SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 5 OF 1999

BETWEEN:

DEON SAMPSON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Dennis Bryon	Chief Justice
The Hon. Mr.Albert Redhead	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams for the Appellant
Mr. Haymant Balroop for the Crown

1999: July 20

JUDGMENT

[1] REDHEAD J.A: This appeal was heard and allowed on 20th July, 1999. We now give our reasons in writing.

[2] This appellant was, along with Charlotte Hackshaw, indicted for the rape of one Sherri-Ann Hackswaw. The jury acquitted him of the rape charge but found him guilty of attempting to procure the said sherry-Ann Hackshaw to become a common prostitute and was sentenced to 7 years imprisonment by the judge.

[3] He now appeals to this court against his conviction and sentence.

[4] Three main grounds of appeal were argued on behalf of the appellant.

1. That the conviction under all the circumstances of the case is unsafe and unsatisfactory;
2. That the trial judge erred in law in directing the jury to consider convicting the accused on a charge of procuring or attempting to procure a woman to become a common prostitute and
3. The trial judge did not properly direct the jury as to what is a common prostitute and the meaning of the word procure.

[5] That facts upon which the prosecution relied are that the appellant said on oath that he was accustomed visiting Charlotte Hackshaw and having sex with her for money. On 4th May, 1997 at about 12 midnight after he had left a dance went to Charlotte's home.

[6] He offered her $100.00 to have sex with him. Charlotte told him that was not enough. He gave her $85.00 more. She then informed the appellant that she was not feeling too well but she had a 17 year old daughter who has a boyfriend with whom she has sexual intercourse.

[7] The appellant said Charlotte then left him, went inside of the bedroom , brought out a sheet and spread it on the floor. She then went back into the bedroom, came back out with her daughter who then lay on her back on the sheet.

[8] Sherri Ann Hackshaw told the jury that on the night in question she went to bed at about midnight. Her mother woke her up and told her to follow her. She followed her mother to the sitting room. Her mother then told her to take off her panty. She did so. Her mother then told her to lie down on the sheet on the floor. She did so as well.

[9] Sherri Ann said on oath that she felt someone holding on to her feet. She tried to pull away but could not get herself free. The person then came and lay on top of her and tried to have sex with her. She said she began to cry. Her mother told her to shut up. The person held her hand on the floor and tried to have sexual intercourse with her. She said she had tried to get her hand free and the person pushed her unto the floor.

[10] According to her testimony he forced his penis in her vagina. She then pushed his penis away. He told her to wait because he did not get it in the "hole". Sherri-Anne said on oath he then pushed her hands away and she tried to get her body away from him, but he pushed her back on the floor. He then tried again to put his penis in her vagina. She then slapped him on his jaw and bit him on his nose. She then pushed him off and ran into the bedroom. After she got into the bedroom she looked through a hole by the bedroom the person then lit a match and saw his face. She then realized it was the appellant.

[11] As I have said the appellant on oath admitted that he paid Charlotte $185.00 to have sexual intercourse with her. He also said that he tried to have sex with Sherri-Ann. The Appellant also said:-

> "After I go over Sherri-Ann she was fussing. I told her I ain't got it in yet. After I told her that she bit me on my nose. When she bit me on my nose I then realize she was not agreeing to have sex. I got up from off her and pulled up my pants."

[12] He also testified that after Sherri-Ann went into the bedroom, he lit a match to look for his wallet which had dropped out of his trousers pocket. He then told Charlotte he wanted back his money because he was not satisfied. Charlotte then had sexual intercourse with him for the money.

[13] Dr. Varunny in his testimony before the jury said that on 5th May, 1997 at about 12.30 p.m he examined Sherri-Ann and made the following findings:-

1. Hymen intact but there was hyperemic area on the inner lining of the labia majora especially on the right inner lining.
2. A whitish discharge on the outside of the vaginal wall
3. No complete penetration was done. There was no penetration beyond the hyperemia.

[14] He also said that if there was penetration it did not penetrate the hymen. There had to be some sort of friction otherwise there would not have been an hyperemic area.

[15] Mr. Williams, learned counsel for the appellant argued that the appellant having being indicted under S.123[1] of the Criminal Code for the offence of rape, attempting to procure a woman to become a common prostate is not an alternative offence for which he could be convicted.

[16] Under Section 323 to the schedule dealing with alternative it states:

> "When a person is charged with an offence mentioned in the first column of this table and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence mentioned in the second column of this table, he may be convicted of the latter offence although he was not charged with it"

[17] The appellant was charged with rape which is mentioned in the first schedule but procuring a woman to become a common prostitute was not an offence mentioned in the second column of that offence, rape. Consequently the appellant should not have being convicted of that offence. This the learned Director of Public Prosecutions conceded.

[18] What is more, having regard to the facts of this case, the appellant could not be found guilty of procuring even if he was indicted for that offence because in my opinion he did not procure anyone.

[19] Even if procuring was an alternative count which could have been left to the jury the conviction suffers from two other defects. The trial judge's failure to direct the jury on what in law is a common prostitute.

> "Common prostitute ……. Is not limited so as to mean only one who permits acts of lewdness with all and sundry, or with such as hire her, when such acts are in the nature of ordinary sexual connection. We are of opinion that prosecution is proved if it is shown that a woman offers her body commonly for lewdness for payment in return"
> [Per Darling J. in Rex v De Munch 1918 1KB 635 at 637-638]

[20] There is authority that indulging in one act of prostitution does not satisfy the definition of common prostitute. Secondly the alternative count ought to have been put to the appellant. This was not done [See Criminal Appeal No. 2 of 1995 Antigua Joseph Shane Merchant v. The Queen].

[21] For the forgoing reasons we allowed the appeal. The sentence and conviction were set aside.

A.J. REDHEAD
Justice of Appeal