19/78

SUPREME COURT OF VICTORIA

FOX v WARDE

McInerney J

2 March 1978 — [1978] VicRp 37; [1978] VR 362

CRIMINAL LAW – OCCUPIER OF PREMISES USED FOR HABITUAL PROSTITUTION – MEANING OF "OCCUPIER" CONSIDERED – WHETHER PERSON AN OCCUPIER WITHIN THE MEANING OF THE ACT – FINDING BY MAGISTRATE THAT PERSON WAS AN OCCUPIER – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *VAGRANCY ACT* 1966, S12(1(a).

The applicant was convicted before a Magistrates' Court for that she, between the 5th day of April 1977, and the 5th day of May 1977, did, being the occupier of a room at certain premises, to wit, Gentle Touch Massage parlour, did use such premises for the purposes of habitual prostitution. Evidence was given that the respondent had attended the premises and, after being admitted by a receptionist, was shown into a waiting room. Subsequently, the applicant entered this room and directed him to accompany her to a massage room where sex was offered. The respondent conceded that the applicant was not part of the management of the parlour, premises being a large house comprising several rooms.

HELD: Order absolute. The order of the Magistrates' Court set aside, and in lieu thereof the information should stand dismissed.
1. Section 12(1)(a) of the *Vagrancy Act* 1966 requires two things to be shown. First of all, that the defendant is the occupier of the subject premises and secondly, that the defendant, being the occupier of those premises, has used those premises for the purpose of habitual prostitution.

2. If one looks at the associated words, a tenant has lawful possession and the power of excluding everyone including the landlord from the premises. So also has the lessee. The person in charge of premises is, by the very words used, a person with power to take control and exercise control over the premises. In association with those three other words 'occupier' means something more than a person who simply uses a particular room. Certainly it means more than was established in the present case.

McINERNEY J: *[After reviewing the evidence, His Honour continued]* ... The evidence clearly established that the defendant on the occasion of the 5th May used the particular room to which the informant was directed for the purpose of prostitution, in that she offered the performance of services of a character falling within the legal concept of prostitution. In this connection it is sufficient to refer to the case of *R v Webb* (1964) 1 QB 357; [1963] 3 All ER 177 and the earlier case of *R v De Monk* (1917) 3 KB. The Magistrate was entitled to infer from the evidence that over a period of some six months preceding the date of the record of interview the defendant had, as an employee of the proprietor or proprietary of the Gentle Touch Massage Parlour or by their permission, engaged in acts of prostitution to the extent of establishing that she had engaged and used those premises for the purposes of habitual prostitution. In that sentence I have used the words 'those premises' as meaning the premises at 436 St Kilda Road.

The evidence showed that on the average the defendant had had about twenty customers a week and that in the past week she had had sexual intercourse or oral sex with some four or five men. The evidence further established that she had over the period of her employment used all five of the massage rooms, but there was not, in my opinion, any evidence that she used the particular room to which Senior Constable Fox was directed on any occasion when he was present. However probable it might have been, statistically, that she used that room on other occasions for the like activities, the evidence did not, in my view, establish beyond reasonable doubt that she had in fact so used that particular room. From the evidence of the user of the room on the night of the 5th May 1977, of her previous activities at the premises of the Gentle Touch Massage Parlour, I consider that the Magistrate was entitled to draw the inference that on the night of the 5th May she used that room for the purposes of habitual prostitution in the course of earning her livelihood as a prostitute who habitually engaged in acts of prostitution. Findings to that effect, however, do not suffice to sustain the conviction.

The crucial point remains whether it would be open to the Magistrate on the evidence to find, as he did find, that the defendant was within the period named in the information the occupier – and I limit it in terms to the information – the occupier of premises of a room at certain premises, to wit, Gentle Touch Massage Parlour, situated at 436 St Kilda Road, did use such premises for the purpose of habitual prostitution. Grammatically the words 'such premises' would refer back to the words 'certain premises', to wit, Gentle Touch Massage Parlour, situated at 436 St Kilda Road, and to that extent it is contradictory or, at all events, in conflict with the preceding words 'of a room at certain premises'. I am, however, prepared to deal with the matter on the footing that the Magistrate was making a finding that the defendant was the occupier of that room.

Much debate has taken place as to the meaning of the word 'occupier' in s12(1)(a). It occurs in the collocation of phrases: ' ... tenant, lessee, occupier or person in charge ...' in a paragraph which is an alternative to paragraph (b), which deals with the case of the:

> '... owner or lessee of any premises or the agent of such owner or lessee, lets or sub-lets the premises or any part thereof with the knowledge that the premises or some part thereof are or is to be used as a brothel or for the purposes of habitual prostitution or for soliciting or accosting persons therein or thereon for the purposes of prostitution, or is wilfully a party to the continued use of the premises or any part thereof as a brothel or for any of those purposes ...'

For the defendant, Mr Gillard drew my attention to and relied on the provisions of sub-sections (2) and (3) of s129 which empower the landlord or lessor to assign the lease or other contract under which the premises are held and to determine the lease or other contract if that assignment does not take place, and further, by sub-section (3), attaches certain evidentiary consequences, fraught with penal possibilities, if the landlord or lessor fails to exercise the rights conferred by sub-section (2).

While the maxim *noscitur a sociis* must not be pushed to any great length, it does express a canon of construction or an aid to construction, namely, that words may take their colour from their context.

As was said in the Privy Council in the case to which Mr Gillard drew my attention, *Mandrassa Anjuman Ismalia of Kholwad v Municipal Council of Johannesburg* (1922) 1 AC 500 at p504:

> 'The word, "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; and it is in this sense that it is said in the rating cases that the occupation of premises by a servant, if such occupation is subservient and necessary to the service, is the occupation of his master: *R v Spurrell* (1865) LR 1 QB 72. At other times "occupation" denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the road or highway for the purpose of Section 68 of the *Railway Clauses Act* 1845: *Dawson v Midland Ry* Co 8 Exch 8; *Luscombe v Great Western Ry Co* (1899) LR 2 QB 313. Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used.'

Mr Gillard suggested that an occupier has physical possession and the power or authority to exclude others, and he suggested that in this section the word 'occupier' meant a person who had physical possession of premises and who, whether alone or, in concert with another person, had authority or the power to exclude any other therefrom.

Mr Uren made two answers to that submission. The first, he submitted that the term occupier was synonymous with the person who used premises. He said that a person who was sitting in a chair in the waiting-room to a doctor's surgery was the occupier of that chair. He suggested that the same proposition was true of a person who was using a cubicle in a toilet in a public toilet.

I are not able to accept that submission as to the meaning of the word 'occupier'. To accept it involves, in my view, a failure to give sufficient weight to the fact that the section requires two things to be shown. First of all, that the defendant is the occupier of the subject premises and secondly, that the defendant, being the occupier of those premises, has used those premises for the purpose of habitual prostitution.

That is not to say that in proving that the defendant is an occupier it is not relevant to rely on the very use of the premises by the defendant. Indeed use would ordinarily be one of the matters from which a court would be asked to draw the inference that the person concerned was the occupier of those premises. It is not, in any view, necessary to show that, to use a neutral word, the occupation of the premises by the defendant is permanent. There can be few, if any, occupations which are permanent in that sense. On the other hand, a mere transitory use of premises, as in the instances put by Mr Uren, is not sufficient in my view, to constitute occupation. Use on one occasion only would normally, I suppose, not in itself be sufficient to demonstrate that the person so using the premises is an occupier. It is not, in my view, necessary to show that the occupation is a lawful occupation. The occupation of premises by squatters on the scale that has occurred in London in recent years has, on any view of it, been on a number of occasions unlawful. But that does not prevent the squatters from being regarded as the occupiers of premises, if the inference can otherwise be drawn that they are occupiers.

Again it is not essential that the occupation be exclusive of others. It is clear that there may be cases — and there are cases to be found in the books — where the occupation has been an occupation along with other people. Repeated use of the premises and localisation of the premises used goes a long way towards showing that the defendant is the occupier.

The concept of occupier is used in related provisions of the Act. For instance, in relation to s6 of the *Vagrancy Act*, which by sub-s1(a) makes it an offence for a person, who is the occupier of a house or place that is frequented by reputed thieves or persons having no visible lawful means of support. In relation to that section it was said long ago by the Full Court of this State in *R v Robert Savors* (1867) 4; WW & a'B (I) 146, that the word 'occupier' in the context of that section was used in the situation of a keeper of the premises. That decision was followed and applied by Sholl J in *Silvester v Hodder* [1956] VicLawRp 106; (1956) VR 733 which established that a room in a house may be premises within the present legislation at all events.

The lodger in *Silverster's case* clearly has occupation of defined space with the power to exclude others, including the landlord, and he was held to be the occupier. The same conclusion was reached in the case of *R v Tao* (1976) WLR 25; [1977] 1 QB 141, where the court proceeded on the view that the occupier was to be regarded as someone who, on the facts of a particular case, could fairly be said to be in occupation of premises in question so as to have such a requisite degree of control over those premises to exclude from them those who might otherwise intend to carry on those forbidden activities.

In the present case the only evidence showing any capacity in the defendant to exclude other people from the room of which she is alleged to be occupier is her answer, when she was asked whether she had the power to exclude others during the massage, and she was required to she was next asked. 'Do you lock the door of the massage room when you are massaging a customer?' She replied 'Yes, we have to.' I do not read that answer as indicating that she has the kind of control of the premises requisite to establish that she was an occupier within the meaning of s12(1)(a).

If one looks at the associated words, a tenant has lawful possession and the power of excluding everyone including the landlord from the premises. So also has the lessee. The person in charge of premises is, by the very words used, a person with power to take control and exercise control over the premises. In association with those three other words I think 'occupier' means something more than a person who simply uses a particular room. Certainly it means more than was established in the present case.

I do not intend to go further than the facts of this case. I have no intention of attempting to formulate a judicial definition of the word 'occupier'. Such a course would be extremely dangerous and calculated to be misleading to those who hereafter have to apply the law. It is sufficient for me to say that the acts of this case do not, in my understanding of the word 'occupier', show that she was the occupier of the whole premises.
