10/88

SUPREME COURT OF VICTORIA

KILLEEN v SHARP

O'Bryan J

25 February; 4 March 1988 — [1988] VicRp 86; [1988] VR 954

EVIDENCE – BURDEN OF PROOF – EXCEPTION OR EXEMPTION – MANAGEMENT OF BROTHEL – WHETHER BROTHEL EXEMPT PREMISES – BURDEN OF PROVING SAME – "BROTHEL" – MEANING OF – SOCIAL CLUB FOR HOMOSEXUAL MEN – MONEY PAID BY MEMBERS FOR ADMISSION TO PREMISES FOR SEXUAL PURPOSES – WHETHER PREMISES USED FOR PURPOSE OF PROSTITUTION – WHETHER PREMISES MANAGED AS A BROTHEL: *VAGRANCY ACT* 1966, S11(1); *TOWN AND COUNTRY PLANNING ACT* 1961; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S168.

Section 11(1) of the *Vagrancy Act* 1966 ('Act') provides:

> "Any person who keeps or manages or acts or assists in the management of a brothel (not being premises in respect of which there has or have been issued, and is or are in force under the *Town and Country Planning Act* 1961 such permit or permits as are required under that Act to authorise the use of the premises as premises to which people of both sexes or of either sex, resort for the purpose of prostitution) shall be guilty of an offence.
>
> Penalty: Imprisonment for two years."

S. managed a social club for homosexual men. Upon payment of a fee on entry to the club/premises, members participated in acts of sexual intercourse or sexual gratification. Following a visit to the premises by K., S. was charged under s11 of the Act in that he kept or managed a brothel. On the hearing of the charge, S's counsel submitted that an element of the offence was that the premises did not have a brothel permit under the *Town and Country Planning Act* 1961, and it was assumed that the burden was on the prosecution to prove the absence of a permit. The magistrate stated he was not satisfied beyond reasonable doubt as to the lack of a permit and dismissed the charge. On order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted for further hearing.
1. The application of s168 of the *Magistrates (Summary Proceedings) Act* 1975 provides that proof of an exception or exemption need not be given by an informant is a question of construction of the Act creating the offence.

2. Section 11 of the Act contains a general prohibition of keeping or managing a brothel, followed by words which except, exempt, excuse or qualify the word brothel. Accordingly, the person charged was required to prove on the balance of probabilities that the premises were subject to a permit for use as a brothel.

3. At common law, a brothel is constituted where persons resort to premises for the purpose of prostitution, that is, payment for sexual services rendered. Where persons paid to gain entry to premises for the purposes of sexual intercourse or sexual gratification with other persons, it was open to conclude that the premises were being used for the purpose of prostitution and accordingly, were being managed as a brothel.
***Singleton v Ellison* (1895) 1 QB 607; (1895) 18 Cox CC 79, applied.**

O'BRYAN J: [1] This is an order nisi to review the decision of the Magistrates' Court at Melbourne on 20th January 1986 when the said Court dismissed an information for an offence that "The respondent at Melbourne on 1st November 1985 kept or managed a brothel known as the Steamworks Club situate at 279-281 La Trobe Street, not being premises in respect of which there has or have been issued or is or are in force a permit under the *Town and Country Planning Act*, contrary to the *Vagrancy Act*, s11(1)."

On 13th March 1986 Kaye J granted an order nisi against the decision in the Magistrates' Court allowing an appeal against an order of Master Evans made on 4th March 1986 refusing an application for an order nisi. The grounds of the order nisi are:

1. That the Magistrate failed to find that the premises known as the Steamworks Club situate at 279-281 **[2]** La Trobe Street, Melbourne in the State of Victoria was a brothel.

2. That the Magistrate was wrong in law and in fact in holding that the prosecution had failed to prove beyond reasonable doubt that there was not in force in respect of the premises known as the Steamworks Club situate at 279-281 La Trobe Street, Melbourne in the State of Victoria a planning permit under the *Town and Country Planning Act* 1961.

3. That the Magistrate was wrong in law in effectively holding that the prosecution carried the legal and evidentiary onus of proving beyond reasonable doubt or at all that a planning permit in respect of the premises was not in force under the *Town and Country Planning Act* 1961.

4. That the Magistrate having held there was a case to answer and the defendant having failed to challenge the case for the prosecution by further evidence, the Magistrate ought to have held that the prosecution had proved beyond reasonable doubt that the defendant kept or managed a brothel in breach of s11(1) *Vagrancy Act* 1966.

When the hearing commenced Mr Monotti of counsel, who appeared for the respondent, submitted that grounds 1, 2 and 4 of the order nisi are so wide and vague as not to be grounds at all. Mr Monotti relied upon a decision of Mr Justice Brooking in *Motor Accidents Board v Coutts* [1984] VicRp 69; [1984] VR 790. In *Coutts' case* Brooking J held: "A ground which was so wide and vague as not to be a **[3]** ground at all could not be amended". His Honour reviewed a number of authorities touching upon the sufficiency of grounds for review. In my opinion, the problem in *Coutts' case* is not present in this proceeding. Grounds 2, 3 and 4 at least raise, specifically, matters upon which it is sought to review the order in the Court below.

Ground 1 does not raise a matter in issue in the Court below and may be put to one side. The purpose of requiring a party to state grounds is to identify the points intended to be raised by way of appeal. After hearing argument I am satisfied that grounds 2, 3 and 4 were sufficiently specific to raise points taken in the Court below and decided adversely to the applicant, a person aggrieved by the decision.

The *Police Offences Act* 1907 (7 Edward VII No, 2093) amended the *Police Offences Act* 1890 and introduced an offence of keeping or managing a brothel (s5(4)). The 1907 Act provided:

"Any person who keeps or manages or acts or assists in the management of a brothel shall be liable to imprisonment with or without hard labour for any time not exceeding two years."

The new offence remained in the *Police Offences Act* (s80) in the same terms until 1966 when the *Vagrancy Act* replaced Part III of the *Police Offences Act* 1958. Section 11 of the *Vagrancy Act* 1966 provided:

"(1) Any person who keeps or manages or acts or assists in the management of a brothel shall be guilty of an offence. Penalty: Imprisonment for two years."

In 1984 the *Planning (Brothels) Act* became law. The Act amended the *Town and Country Planning Act* 1961 by inserting an interpretation of brothel as follows:

[4] "Brothel means land to which people of both sexes or of either sex resort for the purpose of prostitution."

Further amendments to the *Planning (Brothels) Act* empowered a responsible authority to grant a permit for the use of land for the purposes of the operation of a brothel. Consequential amendments were made to ss10, 11 and 12 of the *Vagrancy Act* 1966. In s11(1) of the *Vagrancy Act*, after the words "a brothel" was inserted words in parenthesis not being premises in respect of which there has or have been issued or is or are in force, under the *Town and Country Planning Act* 1961 such permit or permits as are required under that Act to authorise the use of the premises as premises to which people of both sexes, or of either sex, resort for the purpose of prostitution".

At the conclusion of the evidence tendered on behalf of the applicant, counsel for the respondent submitted that there was no case to answer on the ground that the prosecution had failed to make out its case in relation to a brothel permit. Counsel submitted that an element of the offence was that the premises did not have a brothel permit under the *Town and Country*

Planning Act 1961. Both the prosecutor and counsel for the respondent appear to have assumed that the burden was on the prosecution to prove the absence of a permit. The informant informed the Magistrate that he relied upon a question and answer in a record of interview conducted with the respondent to satisfy the burden of proof. The respondent had been asked by the informant "Does the **[5]** Steamworks Club have a brothel permit?" to which the respondent answered "No." The learned Magistrate rejected the submission of no case to answer whereupon counsel for the respondent elected not to call evidence or make any further submissions on behalf of the respondent. The learned Magistrate then stated that he was not satisfied beyond reasonable doubt as to the lack of a permit and dismissed the information.

Ground 3 of the order nisi is concerned with this point. Mr Panna, of counsel for the applicant, submitted that the words in parenthesis introduced into s11 in 1984 did not introduce a new element in the offence of managing or assisting in the management of a brothel but introduced an exception, exemption, proviso, excuse or qualification which may be proved by a person charged with an offence against s11. Mr Monotti, for the respondent, submitted the contrary. If the submission of Mr Panna be correct, it was unnecessary to specify in the information that the premises were "premises in respect of which there was or have not been issued and is or are in force a permit under the *Town and Country Planning Act*". (s168 *Magistrates (Summary Proceedings) Act* 1975.

There need not be, in order to attract the operation of the section (s168), a description of the offence followed by an express and separate statement of the exception (*Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491 at 494; [1949] ALR 144). On the other hand, it is significant that s11 of the *Vagrancy Act* contains a general prohibition of **[6]** keeping or managing a brothel, followed by words which except, exempt, excuse or qualify the word brothel. Premises in respect of which a permit has been issued to authorise the use of the premises as a brothel under the *Town and Country Planning Act* are exempt from the prohibition created by s11. The prohibited act specified in s11 is keeping or managing a brothel. Essential elements in the offence are that premises are used as a brothel and that a person charged keeps or manages the premises. In my opinion, the words in parenthesis in s11 constitute an exception or exemption and a person charged is required to prove on the balance of probabilities that the premises are subject to a permit for use as a brothel. It would indeed be a curious result if the consequence of the 1984 Act was to introduce a further element in the specification of a statutory offence known to the law since 1907.

Mr Monotti sought to apply a statement of principle by the Chief Justice Sir Owen Dixon in *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136 @ 139; (1952) ALR 1001 at 1003 to s11. The Chief Justice referred to the common law doctrine:

> "That where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it."

The Chief Justice distinguished between such a statutory provision and -

> "One where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law places upon **[7]** the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification."

The passage continues:

> "A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground of defeasance which assures the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is so the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it."

As I recently observed, an essential element in the liability imposed by s11 is that a person keeps or manages a brothel. Section 11 is a law concerned with keeping or managing a brothel. It is for the defendant who is charged with keeping or managing a brothel to prove that the premises kept or managed as a brothel are exempt premises by reason of a permit granted under the *Town*

and Country Planning Act. The question is one of construction. The conclusion I have reached is reasonable and necessary, bearing in mind that, if a permit authorising the use of the premises as a brothel has been issued, usually the person charged with an offence of keeping or managing a brothel will be aware of and able to establish the fact. In my opinion, the case is not unlike *Everard v Opperman* [1958] VicRp 62; [1958] VR 389; [1958] ALR 847 when Sholl J held that the onus was on the defendant to prove that a special permit had been granted authorising the use on a highway of a motor car without compliance with the provisions of s32 of the *Motor Car Act* (see, in **[8]** particular, the judgment at 391-2). When Parliament amended s11 it intended to express an exception or exemption by the words in parenthesis and placed the burden of proof on the party seeking to rely upon the special facts.

The learned Magistrate fell into error when he held that the applicant carried the burden of proving the absence of a permit. In my opinion, ground 3 of the order nisi has been made out. Mr Monotti submitted that if the learned Magistrate was wrong in holding that the informant carried the onus of proving beyond reasonable doubt the absence of a permit, nevertheless the learned Magistrate ought to have dismissed the information because the informant did not prove beyond reasonable doubt that the respondent kept or managed a brothel. The respondent in seeking to uphold the order of the Court below is entitled to support that order upon any ground which was open to him at the stage when the order was made: *Preston Ice and Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371. This submission concerns the meaning of the words "a brothel". The *Vagrancy Act* gives no definition of a brothel. Curiously, when the definition of brothel was introduced into the *Town and Country Planning Act* in 1984 the definition was not also introduced into the *Vagrancy Act*.

Before considering the meaning of brothel I should recite briefly the facts which were uncontested in the Court below. The applicant visited the Steamworks **[9]** Club performing vice duties in the Melbourne area. He paid $11 admission fee and was offered condoms from a box. Downstairs were cubicles for hire, a pool, spa and sauna. A bookshop offered homosexual magazines, sex aids and lubricants. Some cubicles were locked, In others male persons lay on beds with the door ajar. About 100 to 120 male persons were present in various stages of undress. In an area several males were masturbating one another, one male was performing oral sex on another male. The applicant later spoke to the respondent who admitted that he was the manager of Steamworks and the person in charge of the premises. The respondent said the premises were used as a fitness and social club for homosexual men. In a record of interview the following questions were asked of and answers given by the respondent:

Q.14 How much do you charge members to gain entry to the premises?
A. $7.00
Q.15 How much do you charge non members?
A. $9.00
Q.20 Is it correct that people attending the premises engage in sexual activity amongst themselves?
A. Yes.
Q.21 Are you aware of what type of sexual activity occurs?
A. Clientel (sic) being homosexual it would therefore have to be homosexual activity.
Q.22 Is it correct that persons attending the Steamworks are supplied with condoms?
A. Yes.
Q.23 Why are these supplied?
A. Condoms are supplied as part of Aids educational program through the Victorian AIDS Council to educate gay men and prevent the spread of aids.
Q.24 Are the condoms used on the premises?
A. They may be used on the premises or off the premises.
Q.25 Persons attending the steamworks club are permitted to engage in sexual activity on the premises. Is that correct?
A. Yes, the management and staff of steamworks do not control the activities of clients whilst they are on the premises.
Q.26 In fact the majority of persons attending the steamworks club engage in some sort of sexual activity on the premises. Is that correct?
A. A mixture of clientel (sic) use it for different purposes, some for social, some fitness and some sexual.

From these answers and the observations made the learned Magistrate could only conclude that homosexual acts of sexual intercourse and lewd, indecent practices between males were

being carried out on the premises to the knowledge of the respondent. Further, that the males participating in such sexual activities had paid money at the door before entering the premises. The question is whether premises used for the purposes described, by people of the same gender, were managed knowingly by the respondent as a brothel. I was referred to many authorities for the meaning of "brothel" at common law. In every instance, the conduct was by persons of both sexes.

[11] I propose to refer briefly to some of the cases for the common law meaning of brothel. The definitions offered in the early cases are not exhaustive and developed from heterosexual conduct in every instance. In 1882, in *R v Justices of Parts of Holland, Lincolnshire* 46 JP 312 Grove LJ gave a definition of brothel in a case where people of both sexes congregated in premises and the charge was one of permitting the premises to be a brothel. His Lordship said:

> "What needs only to be proved is this, namely that the premises were kept knowingly for the purpose of people having illicit sexual connection there."

Lopes LJ agreed in this definition.

In 1895, in *Singleton v Ellison* [1895] 1 QB 607; (1895) 18 Cox CC 79 Wills J said:

> "A brothel is the same thing as a 'bawdy-house' – a term which has a well known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution."

In *Rowarth v Grace* [1943] VicLawRp 39; [1942] VLR 173; [1942] ALR 241, Martin J adopted the definition of "a brothel" laid down in *Singleton* in a case in which a person was charged with an offence against s80 of the *Police Offences Act*. In 1964, in *Gorman v Standen* [1964] 1 QB 294 Parker CJ accepted that at common law a brothel was the same thing as a "bawdy-house". More recently, in *Kelly v Purvis* [1983] 1 QB 663; [1983] 1 All ER 525; [1983] Crim LR 185; (1982) 76 Cr App R 165; [1983] 2 WLR 299; (1982) 147 JP 135 Ackner LJ observed (QB), *per curiam*:

> " ... that to constitute premises as a brothel, it is not essential to show that they are in fact used for the purpose of prostitution, which involves payment for services rendered. **[12]** A brothel is also constituted where the women (for there must be more than one woman) do not charge for sexual intercourse."

It may be seen that the common law definition of a brothel given in the nineteenth century was not exhaustive and did not contemplate a situation of acts of sodomy or of lewd, indecent, practices between males. Male prostitution and sodomy were practices not associated with brothels until recently. The aberration of premises being used by male persons only for the purposes of sexual activity such as that observed by the informant would have led the courts, inevitably, to define a brothel in wider terms to include people of the same sex, or of the male sex.

Mr Monotti submitted that unless the evidence proved that the premises were being used for the purpose of prostitution no offence was committed. Mr Monotti submitted that payment is associated with prostitution and the evidence before the Magistrates' Court did not show that any male upon the premises paid for sexual intercourse or sexual activity.

In my opinion, the point taken by Mr Monotti is not correct and does not determine the matter on the facts of this case. The evidence showing that each male person paid to gain entry to the premises for the purposes of sexual intercourse or sexual gratification with other persons proved that the premises were being used for the purpose of prostitution. It is not necessary to prove that payment was received by some person for acts of fornication or of indecency committed by him with another person.

[13] In *Winter v Woolfe* [1931] 1 KB 549; (1930) 29 Cox CC 214; 64 JP 312, on an information against a person for unlawfully and knowingly permitting premises to be used as a brothel (the equivalent of s11 *Vagrancy Act*) the evidence led to an inference that men and women were resorting to the premises habitually for the purpose of having illicit sexual intercourse of which the person charged must have known. There was no evidence that the women resorting to the premises for the purpose of fornication received any payment. The Divisional Court (comprising Avory and

Swift JJ) held that it was sufficient to prove that with the knowledge of the occupier (the person charged) persons of opposite sexes were permitted there to have illicit sexual intercourse. The definition of brothel given by Grove J in *Justices of Parts of Holland, Lincolnshire* was approved.

In *Rowarth v Grace* [1942] VicLawRp 39; [1942] VLR 173; [1942] ALR 241 Martin J considered, briefly, the point that there was no proof of payment. His Honour said at p175:

> "The Queensland case of *Fraser v O'Hara* 11 QJPR 10; [1917] St RQd 33 and *Winter v Wolfe* (*supra*) both show that it is unnecessary that payment to the women concerned should be proved."

In my opinion, the evidence proved beyond reasonable doubt that the premises were being managed as a brothel to the knowledge of the respondent. Ground IV of the order nisi has been made out. The order nisi must be made absolute and the order dismissing the information should be set aside. The matter must be remitted to the Magistrates' Court to **[14]** be dealt with according to law. Mr Monotti argued that the respondent should now be allowed to proceed with his defence. In the court below when the respondent was represented by Counsel he elected not to call evidence in defence to the charge.

In my opinion, he is precluded from doing so now save on the question of penalty. Penalty must be dealt with in the Magistrates' Court according to law. Order that the order dismissing the information be set aside. The information is remitted to the Magistrates' court to be dealt with in accordance with law. Costs of the applicant to be taxed and paid by the respondent.
