when the refusal was communicated to the accused.

6. As a general rule an accused should not be refused an adjournment if the fact that he is without counsel on the scheduled trial dates is not his fault but that of his counsel and he had no complicity in the matter. (**Barrette v. R.**, supra).
7. As a general rule an accused should be refused an adjournment if he has not acted diligently and honestly in attempting to obtain counsel and it can be inferred from the circumstances that he failed to avail himself of the opportunity to do so for the purpose of delaying the proceedings. (**Manhas v. R.** (1980), 17 C.R. (3d) 331).
8. On an appeal from a refusal it would appear that a court of appeal will not find the learned trial judge erred notwithstanding his reasons may not be fully articulated if the record discloses evidence from which it can be inferred that the absence of counsel was brought about by the accused for the purpose of delaying the proceedings. (**Barrette v. R.**, supra; **Manhas v. R**, supra; **R. v. Richard and Sassano**, supra).
9. The scope of review by an appeal court of a refusal, notwithstanding it involves the review of the exercise of a discretionary power, is wide as the consequences of a refusal are to deprive an accused of his right to be represented by counsel. On appeal the appellant must show that in refusing the adjournment the trial judge deprived the appellant of his right to make full answer and defence and thus made an error in principle which constituted a miscarriage of justice. (**Barrette v. R.** and **Manhas v. R.,** supra**).**

Opinion

Counsel for the appellant asserts that the learned trial judge misconstrued the

evidence in finding that the appellant did not make reasonable and timely efforts to obtain counsel. He asserts that the learned trial judge erred in finding that the appellant did nothing to secure counsel between November 12th and February 4th and erred in finding the appellant did not respond to the February 25th letter. With respect, I disagree: the learned trial judge did not find the appellant credible as is clear from her reasons given following the trial. In view of her findings it is clear that the learned trial judge rejected his evidence that he contacted legal aid in November after firing his first counsel. Furthermore, the learned trial judge expressly rejected his evidence that he made many calls to legal aid offices and was given the run around. The learned trial judge stated that the only concrete information before her as to Mr. Beals efforts to retain counsel was on April 29th when Metro Law Clinic authorized him to retain a lawyer on certificate. It is clear that she was aware that he had made some efforts to retain counsel as apparently he did apply to legal aid as evidenced by the February 25th letter asking him to contact the Dartmouth Legal Aid Office. A review of the transcript shows that the learned trial judge was correct in her first ruling when she found that there was no evidence that the appellant responded to the February 25th letter.

Having rejected his evidence that he made many calls to legal aid offices it follows that the learned trial judge would find that the appellant did not make a significant effort to obtain counsel until April 29th, 1993. The February 25th letter from legal aid required that he respond to their inquiries; a response was essential to his obtaining legal assistance. It was open on the evidence for the trial judge to find that he had not responded to this letter as he did not testify to having done so. In the further reasons the learned trial judge gave at the conclusion of the trial she found that the appellant's request for an adjournment was not "reasonably motivated". In my opinion the learned trial judge did not misconstrue the evidence; she simply did not believe the appellant.

I disagree with the appellant's counsel that Palmeter, A.C.J. was required to advise the appellant on February 4th that if he was having difficulty obtaining counsel he should advise the court; that is putting too high a duty on the motions judge.

As noted by Pigeon J. in **Barrette v. R.**, supra, an appeal court must look carefully at a situation where an accused has been refused an adjournment and proceeds to trial unrepresented as an accused in such circumstances has been effectively deprived of counsel. However, the findings of credibility are for the trial judge whose assessment should be given due consideration by an appeal court which does not have the benefit of observing the witnesses. In reviewing the transcript and considering the arguments of counsel for the appellant I am not persuaded the learned trial judge erred in rejecting the appellant's evidence. I am also satisfied that it was open to her on the evidence to find that the request for the adjournment was not reasonably motivated. The facts show that over five months had past from the time the appellant discharged his initial legal aid counsel until he retained counsel on April 29th, 1993, just days before the trial. The appellant had a Grade 11 education. The appellant has a substantial criminal record. He is well acquainted with the justice system as was recognized by the learned trial judge. On the 4th of February, 1993, Associate Chief Justice Palmeter had given the appellant a clear direction that he was to obtain counsel and that the trial would proceed on May 3rd, 1993. The learned trial judge's ruling that his request for an adjournment was not well motivated constituted a finding that the appellant was not acting in good faith and that he deliberately failed to retain counsel until the 29th of April, a few days before the trial with the intention that this would prevent the trial from going ahead. In so exercising her discretion the learned trial judge acted in accordance with the principles enunciated in the cases to which I have referred. In the circumstances, I am not persuaded that the learned trial judge failed to exercise her discretion in a judicial manner.

As to the second ground of appeal, that the evidence did not support the guilty verdict, I am respectfully in disagreement with counsel for the appellant. The learned trial judge accepted the evidence of A.D., where it was in conflict with that of the appellant. She accepted the evidence of A.D. that she worked as a prostitute for the appellant and gave him part of her earnings. She accepted the testimony of A.D. that when she was 15 and working

for the appellant she had advised the appellant of her age. It is trite to say that findings of credibility are for the trial judge. Counsel for the appellant argues that there is no evidence as to what the appellant did as a pimp; no evidence that he provided drives or protection to A.D. Although the evidence supports that assertion, there exists however, the evidence of A.D. to which I have already referred which was sufficient to warrant a finding that A.D. worked as a prostitute for the appellant.

In finding the appellant guilty the learned trial judge stated:

> " As always, the burden is on the Crown to prove the elements beyond a reasonable doubt. I can accept all, some or none of any witness' testimony. The accused in this case, Mr. Beals, need not prove his innocence. I accept the evidence of Ms. D. on the first count where it conflicts with Mr. Beals on the points material to the charge. I am satisfied beyond a reasonable doubt that she worked as a prostitute for Mr. Beals and turned at least part of her earnings from that source over to him. Section 212(2), which refers back to 212(j) of the Criminal Code, requires that the Crown prove that the accused lived wholly or partly on the avails of prostitution. Without doubt, Ms. D.'s earnings were the avails of prostitution.
>
> In R. v. GRILLO, a decision of the Ontario Court of Appeal in March of 1991, the court says at page 61:
>
> > 'living on the avails is directed at the idle parasite who reaps the benefits of prostitution without any legal or moral claim to support from the person who happens to be a prostitute.'
>
> Mr. Beals did not put forward any legal or moral claim to support Ms. D., indeed, he denied receiving money from her.
>
> In CELEBRITY ENTERPRISES, a decision of the British Columbia Court of Appeal, the court said, at page 555:
>
> > 'In order that a male may live on the avails of prostitution of another person who is a female, the male must at least receive either in kind or in part, all of the female's proceeds from prostituting herself, or have those proceeds applied in some way to support his living.'
>
> In this case there was no indirect application of the proceeds. Ms. D. testified and I've accepted her evidence that she worked for Mr. Beals in such capacity, and in such capacity, turned over her earnings. The only reasonable inference I can draw from the fact that Ms. D. worked for Mr. Beals as a

> prostitute and gave him her earnings, is that he lived off of the avails.
>
> I am satisfied as well that Mr. Beals was aware that Ms. D. was under 18-years of age at the relevant time, and specifically that she was 15-years-old. Both from her own evidence and her appearance, it is clear that her age was obvious and was made obvious to Mr. Beals, at least to the fact that she was under the age of 18 years.
>
> Accordingly on the first count under Section 212(2), the Crown has met the burden, and I find Mr. Beals guilty of the offence."

Counsel for the appellant submits that the learned trial judge was not entitled to infer that the appellant lived off the avails in the absence of any evidence that monies received by the appellant were applied towards his living expenses in view of his testimony that he lived with his mother and therefore had few expenses and that he supported himself by working on cars. Counsel argues that the evidence did not support the apparent conclusion of the learned trial judge that the only reasonable inference she could draw from the fact that A.D. worked for the appellant as a prostitute and gave him her earnings was that he partially lived off the avails. I would note that, in her decision, the learned trial judge stated that the appellant did not put forward any legal or moral claim to support from A.D. and, in fact, he denied receiving money from her. The learned trial judge did not accept the appellant's evidence on this issue.

The duty of this court in determining if the verdict should be set aside on the grounds that it is unreasonable or cannot be supported by the evidence is well known. In **Yebes v. R.**, 36 C.C.C. (3d) 417 the Supreme Court of Canada ruled that the test is whether the verdict could reasonably have been rendered by a properly instructed jury acting judicially. McIntyre J. described the function of the court as follows:

> " The function of the Court of Appeal...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. Quercia**, 60 C.C.C. (3d) 380 Mr. Justice Doherty of the Ontario Court of Appeal stated:

> " ...An appellate court must set aside a conviction if that verdict 'is unreasonable or cannot be supported by the evidence'. The review countenanced by s. 686(1)(a)(i) is not limited to a determination of whether there was any evidence to support the conviction; nor, however, is it so wide as to permit a *de novo* assessment of the evidence. The section is a protection against perverse or unsafe convictions, not a means of bringing trial verdicts in line with appellate courts' estimations of the merits of individual cases:"

In **R. v. R.W.**, 74 C.C.C. (3d) 134 the Supreme Court of Canada dealt with the scope of appellate review of verdicts which turned on findings of credibility. The judgment of the Court was delivered by McLachlin J. She stated at pp. 141-142:

> " It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: ... The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable."

The essence of counsel's argument on the second ground of appeal is that the learned trial judge should have accepted the appellant's evidence which was in direct conflict

on essential issues with that of A.D. I have examined the evidence and considered the effect of the evidence. After considering all the evidence and taking into account some minor discrepancies in A.D.'s testimony I can see no reason to come to any different conclusion than that reached by the trial judge when she concluded that the evidence of A.D. was credible when she testified that she worked for the appellant as a prostitute. It was open to the learned trial judge to draw reasonable inferences from the evidence. In my opinion the learned trial judge drew a reasonable inference from the proven facts when she inferred that the appellant was partially living off the avails of A.D.'s prostitution notwithstanding his testimony that he lived with his mother and had an income from repairing cars.

In summary, having reviewed the evidence and the decision of the learned trial judge, this was not an unsafe verdict. The trial judge considered and applied the law correctly; the guilty verdict was one which she could reasonably have rendered on the evidence. The appeal ought to be dismissed.

Hallett, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.