PATRICIA PATTERSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967

*Dec. 7, 8
Dec. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Disorderly houses—Keeper of common bawdy house—No evidence of prior use of house as such—Whether accused properly convicted—Criminal Code, 1953-54 (Can.), c. 51, s. 168.

As a result of a sexual proposition by telephone made by a police agent provocateur, the appellant arranged to procure another girl who would make arrangements for a suitable place of assignation where both could entertain the caller and three male friends, also police officers. The appellant met the police officers at an agreed location and under her direction they drove to the home of her confederate. There, they were told that the confederate intended to take them to another house as soon as a telephone call, which she was expecting, confirmed the arrangements she had already made. Eventually, a telephone call came and the confederate was heard to say "leave the front door open". The men and the two girls then drove to a private home in a suburban residential area, the owner of which was not disclosed in the record. Money exchanged hands and after the girls had removed some of their clothing, they were arrested. There was no evidence in the record that the home had ever been used for the purpose of prostitution or the practice of acts of indecency. It had no such reputation nor was there any evidence of undue traffic to or from the premises. The appellant was convicted of keeping a common bawdy house, and her conviction was affirmed by a majority judgment in the Court of Appeal. An appeal was launched to this Court.

Held: The appeal should be allowed and a verdict of acquittal entered.

To obtain a conviction of keeping a common bawdy house, the Crown must prove that there had been a frequent or habitual use of a place for the purpose of prostitution. There was no such evidence in this case nor was there any evidence upon which the magistrate could properly base an inference that the place had been habitually so used.

Droit criminel—Maisons de désordre—Tenancier de maison de débauche—Aucune preuve que la maison utilisée antérieurement à ces fins—Verdict de culpabilité peut-il être soutenu—Code criminel, 1953-54 (Can.), c. 51, art. 168.

A la suite d'un appel téléphonique d'un officier de police, un agent provocateur, aux fins de rapports sexuels illicites, l'appelante a convenu d'embaucher une autre fille qui ferait des arrangements pour obtenir un local où les deux filles pourraient recevoir celui qui téléphonait ainsi que trois amis, aussi des officiers de police. L'appelante a rencontré les officiers de police à l'endroit convenu et, sous sa direction, ils se sont tous dirigés en automobile à la maison de l'autre fille. A cet endroit, on leur a dit que cette fille avait l'intention de les amener à une autre maison dès qu'elle aurait reçu un appel téléphonique confirmant les

*PRESENT: Cartwright C.J. and Fauteux, Ritchie, Spence and Pigeon JJ.

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arrangements qu'elle avait faits antérieurement. Éventuellement, l'appel téléphonique a été reçu et on entendit la fille demander de laisser la porte d'en avant ouverte. Les hommes et les deux filles se sont alors dirigés en automobile vers une maison privée dans un quartier résidentiel de banlieue. Le nom du propriétaire de cette maison n'apparaît pas au dossier. Les officiers ont donné de l'argent aux filles et après que ces dernières eurent enlevé quelques-uns de leurs vêtements, elles furent mises sous arrêt. Il n'y avait aucune preuve dans le dossier que la maison avait en aucun temps servi à des fins de prostitution ou pour la pratique d'actes d'indécence. La maison n'avait pas cette réputation et il n'y avait aucune preuve d'entrées ou de sorties inusitées. L'appelante a été trouvée coupable d'avoir été la tenancière d'une maison de débauche, et le verdict de culpabilité a été confirmé par un jugement majoritaire en Cour d'Appel. Un appel a été logé devant cette Cour.

Arrêt: L'appel doit être maintenu et une déclaration de non culpabilité doit être enregistrée.

Pour obtenir une déclaration de culpabilité d'avoir été le tenancier d'une maison de débauche, la Couronne doit prouver que le local a été employé fréquemment ou habituellement à des fins de prostitution. Il n'y avait aucune telle preuve dans le dossier et il n'y avait non plus aucune preuve sur laquelle le juge aurait pu baser à bon droit une inférence que le local avait été employé habituellement à de telles fins.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], confirmant une déclaration de culpabilité. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the appellant. Appeal allowed.

John F. Hamilton, for the appellant.

C. J. Meinhardt, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] delivered on January 5, 1967, whereby that Court dismissed the appeal from the conviction of the accused on February 8, 1966, by a police magistrate. The accused was charged with unlawfully keeping a common bawdy house, situate and known as 43 Harding Boulevard.

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[1] [1967] 1 O.R. 429, 3 C.C.C. 39.

In the Court of Appeal for Ontario, MacKay J.A., with whom Porter C.J.O. concurred, gave reasons for dismissing the appeal and Schroeder J.A. gave reasons for allowing the appeal and quashing the conviction. The facts were accurately stated in considerable detail in the judgment of Schroeder J.A. as follows:

On December 2, 1966 (*sic* – a misprint for 1965) a morality squad officer of the Metropolitan Toronto Police Department, Detective John Leybourne, telephoned the appellant, using an assumed name, and made an instigative sexual proposition to her. In the result, it was arranged that she should procure another girl who would make arrangements for a suitable place of assignation where both could satisfy the sexual appetites of the agent provocateur and of three male friends (fellow officers of the morality squad but not so made known to the appellant).

Subsequently Detective Leybourne and two fellow detectives, all attired in plain clothes, met the appellant at an agreed location on Bloor Street, and under her direction they drove to the home of her confederate, one Beverley Dixon. Upon their arrival Dixon informed them that she intended to take them to another house and was awaiting a telephone call to confirm the plans which she had set afoot. A call eventually came and in responding to it Dixon was heard to say "leave the front door open".

The three detectives and the two girls then repaired to a suburban home in a quiet residential section of Richmond Hill, known and described for municipal purposes as 43 Harding Boulevard. The record discloses nothing as to the identity of the owner or occupant of that property.

Detective Leybourne had given the appellant $75 as compensation for the favours to be bestowed upon him and his two companions and an additional $10 to pay for the use of the premises. After their arrival the appellant and her female companion repaired to another part of the house, and later returned to the presence of the detectives wearing nothing but their under-garments. At this point the three police officers disclosed their identity and after Detective Leybourne had repossessed himself of the $85 previously paid to the appellant he charged her and her companion with the offence out of which the present appeal arises.

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Beverley Dixon, who had made the necessary arrangements for the use of the Harding Boulevard premises, was acquitted by the Magistrate and a conviction was entered against the appellant only.

There is not the remotest suggestion in the record that house number 43 Harding Boulevard in Richmond Hill, a private residence in a quiet and respectable residential subdivision, had ever been used by the appellant or any other person for the purpose of prostitution or the practice of acts of indecency. No evidence was adduced as to any undue traffic to and from the said premises which would reflect prejudicially upon the reputation of the house or its occupants. The only evidence offered was that of the three detectives which undoubtedly proved the intent of the appellant and her co-accused to commit an act of prostitution with these witnesses at the place in question.

The appellant has stated the points at issue in this appeal as follows:

1. Did the Court of Appeal for Ontario err in finding 43 Harding Boulevard was a common bawdy house?

2. Did the Court of Appeal for Ontario err in holding that the appellant was the keeper of a common bawdy house, pursuant to s. 168 of the *Criminal Code*?

The majority in the Court of Appeal found that the premises at 43 Harding Boulevard were a common bawdy house and that the appellant was the keeper thereof. Schroeder J.A., dissenting, was of the opinion that the premises were not a common bawdy house and that the appellant was not the keeper thereof. I am of the opinion that this appeal may be disposed of by considering the first question only and I have come to the conclusion for the reasons which I shall outline that the premises were not a common bawdy house within the meaning of those words as used in s. 168 of the *Criminal Code*. Therefore, as Roach J.A. said in giving judgment for the Court of Appeal for Ontario in *R. v. King*[2]:

> Since this place was not a common bawdy house, it is irrelevant who the keeper was.

[2] [1965] 2 C.C.C. 324 at 325, [1965] 1 O.R. 389.

Section 168 of the *Criminal Code* provides in subs. (1), paras. (*b*), (*h*), and (*i*):

168. (1) In this Part,

(*b*) "common bawdy house" means a place that is

(i) kept or occupied, or

(ii) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

* * *

(*h*) "keeper" includes a person who

(i) is an owner or occupier of a place,

(ii) assists or acts on behalf of an owner or occupier of a place,

(iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,

(iv) has the care or management of a place,

or

(v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and

(*i*) "place" includes any place, whether or not

(i) it is covered or enclosed,

(ii) it is used permanently or temporarily,

or

(iii) any person has an exclusive right of user with respect to it.

Schroeder J.A. was of the opinion that the words "kept or occupied" and the words "resorted to" as used in s. 168(1)(*b*)(i) and (ii) connote a frequent or habitual use of the premises for the purposes of prostitution. I am in accord with that view. I have considered all the cases cited and I have noted that there has been evidence, in each case where conviction has resulted, of one of three types,

firstly, there has been actual evidence of the continued and habitual use of the premises for prostitution as in *The King v. Cohen*[3] and *Rex v. Miket*[4],

secondly, there has been evidence of the reputation in the neighbourhood of the premises as a common bawdy house, or

thirdly, there has been evidence of such circumstances as to make the inference that the premises were resorted to habitually as a place of prostitution, a proper inference for the court to draw from such evidence.

Examples of the latter are, particularly, *Rex v. Davidson*[5], where Stewart J.A. giving judgment for the majority of the Court said at p. 54:

It might very well happen that a clerk in a hotel who had become friendly with a man, a guest or inmate or a regular customer of the hotel,

[3] [1939] S.C.R. 212, 71 C.C.C. 142, 1 D.L.R. 396.

[4] [1938] 2 W.W.R. 459, 70 C.C.C. 202, 53 B.C.R. 37, 3 D.L.R. 710.

[5] (1917), 28 C.C.C. 44, 1 W.W.R. 160, 11 Alta. L.R. 9, 35 D.L.R. 82.

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might, on receiving a wink, shut his eyes to his friend's proposed escapade and allow him to take a woman to his room on one occasion without protest, and yet not be guilty at all of habitually allowing any casual guest to do so.

And at p. 55:

> The way in which the whole thing happened was such that the magistrate might quite properly infer that it was not an isolated instance but rather a matter of course and of custom or habit. Moreover, I think the decision in *Rex v. James*, 25 Can. Cr. Cas. 23, 25 D.L.R. 476, 9 A.L.R. 66, 9 W.W.R. 235, went upon the same principle, viz., that the existence of a habit or custom of doing a certain thing might be inferred from the circumstances surrounding the doing and the manner of doing or even of offering to do that thing on a single occasion.
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> This is sufficient to sustain the conviction and the motion should, therefore, be dismissed with costs.
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> It was admitted that though the accused was only a night clerk he came within the definition of a "keeper" given in sec. 228(2) of the Code.

Also, in *Rex v. Clay*[6], Bissonnette J. said at p. 40:

> As a general rule, proof of an isolated act of prostitution cannot suffice to establish the offence of keeping a disorderly house. But if, from circumstances surrounding the evidence of this isolated act, a certainty arises that this house is habitually used for purposes of prostitution, the magistrate is thereupon justified in not requiring direct proof of the bad reputation or delictual character of this house.

It would therefore appear that the element of habitual or frequent use of the place will remain the necessary interpretation of proof despite the amendment of the definition of "common bawdy house" to add the words "resorted to by one or more persons" and in fact that the word "resorted" itself has been relied upon to support the view that such habitual or frequent use of a place is required. (See *Rex v. Davidson, supra*). So in cases where the Crown has failed to prove a habitual or frequent use of a place for the purposes of prostitution, the conviction has not been upheld. In *Rex v. King, supra*, Roach J.A. said at p. 325:

> It was not a place kept or occupied or resorted to by one or more persons for the purposes of prostitution or the practice of acts of indecency. The authorities make it clear that to come within that definition the place must be one that is habitually so kept or resorted to.

I echo the words of Hanrahan P.M., in *Rex v. Martin*[7], when he said:

> It is true convictions have been registered and sustained on appeal on evidence of a single act of prostitution, but always in such cases the

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[6] (1946), 88 C.C.C. 36, 1 C.R. 327.

[7] (1947), 89 C.C.C. 385 at 386.

surrounding circumstances established the premises had been habitually used for such a purpose and in most cases had acquired such a reputation in the community.

As I have said, there was no evidence in the present case of any reputation in the community and there was no evidence of the use of the premises for prostitution on any other occasion than the one which was the subject of this prosecution. There was moreover no evidence upon which the learned magistrate properly could base an inference that the place had been habitually so used.

I would allow the appeal, quash the conviction, and direct a verdict of acquittal.

Appeal allowed, conviction quashed and verdict of acquittal directed.

Counsel for the appellant: John F. Hamilton, Toronto.

Counsel for the respondent: The Attorney-General for Ontario, Toronto.