ICLR: King's/Queen's Bench Division/1983/KELLY v. PURVIS - [1983] Q.B. 663

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[DIVISIONAL COURT]

KELLY v. PURVIS

1982 Nov. 11, 12; Dec. 2

Ackner L.J. and Webster J.

Crime - Sexual offences - Brothel, assisting in management of - Massage parlour - Masseuses providing sexual services not amounting to full sexual intercourse - Whether massage parlour "brothel" - Sexual Offences Act 1956 (4 & 5 Eliz. 2, c. 69), s. 33 1

The defendant, who assisted in the management of a licensed massage parlour, was charged with assisting in the management of a brothel, contrary to section 33 of the Sexual Offences Act 1956. At her trial before the magistrate, the prosecutor established prima facie that during the massage extra services, involving masturbation of the client, were offered by the masseuse for additional fees, paid directly to that masseuse, and not forming part of the takings of the establishment. The defendant was fully aware of the sexual services being provided and on occasions performed them herself. At the close of the case for the prosecution it was submitted on behalf of the defendant that the offence alleged had not been established. The magistrate ruled that although he was satisfied that the masseuses were common prostitutes, he was not satisfied that a prima facie case had been made out that the premises were a brothel since there was no evidence that full sexual intercourse was provided there. Accordingly, he dismissed the information.

On appeal by the prosecutor:-

Held, allowing the appeal, that premises where more than one woman offered herself as a participant in physical acts of indecency for the sexual gratification of men constituted a brothel for the purposes of section 33 of the Sexual Offences Act 1956; that, accordingly, on a charge of assisting in the management of a brothel it was not essential to prove that normal sexual intercourse was provided at the premises (post, p. **671A-B**).

Reg. v. Justices of Parts of Holland, Lincolnshire (1882) 46 J.P. 312, D.C. and *Winter v. Woolfe* [1931] 1 K.B. 549, D.C. considered.

Per curiam. To constitute a brothel, it is not essential to show that premises are in fact used for the purpose of prostitution which involves payment for services rendered. A brothel is also constituted where the women (for there must be more than one woman) do not charge for sexual intercourse (post, pp. **669G - 670A**).

The following cases are referred to in the judgment:

Caldwell v. Leech (1913) 109 L.T. 188, D.C.

Durose v. Wilson (1907) 96 L.T. 645, D.C.

Gorman v. Standen [1964] 1 Q.B. 294; [1963] 3 W.L.R. 917; [1963] 3 All E.R. 627, D.C.

Reg. v. Justices of Parts of Holland, Lincolnshire (1882) 46 J.P. 312, D.C.

Reg. v. Webb [1964] 1 Q.B. 357; [1963] 3 W.L.R. 638; [1963] 3 All E.R. 177, C.C.A.

1 Sexual Offences Act 1956, s. 33: see post, p. 668E.

Rex v. De Munck [1918] 1 K.B. 635, C.C.A.

Singleton v. Ellison [1895] 1 Q.B. 607, D.C.

Winter v. Woolfe [1931] 1 K.B. 549, D.C.

The following additional cases were cited in argument:

Abbott v. Smith (Note) [1965] 2 Q.B. 662; [1965] 3 W.L.R. 362; [1964] 3 All E.R. 762.

Dickenson v. Fletcher (1873) L.R. 9 C.P. 1.

Reg. v. Pierson (1706) 1 Salk. 382.

Rex v. Chapman [1931] 2 K.B. 606, C.C.A.

Woodhouse v. Hall (1980) 72 Cr.App.R. 39, D.C.

CASE STATED by the South Westminster Stipendiary Magistrate sitting at Bow Street.

On January 21, 1982, an information was preferred by the prosecutor, Robert Kelly, a Sergeant in the Metropolitan Police, against the defendant, Christine Purvis, alleging that between October 20, 1981, and January 20, 1982, she did assist in the management of a brothel at premises known as Celebrity Sauna, 85, Charlotte Street, London, W.1, contrary to section 33 of the Sexual Offences Act 1956. The defendant pleaded not guilty to the information.

The stipendiary magistrate (Mr. W. E. C. Robins) heard the information on April 6, 1982, to the conclusion of the prosecution case and found, prima facie, the following facts. Between October 20, 1981, and January 20, 1982, the defendant was prima facie assisting in the management of the premises concerned, a massage parlour licensed by the appropriate local authority. The premises consisted of a lounge/reception area, two changing rooms, three massage rooms, a solarium, a sauna and two shower cubicles. On payment of the appropriate fee on entry, massage, or sauna and massage were provided. The defendant told the prosecutor that the charges were as follows: massage £12; sauna and massage £15; VIP treatment including free drinks at the bar £18. A card also advertised a sauna at £5, but the defendant told the prosecutor that they did not do saunas on their own. During the massage, which tended to concentrate on the customer's lower back, buttocks and thighs, extra services were offered by the masseuse concerned for an additional fee of £15, namely manual masturbation of the client's penis. There was a charge of £20 if the additional service was performed topless, and a charge of £25 if performed naked. Those fees were usually paid direct to the masseuse concerned but on one occasion to the receptionist. There was no evidence that the additional fees and surcharges were treated as part of the takings of the establishment. Eleven women were seen in the premises during the eight days of observation, usually four working there at any one time, one of them acting as receptionist. A number of men were seen to visit the premises. On each occasion on which the officers visited the premises during the observation, they were offered masturbation and heard similar offers to other men. On two occasions men were seen to be masturbated, one by the defendant. Semen was found on tissues taken from the premises at the conclusion of the last police visit. The defendant also acted as a masseuse and performed masturbation. There were also conversations in her presence when she

was the receptionist which indicated that she was fully aware of the sexual services given by the other masseuses. There was no evidence that full sexual intercourse was offered at the establishment, although when asked by the prosecutor "Do any of the girls do full sex?" the defendant replied "Only with regulars, sir; we don't know you, sir. You will have to discuss it with the girls."

It was contended by the prosecutor that these masseuses were prostitutes plying their trade in an establishment in which during the relevant period, the defendant assisted in the management, and that therefore the premises became a brothel within the meaning of section 33 of the Sexual Offences Act 1956. It was submitted by the defendant that whether or not the masseuses could legally be described as prostitutes, and whether or not their activities might result in the commission of other offences, the premises could not be described as a brothel. It was further contended by the defendant that the word brothel was generally recognised as meaning an establishment to which male persons resorted for the purpose of having full sexual intercourse with prostitutes and that that definition was approved by the Divisional Court of the King's Bench Division in *Winter v. Woolfe* [1931] 1 K.B. 549, and that that definition was quoted with approval after the coming into force of the Sexual Offences Act 1956 in *Gorman v. Standen* [1964] 1 Q.B. 294.

The magistrate was of the opinion that in the context of the authorities quoted by the defendant, illicit intercourse could only refer to sexual intercourse which was defined in section 44 of the Sexual Offences Act 1956. In default, therefore, of further authorities and argument from the prosecutor to widen that definition he felt obliged to dismiss the information. He was, however, satisfied prima facie that on the authorities quoted by the prosecutor, the women concerned were common prostitutes and the facts were sufficient to support a prima facie case for assisting in the management of

a bawdy house but not a brothel. For those reasons, the magistrate was of the opinion that the defendant's contention was correct in law and accordingly dismissed the information without calling upon the defendant to answer it and also awarded her £500 costs against the prosecutor.

The question for the opinion of the High Court was whether on a charge of assisting in the management of a brothel in contravention of section 33 of the Sexual Offences Act 1956 it was essential that there be evidence that normal sexual intercourse had been provided there or whether it was sufficient to prove that acts amounting to prostitution by more than one woman had taken place on the premises.

Victor Temple for the prosecutor. There is no definition of a brothel in the Sexual Offences Act 1956 itself, so one is obliged to go back to the common law. *Coke's Institutes*, Pt. III (1817 ed.), p. 204, refers to "brothel houses, estuis and bordelloes" and states that the keeper thereof is punishable at the common law. In *Singleton v. Ellison* [1895] 1 Q.B. 607 a bawdy house was equated with a brothel. The term "bawdy house" included one room kept by a lodger who "accommodate[s] lewd people to perpetrate acts of uncleanness" *(Reg. v. Pierson* (1706) 1 Salk 382); but following more recent authority more than one woman would be required

to constitute a brothel: see *Caldwell v. Leech* (1913) 109 L.T. 188; *Durose v. Wilson* (1907) 96 L.T. 645 and *Singleton v. Ellison*. In *Singleton v. Ellison*, a brothel was described as a place resorted to by persons of both sexes for the purposes of prostitution. It is common ground that the premises in the instant case were used for prostitution. Prostitution is not limited to sexual intercourse, but includes a situation where a woman "offers her body commonly for lewdness for payment in return": see *Rex v. De Munck* [1918] 1 K.B. 635, 637 and *Reg. v. Webb* [1964] 1 Q.B. 357. In *Woodhouse v. Hall* (1980) 72 Cr.App.R. 39, 42, a brothel was accepted as being an establishment at which two or more women were offering sexual services.

That full sexual intercourse is not necessary to constitute a brothel is also suggested by section 6 of the Sexual Offences Act 1967, which treats as a brothel somewhere resorted to for the purposes of lewd homosexual practices. The purpose of the distinction between the offences of a tenant permitting premises to be used as a brothel in section 35 of the Act of 1956 and that of a tenant permitting them to be used for prostitution in section 36 of that Act is purely that more than one woman would be necessary for the premises to constitute a brothel, not because in that case full sexual intercourse needed to be shown.

R. Alun Jones for the defendant. Until 1872 there was no distinction either in statute or at common law between premises being used for prostitution and a brothel. Prosecutions were brought under the Disorderly Houses Act 1752, the preamble of which clearly suggested that the mischief at which it was aimed was the element of public nuisance involved. Sections 5 and 8 of that Act mention "bawdy houses, gaming houses or other disorderly houses …" Both in *Hawkin's Pleas of the Crown*, 8th ed. (1824), vol. 1, p. 717, which refers to bawdy houses, and in *Coke's Institutes*, Pt. III (1817 ed.), p. 204, which refers to brothel houses, the offence is described as a "common nuisance." It was only towards the end of the 19th century that Parliament began to provide specific rules for specific offences. The Licensing Act 1872 by sections 14 and 15 respectively made a clear distinction between permitting premises to be the habitual resort of prostitutes and permitting them to be a brothel. Whilst payment is an essential element in prostitution, full sexual intercourse is not; but to establish a brothel, full sexual intercourse is necessary, though the element of payment is not. A "brothel" was defined by Groves J. in *Reg. v. Justices of Parts of Holland, Lincolnshire* (1882) 46 J.P. 312 as

"premises kept knowingly for the purposes of people having illicit sexual connexion there." Lopes J., at p. 313 defined a brothel as a place where "people of opposite sexes … have illicit sexual intercourse."

The difference between habitual prostitution and a brothel is maintained in *Winter v. Woolfe* [1931] 1 K.B. 549, a leading authority which has been recognised by Parliament in subsequent legislation. It was held there that it was not necessary to prove that the women resorting to the premises were prostitutes, or that they received payment for acts of fornication, and the main point was that persons of opposite sexes had been permitted with the knowledge of the occupier to have illicit sexual intercourse there. In giving judgment, Avory J. adopted the definition of a brothel given by Grove J. and Lopes J. in *Reg. v. Justices of Parts of Holland, Lincolnshire*,

46 J.P. 312. In *Gorman v. Standen* [1964] 1 Q.B. 294, 303, Lord Parker C.J. stated that "A bawdy house by definition is a house resorted to or used by more than one woman for the purposes of fornication."

The forerunner of the Sexual Offences Act 1956 was the Criminal Law Amendment Act 1885, section 13 of which provided for the suppression of brothels, but retained the distinction between premises used "as a brothel" and those used "for the purposes of habitual prostitution." If Parliament uses a word previously defined judicially without providing its own definition it may be presumed that it thereby adopts that definition. In any case, the words of a penal enactment must clearly indicate the circumstances in which they operate: *Dickenson v. Fletcher* (1873) L.R. 9 C.P. 1. Where there is any doubt as to the meaning of an enactment, the benefit of the doubt should be given to the subject and against the legislature which had failed to explain itself: *Rex v. Chapman* [1931] 2 K.B. 606.

In enacting the Sexual Offences Act 1967, Parliament was not purporting to define a brothel but simply to apply to homosexual acts what sections 33 to 36 of the Act of 1956 did for heterosexual acts. Likewise, section 5 of the Act of 1967 gives no definition of prostitution by men. The facts of the present case do not establish that the premises were a brothel because there was no evidence of full sexual intercourse having taken place, and the appeal should be dismissed.

Temple in reply. The definition of a brothel was also considered in *Abbott v. Smith (Note)* [1965] 2 Q.B. 662, 663 where Judge Chapman stated: "the essence of a brothel, or bawdy house, is that there must be premises resorted to or used by more than one woman for the purpose of illicit sexual intercourse or other sexual lewdness … with more than one man. …" It is significant that offences under sections 30 and 31 of the Sexual Offences Act 1956 of living on the earnings of prostitution and of controlling a prostitute respectively are both triable on indictment as well as summarily, whereas that of keeping a brothel under section 33 is only triable summarily.

Cur. adv. vult.

December 2. ACKNER L.J. read the following judgment of the court. This prosecutor's appeal by case stated from the adjudication on April 6, 1982, by the South Westminster Metropolitan stipendiary magistrate, Mr. William Edward Charles Robins, sitting at Bow Street, raises the question: what constitutes a brothel?

Only the prosecution evidence was heard, because the magistrate accepted the defence submission that the prosecution had failed to establish the offence alleged, namely, that between October 20, 1981, and October

20, 1982, the defendant, Christine Purvis, assisted in the management of a brothel at premises known as Celebrity Sauna, 85 Charlotte Street, London W.1, contrary to section 33 of the Sexual Offences Act 1956.

The prosecution evidence established, prima facie, the following facts. [His Lordship summarised the facts as set out in the case stated, and continued:] The magistrate was satisfied that the women concerned were common prostitutes. He was not, however, satisfied that a prima facie case had been made out that the premises were a brothel by reason of the

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absence of evidence that sexual intercourse, within the meaning of the Sexual Offences Act 1956, was provided.

The magistrate's finding that the women concerned were common prostitutes was not challenged. Whereas under American law prostitution is the "practice of the female offering her body to an indiscriminate intercourse with men, usually for hire," it is well established that in English law "prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return": see *Rex v. De Munck* [1918] 1 K.B. 635, 637, *per* Darling J. applied in *Reg. v. Webb* [1964] 1 Q.B. 357. *Reg. v. Webb* was also a case of a massage parlour, where the masseuses masturbated their clients. In that case, the point was taken by the defendant that the definition given by Darling J. in *Rex v. De Munck*, should be read as confined to cases where the woman offers her body for lewdness in what one might call a passive way, or where she submits to something being done to her. Lord Parker C.J., giving the judgment of the court, observed that the words used by Darling J. were not the words of the Sexual Offences Act 1956, but merely the judge's own definition, for the purposes of that case, of circumstances in which prostitution may be said to have been proved. In the judgment of that court, the expression "a woman offers her body commonly for lewdness" includes a case where a woman offers herself as a participant in physical acts of indecency for the sexual gratification of men.

It is thus common ground that these premises were used for the purpose of prostitution. Is that sufficient for it to qualify as a brothel, or do the prosecution have to establish that sexual intercourse takes place with the women who used the premises?

There is no definition in section 33 of the Sexual Offences Act 1956 as to what constitutes a brothel. The section merely provides: "It is an offence for a person to keep a brothel, or to manage, or act or assist in the management of, a brothel." That offence derives from the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), where in section 13 it is provided that: "Any person who - (1) keeps or manages or acts or assists in the management of a brothel … shall commit an offence." That Act, too, gives no definition of a brothel. In such circumstances, as Lord Parker C.J. pointed out in *Gorman v. Standen* [1964] 1 Q.B. 294, 301: "one is driven back to the meaning of 'brothel' at common law."

In *Stephen, Digest of the Criminal Law*, 5th ed. (1894), at p. 142, the definition of a "common bawdy house" is given as "a house or room, or set of rooms, in any house kept for purposes of prostitution."

In *Gorman v. Standen*, Lord Parker C.J. stated that at common law, a brothel was the same thing as a bawdy-house. He pointed out, at p. 301, that the definition of what is involved in a bawdy-house or a brothel had been variously stated in the cases: "Sometimes it is stated as a place resorted to by persons of both sexes for the purpose of prostitution; sometimes it is referred to as a place used by persons of both sexes for the purposes of prostitution."

The form of indictment for keeping a bawdy-house was referred to by Avory J. in *Caldwell v. Leech* (1913) 109 L.T. 188:

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> "'Did keep and maintain a certain house and in the said house for filthy lucre and gain divers evil-disposed persons, women as well as men, upon the times and days aforesaid as well in the night as in the day unlawfully and wickedly did receive and entertain. …'"

In general the cases have been concerned, not so much with the activities which went on in the premises, as with the number of women who have to be involved, the extent of the control or management, and whether the women must be professionals or only amateurs. In *Singleton v. Ellison* [1895] 1 Q.B. 607, it was held that where a woman occupied a house and had men in for the purpose of fornication with her, she had not committed the offence of keeping a brothel within the meaning of the Criminal Law Amendment Act 1885. Wills J. said, at p. 608:

> "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. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men."

Singleton v. Ellison was distinguished in *Durose v. Wilson* (1907) 96 L.T. 645, a case involving a block of flats where a number of the tenants were in the habit of bringing different men nightly to the premises for the purpose of prostitution. However, A. T. Lawrence J. stated, at p. 646: "a brothel is such a place as that described in that case - that is, premises used by more than one woman for prostitution."

In *Caldwell v. Leech*, 109 L.T. 188 Avory J. expressed his entire agreement with the judgment of A. T. Lawrence J., and stated, at p. 191:

> "In my opinion the whole fundamental idea of a bawdy-house is that it is a house to which persons of both sexes indiscriminately make resort for the purposes of prostitution."

The case upon which the defendant strongly relies, and which persuaded the magistrate to dismiss the information, is *Winter v. Woolfe* [1931] 1 K.B. 549. This case concerned a cottage about two miles from Cambridge, frequented in the main by undergraduates, where sexual intercourse took place with a number of women. The women were not, however, proved to be prostitutes and therefore, at the close of the case for the prosecution, it was successfully submitted that there was no case to answer. Accordingly, the court held that although the occupier of the cottage knew what was going on, the premises were not being used as a brothel. Avory J. in giving the judgment of the court, held, at p. 554, that the justices had "given too restricted a meaning to the word 'brothel' as it is used at common law, and as it is used in section 13 of the Criminal Law Amendment Act 1885." It was not necessary to prove that the women resorting to the premises were prostitutes, known as such to the police, or that they received payment for acts of fornication committed by them with men. It was sufficient to prove that with the knowledge of the occupier persons of opposite sexes were permitted there to have illicit sexual intercourse. This case, in our judgment, merely demonstrates 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. A brothel is also constituted where the women (for there must be more than one woman) do not charge for sexual intercourse.

In the course of his judgment (and this is essentially what is relied upon by the defendant) Avory J. expressed his willingness to accept the definition of a brothel given by Grove J. and Lopes J. in *Reg. v. Justices of Parts of Holland, Lincolnshire* (1882) 46 J.P. 312. Grove J. said, at p. 312:

> "The sole question is, whether there was any evidence to support this conviction before the justices for permitting these licensed premises to be a brothel. … I don't think that the matter of nuisance is of any importance, for it is too well known that these places are often kept in such a way as to be no nuisance at all, but kept perfectly private. But 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 J. said, at p. 313:

> "Now the sole question before the justices was, whether the applicant permitted his premises to be a brothel. What is the meaning of permitting the premises to be a brothel? I think my brother Grove has given a very apt definition, namely, that it is permitting people of opposite sexes to come there and have illicit sexual intercourse. That is a very complete and satisfactory definition of the whole matter."

Reg. v. Justices of Parts of Holland, Lincolnshire was concerned with whether there was any evidence to support the conviction by the justices for permitting licensed premises to be a brothel. There was evidence that two prostitutes, accompanied by two men, went into the house; that the police had watched the house; that they observed soon afterwards, by shadows on the blinds, these four people undressing in a double-bedded room. When the police at a later hour, knocked at the door, considerable delay occurred in opening it. Then they found that the two prostitutes had been transferred to the bed of the landlord's wife, three women in one bed, while in the double bedded room were the two men by themselves. It was argued that the conviction could not be supported by the evidence of one isolated act. The court, however, held that although only one instance was proved, still it supplied strong evidence of the mode of conducting the house, and it was reasonably to be inferred that this had not been a solitary instance of such conduct, but one of many such instances. There was the concealment of the two prostitutes by the wife of the landlord showing that this had been no extraordinary case but a frequent occurrence. The wife gave no evidence. The justices were thus held not to be bound to state a case, there being no point of law raised before them. That case merely decided that there was evidence before the justices from which they could infer either that the premises were being used for the purposes of prostitution, or that persons of opposite sexes were permitted there to have illicit sexual intercourse. It

was not a case which called for an exhaustive definition of a brothel. In *Winter v. Woolfe* [1931] 1 K.B. 549, Avory J., in expressing his willingness to accept the definitions given by Grove J. and Lopes J. was doing no more than justifying his view that the justices were giving too restricted a meaning to the word "brothel."

We therefore answer the question raised by the case stated in these terms. On a charge of assisting in the management of a brothel in contravention of section 33 of the Sexual Offences Act 1956, it is not essential that there be evidence that normal sexual intercourse is provided in the premises. It is sufficient to prove that more than one woman offers herself as a participant in physical acts of indecency for the sexual gratification of men.

We should perhaps add, although this has not featured in our reasoning, that the view which we have expressed above does give content to section 6 of the Sexual Offences Act 1967 which provides that premises shall be treated for the purposes of sections 33 to 35 of the Act of 1956 as a brothel if people resort to it for the purpose of lewd homosexual practices in circumstances in which resort thereto for lewd heterosexual practices would have led to it being treated as a brothel for the purposes of those sections.

The appeal will be allowed and the case remitted to the magistrate to hear and determine according to the law as it has been laid down by this court.

Appeal allowed.

Costs in cause.

Case remitted to magistrate to continue hearing.

Solicitors: Solicitor, Metropolitan Police; Peters & Peters.

[Reported by PAUL MAGRATH, Barrister-at-Law]