38/88

SUPREME COURT OF VICTORIA

COX v MACINTYRE

O'Bryan J

2 June 1988

CRIMINAL LAW – USING PREMISES FOR HABITUAL PROSTITUTION – "NOT VERY OFTEN" – WHETHER SUCH USE "HABITUAL": *VAGRANCY ACT* 1966, S12.

Where a person charged with using premises for the purposes of habitual prostitution admitted she had sex with clients "not very often" and that "usually the bedrooms" were used for such purposes, it was open to the Court to find that the premises were commonly used for the purposes of prostitution.

O'BRYAN J: [1] On 19 August 1987 Master Barker granted an order nisi to review the decision of the Magistrates' Court at Prahran whereby the applicant was convicted of a breach of s12(1)(a) of the *Vagrancy Act* 1966 and fined $250. **[2]** The grounds of the order nisi are:

> 1. That the magistrate was wrong in law in concluding that the words "not very often" were capable of supporting a finding that the premises were used habitually for the purposes of prostitution.
>
> 2. That the magistrate was wrong in law in directing himself that there was an onus of proof and/or an evidentiary onus on the applicant herein to explain her use of the premises.

Section 12(1)(a) of the *Vagrancy Act* creates an offence when a person being the occupier of any premises uses such premises for the purposes of habitual prostitution. The information charged that the defendant, on the 25th day of July 1986 at Elwood, did use premises, to wit, flat 5, number 517 St. Kilda Road, Elwood, for the purpose of habitual prostitution.

The evidence before the court showed that the respondent entered the said premises at about 8 pm on 25 July and was introduced to the applicant. The applicant and her male companion removed their clothing and the male companion proceeded to take photographs of the applicant. The male companion then requested the respondent to place $100 on the loungeroom table, an agreed sum for sex with the applicant. The respondent identified himself as a police officer and a conversation took place. The relevant part of the conversation for the purposes of this proceeding is as follows: "I said, 'Is it true that earlier tonight **[3]** I presented $100 to have sex and a golden shower?'. She said 'Yes'. I said 'How often does this happen here at 5, 517 St. Kilda Street? I mean how often do you entertain clients here?' She said 'Not very often. Before it usually was couples.' I said 'How much do you charge them?'. She said 'Couples are free.' I said 'Which room do you usually use for sex with the clients?'. She said 'Usually the bedrooms.' I said 'How much money do you get out of the $100?' She said 'I really don't know. Bill manages it. Bill likes it just for his fantasy.' I said 'Do you usually live here at 5/517 St. Kilda Street, Elwood?'. She said 'Yes'. I said 'Is this where you usually entertain clients?'. She said 'Yes. Bill is here to watch, it's his fantasy.' I said 'How much do you charge single male clients?' She said 'Bill arranges that.' I said 'How many clients have been charged to have sex with you?' She said 'Not very many. As I said, it's usually couples. I said 'Do you have any reason for using these premises for habitual prostitution?'. She said 'No, we don't normally.'".

The respondent's case before the court relied upon admissions made in the conversation. At the conclusion of the evidence the respondent closed the case for the informant whereupon a "no case to answer" submission was made on behalf of the applicant. Counsel for the applicant submitted there was no evidence that the premises were used habitually by **[4]** the applicant for prostitution. The learned magistrate, in rejecting the "no case" submission, ruled that the words "not very often" provided sufficient evidence and it was for the applicant to explain what was meant by those words.

The applicant did not give evidence in answer to the charge, nor was any evidence adduced on her behalf. After a further submission was made, the learned magistrate proceeded to convict the applicant. I shall deal with the second ground first.

In my opinion no error on the part of the learned magistrate of the kind specified in the second ground is demonstrated. When a "no case" submission is made, "the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law": *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671.

In *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433; [1963] ALR 165; 36 ALJR 276 Kitto J said at CLR 442:

> "The question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief is simply a question of law whether the defendant could lawfully be convicted on the evidence as it stands – whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred. That is a question to be carefully distinguished from the question of fact **[5]** for ultimate decision, namely, whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt."

The learned magistrate approached the question correctly, so it seems to me, when he ruled as he did. All he was saying was, "If I accept the evidence of the informant as to the conversation, I may infer that the defendant meant by the words 'not very often' that the premises were used sufficiently often for the purpose of proving all the ingredients of the offence." When the learned magistrate added that it remained for the defendant, if she gave evidence, to explain what was meant by those words, all he was saying was that in the absence of some explanation as to their meaning he might draw the necessary guilty inference. The learned magistrate did not impose an onus upon the defendant to explain her use of the premises. In my opinion the learned magistrate applied the test prescribed in *May v O'Sullivan* correctly. Ground 2 therefore fails.

The question remaining is whether on the whole of the evidence the learned magistrate was entitled to be satisfied beyond reasonable doubt that the defendant is guilty, that is to say, satisfied that each element of the offence has been proved. It is not for this court to determine what the applicant meant by the words. If it was reasonably open to the magistrate to be satisfied of every element of the offence beyond reasonable doubt, the conviction cannot be impugned in this court.

[6] The elements of the offence required proof that the applicant was the occupier of premises and that she used those premises for the purposes of habitual prostitution. What does the word "habitual" mean in juxtaposition to the word "prostitution"? "Habitual" carries the dictionary meanings: the nature of a habit: commonly used (by a given person). (*The Macquarie Dictionary*)

The applicant admitted to prostitution within the premises in her answer to the question, "Which rooms do you usually use for sex with the clients?" Answer "Usually the bedrooms.". The degree of frequency in the acts of prostitution may be determined from the whole of the conversation rather than from the single answer "Not very often" offered in answer to the question "How often do you entertain clients here?". I agree with Mr Wilson's submission that it was open to the magistrate to be satisfied that a business of prostitution was being carried on within the premises and that the management of the business was well-organised by the applicant's male companion. Management of the business of prostitution lends support to the finding of the learned magistrate that the premises were commonly used by the applicant for prostitution, at least sufficiently used to satisfy the element of the offence.

As I have indicated, the informant's case did not depend upon the single answer, "Not very often" **[7]** and the learned magistrate was entitled to have regard to the whole of the conversation in deciding whether the elements of the offence were proved. In my opinion the learned magistrate was entitled to convict the applicant after he accepted the evidence that the applicant had used the words attributed to her. From these words he was entitled to draw the inference that the degree of use of the premises for prostitution was in the nature of a habit or that the premises were commonly used by the applicant for the purposes of prostitution. Accordingly, the second ground fails and the order nisi will be discharged with costs.