19/10

NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 148/88

1459

IN THE MATTER	of an Appeal from a determination in the District Court at Wellington
BETWEEN	CHARLES WILLIAM HOHAIA
	Appellant
A N D	CAIRNS
	Respondent

Hearing: 2 October 1989

Counsel: Anna Tutton for the Appellant
R.M. Lithgow for the Respondent

Judgment: 12th October 1989.

JUDGMENT OF ELLIS J

Mr Cairns was charged under s149 of the Crimes Act. It was alleged that on 20 February 1987 for reward he procured D[illegible] to have sexual intercourse with a male who was not her husband. He was tried before a District Court Judge on 20 May 1987 and was acquitted. The informant has appealed by way of case stated and the question for the Court is whether the Judge's decision was erroneous in point of law and in particular:

"What is the intent the prosecution must prove for there to be a conviction under s149 Crimes Act 1961? Specifically must it be proved beyond reasonable doubt:
(1) That the defendant knew that the woman would have sexual intercourse, or
(2) Believed that would be the case, or
(3) Suspected that would be the case, or
(4) Was reckless whether that would be the case,
And whether foresight of any of the prior is sufficient or must more be proved?"

For an immediate understanding of the situation before the Judge, I quote several paragraphs from the case stated:

"4. It was proved upon the hearing that Constable R.M. Fix on 5 February 1987, in response to an advertisement in the Evening Post for girls and ladies for an escort agency, telephoned the defendant and subsequently on that date interviewed him at the premises of the Executive Massage Parlour in Vivian Street, Wellington. During the course of the constable's interview she purported to be seeking employment. The relevant evidence which I accepted was:

> 'He asked me what I knew about massages and I said 'Not a lot'. He then said he charged his girls out at $50.00 plus return cab fare. He said after that the girls' time was worth a ton an hour to them. I then said to him 'So if the girls screw the guy they get the money?' He replied 'yes'. I asked if he got a cut from that money and he said 'No'. He said to me he ensured that when clients wanted girls that they were alone and he did not let his girls do doubles or anything with whips, etcetera. He said he was a cautious man as lately a couple of escort agencies had been busted by hiring female detectives.'

5. It was further proved that on 20 February 1987 Detective Perry telephoned a number advertised in the Evening Post for A1 Escorts and spoke to the defendant, asking him 'for a bird for tonight for a bit of romantic interlude'. The defendant offered so to do at a price of $50.00 for the escort plus taxi fare.

6. It was further proved that a female subsequently arrived at the hotel where Detective Perry was

staying and offered to have sex for a price of $100.00. Subsequently the defendant was interviewed by the Police and when asked by Detective Perry what it was that the defendant thought the detective wanted to do with the girl, the defendant replied 'I don't know. It is not up to me. It is between clients and the girl.'

7. I was satisfied certainly on the balance of probabilities that the defendant was in the business of providing women whom he well knew or expected would provide intercourse. I was not satisfied beyond reasonable doubt that the requirement of intent as to sexual intercourse was met. At the conclusion of my decision I said:

> 'However, at the end of the day I am unable to say beyond reasonable doubt that the requirement of intent was there. The expectation was no doubt in his mind but as far as he was concerned on the evidence it was up to the girl on this occasion as to what she did at the end of the day. Offers could be ranged from oral sex to anything else and it is not the fault of the prosecution that the section is written in these rather antiquated terms. However the essential ingredients have not been established and the information will be dismissed.'"

Section 149 provides:

> "149. Procuring sexual intercourse - Every one is liable to imprisonment for a term not exceeding 5 years who, for gain or reward, procures or agrees or offers to procure any woman or girl to have sexual intercourse with any male who is not her husband."

Two things are immediately obvious. The first is that only one type of sexual activity is referred to, namely sexual intercourse, which is defined in s127. The second is that the words "to have sexual intercourse with a male who is not her husband" describe the purpose of the procurement. In the case of R v. EF [1976] 2NZLR 389, Richmond P delivering the judgment of the Court of Appeal said at page 392, referring to the earlier decision of R v. Johnson [1963] NZLR 92:

> "In the New Zealand decision, on the other hand, this court appears, in the last sentence in its judgment, to have clearly taken the view that in s149 the words 'to have sexual intercourse with any male' should be construed as defining the purpose of the procurement rather than its actual result. We accept that view and regard the English case as inapplicable to s149."

The English case referred to was R v. Johnson [1964] 2 QB 404.

In the present case the evidence showed that the defendant was in the business of providing female escorts for a fee and in this particular case he had been asked "for a bird for tonight for a bit of romantic interlude". The request was not explicit and while it could be interpreted as a request for a woman for sexual intercourse, other activities were not excluded by any necessary implication. It was established that the woman who was procured did offer to have sexual intercourse with the detective. On the other hand, when the defendant was questioned by the detective as to what he thought the detective wanted to do with the girl, the defendant replied "I don't know. It is not up to me. It is between clients and the girl." No doubt sexual intercourse was a possibility and perhaps a strong possibility, but it was not the only possibility. This was the Judge's view.

From the section itself it must follow that the prosecution must prove in this particular charge that the defendant procured the woman and that the procurement was for the purpose of her having sexual intercourse and that such intercourse was with a male who was not her husband.

It was not in contest before me that this particular provision of the Crimes Act was one which requires the prosecution to prove mens rea or a guilty intent on the part of the defendant. That intent must be to procure the woman for the purpose of her having sexual intercouse with a man who is not her husband. As I have said, that involves three elements. While the defendant may recognise the sexual intercourse may not take place, or may be only one of several activities, he must still intend to procure her for the purpose of it. While the defendant in this case may have narrowly escaped conviction, the Judge's finding is one of fact, namely that while he was satisfied on the balance of probabilities that the woman was procured for the purpose of sexual intercourse, he was not prepared to find this proved to the high standard of beyond reasonable doubt, as it was possible that she was procured for other sexual activity as far as the defendant's mental state was concerned. It follows therefore that in my view the Judge did not misdirect himself as to the law and it was open to him on the facts to find as he did.

I therefore recapitulate what I have just said. The prosecution must establish that the defendant with guilty intent procured the woman for the purpose of her having sexual intercourse with a man not her husband.

Miss Tutton submitted that it would be sufficient if the prosecution established that either the defendant knew that he was procuring the woman for the purpose of her having sexual

intercourse, or that the defendant knew that it was "a real risk" that the purpose was that of her having sexual intercourse. She continued her submission by suggesting that it was enough if the prosecution proved that the defendant knew of the "real risk" and procured her "recklessly", that is not caring whether sexual intercourse was the purpose or not. There is a substantial thread of common sense running through this submission. There is in my mind no doubt that in situations such as this, the defendant is indifferent as to whether sexual intercourse takes place or not and indeed is indifferent to the purpose of the procurement, simply assuming that some sexual gratification within the bounds of the overall agreement will take place with the consent of the woman.

The concept of recklessness or indifference is often applied in formulation of the concept of criminal intent. The ordinary meaning of the word "recklessness" was described by Lord Diplock in R v. Caldwell [1979] 1 AllER 961 where he said at page 966 albeit in a different context:

> "It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech, a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any though were given to the matter, it would be obvious that there was."

In New Zealand the Court of Appeal said in R v. Howe [1982] 1 NZLR 618, at page 623:

> "At the present day the Courts generally lean towards interpreting ambiguous statutes that create offences, especially serious offences, as requiring a guilty state of mind extending to all the ingredients. The climate of judicial opinion regarding mens rea is illustrated by statements in speeches in the House of Lords by Lord Reid in Sweet v. Parsley [1970] AC 132, 148; [1969] 1 AllER 347, 349, Lord Diplock in R v. Sheppard [1981] AC 394, 407-408; [1980] 3 AllER 899, 906, and Lord Hailsham of St Marylebone LC in R v. Lawrence [1982] AC 510, 520; [1981] 1 AllER 974, 978. The New Zealand Courts, we think, subscribe strongly to the conservation of mens rea as a cardinal requirement of the criminal law. In other words, there must normally be true moral blameworthiness before people can be convicted of crime. The degree of blameworthiness that is caught varies with the subject-matter and the wording by which the legislature elects to define the crime, but the two main heads are intention and recklessness.
> As to recklessness, there has been a line of cases in England of high authority affirming that this word has no separate legal meaning. And that, although involving more than mere carelessness, it is not limited to deliberate risk-taking but includes failing to give any though to an obvious and serious risk: R v. Caldwell [1982] AC 341; [1981] 1 AllER 961, R v. Lawrence, R v. Pigg [1982] 2 AllER 591; [1982] 1 WLR 762. We do not overlook that criticism has been directed by commentators at some of the reasoning in those decisions, but we respectfully find the speeches of Lord Hailsham and Lord Diplock helpful in relation to the particular subject-matter of the section that has to be interpreted in the present case.
> In practice the lines between deliberately taking a serious risk, deliberately shutting one's eyes to it and simply not adverting to it can be very fine. So fine that in Reynhoudt Dixon CJ at 107 CLR 381, 387 refrained from discussing what he said he hoped was 'a merely abstract and not very practical question, namely the degree of advertence to each constituent element making up the offence that may suffice."

The concept of recklessness was fully discussed more recently by Barker J in Smith v. Police (1988) 3 CRNZ 262.

In the present context there is nothing unlawful about consensual sexual intercourse, it is the procuring of it for reward that is the offence.

Looked at this way, the definition of recklessness by Lord Diplock as ignoring a risk of harmful consequences, does not accurately describe the defendant's state of mind as to the consequences of the procurement. While I accept that in this case the description of the defendant's state of mind as indifferent as to whether intercourse took place, is accurate, it is not the same as saying he was reckless of the consquences.

It may well be that s149 is restrictively drawn and does not bear favourable comparison with the more widely drawn section 148 or the soliciting provisions of s26 of the Summary Offences Act. That is a matter for Parliament.

Mr Lithgow drew my attention to a decision of Vautier J in Huia v. The Police M337/85 Auckland Registry 14 May 1985. In that case the appellant was convicted under s149. The analysis of s149 made by the Judge is similar to that I have just made, and I respectfully agree with it.

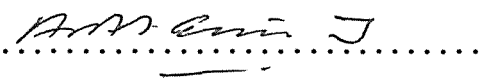
I therefore turn to the questions posed in the case stated. The general part of the question is answered by saying that the prosecution must prove beyond reasonable doubt that the defendant intended to procure a woman and that he intended that such procurement was for the purpose of her having sexual intercourse with a man other than her husband. While the prosecution must prove beyond reasonable doubt that the defendant intended that the procurement was for the purpose of

the woman having sexual intercourse, the prosecution does not have to prove that that was the actual result of the procurement. The offence is complete on the procurement. Naturally the consequences of procurement may be powerful evidence of intention. Nor does the prosecution have to prove that the defendant knew that sexual intercourse would take place. It must prove however that that was the intended purpose of the procurement.

The answer to the specific questions are subsumed by the above and under all the circumstances I do not consider further answers to be helpful. However, if either counsel wishes to pursue the matter further, I hereby reserve leave to apply.

In the hope that nothing further is required, I now turn to the question of costs. Mr Lithgow has aked for costs and drawn attention to the long delay that has taken place since the charge was dealt with in the District Court. This apparently has been due to two factors. The first is the delay in having the relatively short transcript made available from the District Court. The second is some delays occasioned in the Crown Solicitor's office occasioned by the illness and death of the Crown Solicitor. While the delays in the District Court are indeed a matter for concern and the situation in the Crown Solicitor's office is no fault of the respondent, I understand the respondent indeed does not appear to have been particularly

discommoded by the delays and in any event if he had enquired he would have been told that his acquittal was not at risk. A modest order of costs is therefore appropriate. The appellant must pay the respondent's costs which I fix at $250.00.



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