

IN THE HIGH COURT OF NEW ZEALANDWELLINGTON REGISTRYBETWEEN:BARTONAppellantA N D:THE POLICERespondent

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 see Stephan v Police
 and M v Police
 [1985] 2 NZLR

Hearing: 21 November 1984Counsel: Miss H. Croft for Appellant
Mr J.B.M. Smith for CrownJudgment: 23 November 1984

JUDGMENT OF JEFFRIES J.

This is an appeal against a conviction under Section 26 of the Summary Offences Act 1981 that appellant in any public place offered her body for the purpose of prostitution. The point to be decided is a narrow one, but some background is necessary.

In the early evening of 21 June 1984 a police constable in plain clothes visited an establishment known as Solomon's Massage Parlour. He was on official duties. He came into a reception area after being admitted to the premises. He was in the company of another police officer also engaged in undercover duties. It is convenient here to describe the premises as they have a bearing on the issue to be decided. No plan was prepared but verbal descriptions were given in the course of examination and cross-examination. After passing through the door with a grill for first observing callers a visitor steps into a reception area. From that reception area there is a door through to a television lounge, a sauna and a

pool, apparently, but it is not known for certain, in different rooms. Having passed through the door from the reception area there is a corridor that goes down to the left and off this corridor are three apparently quite small rooms, one of which was described by a witness for the prosecution.

The witness identified appellant as the person who greeted him once he had come into the reception area. Apparently there is a board which details the services available and the cost, and the witness after consulting the board decided to have a 1/2 hour massage, and \$25.00 was paid for him. After waiting some time the witness was called by appellant into one of the massage rooms. Witness said there was a mattress on the floor. He there underwent a massage for about a 1/2 an hour near the conclusion of which appellant offered him sex with her in different forms, which he declined, pleading lack of money. There is no argument now in this court that an offer was in fact made. Later in the evening another police officer went to those premises but appellant was not present, although she was apprehended in premises elsewhere of like character, and later arrested. She made no admissions and was ultimately charged.

In the lower court the charge was defended but no evidence was called for appellant. The argument was a legal one, first that she had not in fact made an offer of sex which was overruled, and that is now accepted by appellant in this court. The other ground was that the room to which appellant took the witness was not a public place in terms of section 26. For the purposes of argument in this court it was accepted on appellant's behalf that the reception area and other activity rooms were public places, but the precise offer of sex was not made in a public place but in the privacy of the massage room. The offence is defined in section 26 of the Act in the following way:

"Every person is liable to a fine not exceeding \$200.00 who, in a public place, offers his or her body, or any other person's body, for the purpose of prostitution."

The starting place for decision on this argument is the definition of public place which is contained in section 2 of the Act in these terms:

"'Public place' means a place that, at any material time, is open to or is being used by the public, whether free or on payment of a charge, and whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place; and includes any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle carrying or available to carry passengers for reward."

Absenting refinements and examples appellant's proposition is that a conventional room in a building with no one else present, excepting the offeror and offeree, is not a public place. That proposition is true only if the surrounding circumstances of how the offeror and offeree found themselves in the particular room in the building are entirely excluded from scrutiny. In this court's view to contract the focus of attention to such a small area of the fact situation is legally unacceptable, artificial and potentially distorting.

The relevant and undisputed facts are these. Solomon's Massage Parlour is a service business conducted on premises, open to the public. The associated activity rooms, or places, of lounge, sauna and pool are public places, as are the reception area and corridors. The activity of body massage is carried out in a separate room by a masseuse primarily for understandable reasons of modesty on the part of the customer. It is accepted that the rooms are used by members of the public in the aforesaid way, and the material difference in regard to public access to the massage rooms from, say, the television lounge is that the members of the public enter the massage

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rooms singly and not in numbers. That is not a sufficient reason for the rooms themselves to lose their character as public places. The chief prosecution witness was a member of the public and he had an offer of sex made to him in a massage room. He had been taken by a masseuse from a public place, the television lounge, to the massage room for the purpose of the business, namely a massage. That fact situation, in my view, brings the massage room in which the offer was made within the words:

"'Public place' means a place that, at any material time, is open to or is being used by the public...."

The appeal is dismissed.

A handwritten signature in cursive script, likely of a judge, followed by a checkmark.

Solicitors for Appellant: Jeffries Partners

Solicitors for Respondent: Crown Solicitor, Wellington