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CASE REPORT

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Case Facts

The defendant, Ms Barns, worked at a massage parlour that advertised 'intimate massage'. She was arrested after offering to provide services such as a 'bodyslide' to an undercover police officer.¹ A 'bodyslide' was defined as involving

bodily contact between a nude female provider of the service and her nude male client. It did not involve sexual intercourse or masturbation by the female of the male. However it might involve masturbation by the male of himself or ejaculation in consequence of the bodily contact which included, as the term implies, movement of the female body against the male's. The male was apparently restricted, in handling the female, to that part of her body above the waist.²

Ms Newcombe, the receptionist at these premises, was also arrested. The Crown alleged at trial that the practice of a bodyslide constituted a sexual act and thus an act of prostitution, as prostitution was defined in 1995 as a sexual act with another person under an arrangement of a commercial character.³ Consequently both Newcombe and Barns were convicted of offences under s 229I *Criminal Code* (Qld) of being persons found in places reasonably suspected of being used for prostitution.

Appeal

The convictions under s 29I were appealed on three grounds:

- That a bodyslide did not constitute a sexual act within the definition of s 229D;
- That a genuine belief that an act was not a sexual act within the definition of s 229D constituted a reasonable excuse under s229I;
- That the 'two or more prostitutes' under s229I must be reasonably suspected of being present contemporaneously with the defendant.

Section 229D *Criminal Code* (Qld) provides that:

- (1) A person engages in a 'sexual act' if the person --
- (a) allows a sexual act to be done to the person's body; or
 - (b) does a sexual act to the person's own body or the body of another person; or
 - (c) otherwise engages in an act of an indecent nature with another person.
- (2) Subsection (1) --
- (a) applies equally to males and females; and
 - (b) is not limited to sexual intercourse or acts involving physical contact.

It was held by Davies JA and Maccrossan CJ (Pincus JA dissenting) that 'sexual act' was to have its ordinary meaning that was to be inferred from the context and that a sexual act under (1)(a) and (1)(b) did not need to be 'indecent' as an act under s(1)(c) requires.⁴ Pincus JA felt that the definition of 'sexual act' was ambiguous enough that a judicial direction should be given.⁵ However it was unanimously held that a bodyslide constituted a sexual act. For this reason the first ground of appeal failed.

¹ *R v Newcombe and Barns* [1996] 1 Qd R 323 at 325.

² *R v Newcombe and Barns* [1996] 1 Qd R 323 at 326.

³ S 229E *Criminal Code* (Qld). This provision was amended by the *Prostitution Act 1999* (Qld), No 73 of 1999, to define a number of acts which, when provided under a commercial arrangement, constitute prostitution.

⁴ *R v Newcombe and Barns* [1996] 1 Qd R 323 at 326.

⁵ *R v Newcombe and Barns* [1996] 1 Qd R 323 at 325.

Further, s 229I *Criminal Code* (Qld) provides that a person found in a place suspected of being used by two or more prostitutes will have a defence if they have a reasonable excuse for their presence. It was held that this defence of reasonable excuse is related to the degree of involvement in the provision of prostitution. For example, a delivery person having just made a delivery to such a premise, completely uninvolved in the provision of prostitution would have a defence. However a mere belief that the services offered did not amount to prostitution would not constitute a reasonable excuse. Were this the case it would amount to a mistake in law being a defence, in addition to the defences available in Chapter 5 of the *Criminal Code* (Qld).⁶

Lastly, the appellants asserted that the two or more prostitutes must be reasonably suspected to be present contemporaneously with the offender. Davies JA considered that Chapter 22A of the *Criminal Code*, where the prostitution offences are found, is concerned with the course of conduct on premises where prostitution occurs, rather than identifiable acts. Also considered was the natural construction of s 229I, which provides that

A person who, without reasonable excuse, is found in, or leaving after having been in, a place suspected on reasonable grounds of being used for the purposes of prostitution by 2 or more prostitutes commits a crime.

On this basis the last ground of appeal was dismissed,⁷ with Davies JA citing the case of *R v Armstrong*.⁸

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⁶ *Criminal Code* (Qld)

⁷ *R v Newcombe and Barns* [1996] 1 Qd R 323, 328.

⁸ *R v Armstrong* [1996] 1 Qd R 316; see separate case report at www.law.uq.edu.au/humantrafficking