



Summary of Judgment

GUTIERREZ V THE QUEEN

[2018] VSCA 270

25 October 2018

Today, the Court of Appeal (Tate, Beach and McLeish JJA) dismissed an appeal against the conviction of Oscar Gutierrez on one charge of indecent assault and two charges of rape of a woman who was a tenant of a property he managed.

The Court held that the trial judge had not erred in refusing to grant leave to Gutierrez to adduce evidence of the prior conviction of the complainant for the offence of loitering in a public place 'for the purpose of sex work'.

The defence sought to adduce the evidence on the basis that the prior conviction would demonstrate that the complainant had been willing to engage in sexual services for financial gain. It was argued that this was relevant to the defence case that the charged sexual acts were consensual because the complainant had consented to them in order to prevent her eviction by Gutierrez.

The Court held that that the complainant's prior conviction was evidence 'as to the sexual activities ... of the complainant', within the meaning of s 342 of the *Criminal Procedure Act 2009*, because the purpose for which the loitering occurs 'marks' the conduct in a sexual way; the purpose is an essential element of the offence. The purpose provides a sufficient nexus to sexual activity to render the evidence which the defence sought to adduce, evidence *as to* the sexual activities of the complainant.

The evidence of the prior conviction thus required leave before it could be adduced. The Court agreed with the trial judge that the evidence was not substantially relevant to a fact in issue and held that leave was properly refused.

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.