

IN THE HIGH COURT OF FIJI
AT LAUTOKA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL CASE NO. HAA 61 OF 2017

BETWEEN : TAT SING CHUNG

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Ms. Litia Vateitei for Appellant
Ms. S. Kiran for State

Date of Hearing : 21st November, 2017

Date of Sentence : 12th December, 2017

JUDGMENT

Background

1. This is an appeal filed by the Appellant against conviction. The Appellant was charged in the Magistrates Court at Nadi with one count of keeping a brothel contrary to Section 233 (c) of the Crimes Act, 2009. The particulars of the offence read as follows:

TAT SING CHUNG between the 1st day of September, 2015, and 17th day of March 2016 at Nadi in the Western Division being the owner of Chung's Motel knowingly used it as a brothel.

2. Appellant voluntarily pleaded guilty to the above charge in the presence of his counsel. On 2nd May, 2017, the court convicted Appellant and sentenced him to 5 months' imprisonment.

3. Being aggrieved by the said conviction and sentence, Appellant filed an appeal out of time. Leave to appeal was granted when the Respondent did not object to the appeal. Initially, the Appellant appealed against both conviction and sentence. The Appellant now wishes to proceed only against his conviction because he has already served his term of imprisonment.

4. The Appellant filed the following ground of appeal:

"That the summary of facts that the Appellant pleaded guilty to does not satisfy the elements of the offence brothel".

The Law

Right to Appeal against Conviction Entered Upon a Guilty Plea

5. Section 247 of the Criminal Procedure Act dictates a limitation on right to appeal in cases where a conviction has been recorded on a plea of guilty by the Magistrates Court. Section 247 states:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence".

6. However this limitation is not absolute. In *Niubasaga v State* [2017] FJHC 66; HAA54.2016 (6 February 2017) the Court observed:

"Despite this limitation, it has long been accepted that the section is not an absolute bar to successful appeals. It could be that the facts in evidence do not support the offence admitted to, or that the plea was shown to be equivocal"

7. The Appellant does not say that his plea of guilty was equivocal. His contention is that the facts in evidence (summary of facts) do not support a conviction of the offence he is alleged to have committed.

8. The High Court of Australia in *Meissner v The Queen* [1995] HCA 41; (1995) 184 CLR 132) observed :

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if

convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence." (emphasis added)

Analysis

9. The Section 233 (c) under which the Appellant was charged states:

"A person commits a summary offence if he or she-

(c) being the lessor or landlord of any premises (or the agent of such lessor or landlord) lets the premises or any part of them with the knowledge that the premises are or is to be used as a brothel, or is willfully a party to the continued use of such premises as a brothel.

10. The elements of the offence would be:

- I. The accused
- II. being the lessor or landlord (or the agent of such lessor or landlord)
- III. lets the premises
- IV. with knowledge that the premises are or is to be used as a brothel **or**
- V. is willingly a party to the continued use of such premises as a brothel.

11. The trial court must be satisfied that all the elements of the offence are satisfied by the facts admitted by the accused.

12. In Samy v State (2012) FJCA 3, AAU0019, 2007 Sriskandarajah J emphasized that where the accused person pleads guilty to the charge, the burden is still on the prosecution to satisfy the elements of the offence and they must ensure that all the elements of the offence are mentioned in the summary of facts before the accused pleads to it.

"The burden of proof of the charges, and its ingredients is on the prosecution. The Appellant could have pleaded not guilty and placed the burden on the prosecution to prove the charges and its ingredients."

13. In order to be successful in his appeal, the Appellant must satisfy this court that, upon the facts admitted by the plea, he could not in law have been guilty of the offence.
14. The Counsel for Appellant in her written submission contends that the element that accused -'being a landlord or a lessor' was not satisfied because the summary of facts did not state that accused was the landlord but it only stated that he owned the premises (Chungs Motel). The Counsel further argues that the summary of facts did not mention anything about the element concerning the knowledge on the part of the accused that the premises was being used as a brothel which is the mental component or *mens rea* of the offence.
15. The Prosecution must ensure that all the elements of the offence are set out in the summary of facts. The summary of facts tendered by the Prosecution reads as follows:

"On the 17th day of March, 2016 between 1.30 pm and 7 pm at Chung Motel, Nadi Town A/ASP HEMANT DASS (Comp) 43 years (OCPD/Nadi) of Nadi Police Station led a team and conducted raid at Chungs Motel owned by one TAT SING CHUNG (Accused) 66 years businessman of Sahu Khan Street, Nadi town believing that he was operating the said motel as a brothel.

On the above mentioned date complainant instructed Vishwa Ra (Comp-2) 54 years Police Officer of Nadi Police Station to keep the said motel under surveillance as there were several complaints from the public of the said motel operating as a brothel.

Upon information of (Comp-2), Complainant led a team and raided the said motel and arrested the Accused for operating the said motel as a brothel together with six other occupants.

The Accused was interviewed under caution and he admitted he was operating a motel where he was giving rooms on a short time basis and charging them. He also admitted to operating the said motel as a brothel in Q.45.

He was charged for the offence of Brothel contrary to Section 233 (c) of the Crimes Decree No. 44 of 2009".

16. The Crimes Act 2009 does not define the word 'brothel'. A brothel or bordello is a place where people may come to engage in sexual activity with a prostitute ,

sometimes referred to as a sex worker. Technically, any premises where prostitution commonly takes place qualifies as a brothel. *www.merriam-webster.com* Retrieved 2017-03-02.

17. Section 34 of the UK's sexual Offences Act, is almost identical to Section 233 (c) of the Crimes Act. The Section states:

Landlord letting premises for use as brothel

It is an offence for the lessor or landlord of any premises or his agent to let the whole or part of the premises with the knowledge that it is to be used, in whole or in part, as a brothel, or, where the whole or part of the premises is used as a brothel, to be wilfully a party to that use continuing.

18. Prostitution is the business or practice of engaging in sexual activity in exchange for payment either as money, goods, services, or some other benefit agreed upon by the transacting parties. For the purpose of Sections 51A, 52, 53 and 53A of UK Sexual Offences Act 2003, "prostitute" means a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to A or a third person; and "prostitution" is to be interpreted accordingly.
19. First, I would look at the summary of facts read to the Appellant to see if the second element, namely, 'being the lessor or landlord (or the agent of such lessor or landlord) had been satisfied.
20. In the 1st paragraph of the summary of facts, it is stated that *A/ASP (Complainant) led a team and conducted raid at Chung's Motel owned by one Tat Sing Chung (Accused) 66 years businessman of Sahu Khan Street, Nadi Town believing that he was operating the said motel as a brothel.* In the third paragraph, it is stated that upon information of (Comp 2), Complainant led a team and raided the said motel and arrested the accused for operating the said motel as a brothel together with six other occupants.
21. Then, the last paragraph of the summary of facts, specifically refers to accused's interview under caution and his admission that he was operating a motel where he was giving rooms on a short time basis and charging them and, at question 45, he was operating the motel as a brothel.

22. The questions and answers of the caution interview are not specifically referred to or quoted verbatim in the summary of facts. However, the Appellant had not disputed that he was the owner of the said motel. It has to be accepted that the notion of 'landlord' is similar to or incorporated in the notion of 'ownership'. Therefore, in a context where the Appellant was represented by a legal counsel, it has to be accepted that the second element of the offence was clearly articulated in the summary of facts read to the Appellant.
23. The mental element or *mens rea* of the offence is two fold:
- with knowledge that the premises are or is to be used as a brothel or
 - is willingly a party to the continued use of such premises as a brothel.
24. It appears that if the prosecution can prove that the accused is willingly a party to the continued use of the premises (of which he is the landlord or lessor) as a brothel, it is not imperative to prove the knowledge on the part of the accused for him to be found guilty. However, summary of facts and the caution statement referred therein established that not only he had knowledge but also he was willingly a party to the continued use of his premises as a brothel.
25. The Appellant had admitted in his caution interview that he offers and gives rooms of his motel to girls who come with 'clients' for short periods.

Q 28: What is the price of the room?

A: \$40.00 a night and \$ 20.00 for short time.

Q29: What do you mean by short time?

A: When girls bring clients to have sex, or anytime anyone else wants to use the rooms to have sex with partners.

Q 39: Do you know the girls who bring the clients in your motel?

A: I just know by their faces as they stay in room 6, and 8 and 9.

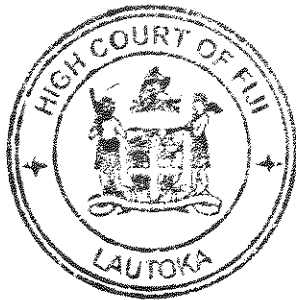
26. Although the summary of facts does not precisely articulate how the motel was being run by the Appellant as a brothel or how he became aware of the fact that his motel was being used as a brothel, later part of the summary of facts refers to his admission where he had admitted that the motel was being run as a brothel.


27. Answer to question 45 where Appellant admitted to operating the said motel as a brothel is specifically referred to in the summary of facts. Question 45 and the answer given by the Appellant read as follows;

Q: It is alleged that you are using the Chung's Motel as a brothel (premises used for the purpose of prostitution) what can you say about it?

A: Yes I am sorry for this, the business is not good now days and to run a motel we need money that's why I give rooms to the prostitutes and gay as they too cannot afford to go other hotels as it is expensive.

28. The admission by the Appellant as referred to in the summary of facts satisfies the elements of the offence although it is not comprehensively stated. The caution statement of the Appellant was tendered in court as part and parcel of the summary of facts in the presence of his counsel. There was no challenge to the caution interview as to its voluntariness or truthfulness. Therefore, it was safe to convict the Appellant on the facts admitted by him which satisfied the elements of the offence although less information was provided.
29. There is no merit for this appeal. Appeal is dismissed. Conviction recorded by the learned Magistrate at Nadi is affirmed.
30. 30 days to appeal




Arund Aluthge
Judge

At Lautoka
12th December, 2017

Solicitors: Legal Aid Commission for Appellant
Office of the Director of Public Prosecution for the Respondent