

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

In an application for Special Leave to Appeal under Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended) read with Articles 128 & 154P3(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 154/14

Democratic Socialist Republic of Sri Lanka

SC SPL LA 21/14

**Complainant**

CA Appeal 283/2012

Vs

HC Colombo 4546/2009

Rosemary Judy Perera

**Accused**

**And between**

Rosemary Judy Perera

**Accused-Appellant**

Vs

Democratic Socialist Republic of Sri Lanka

**Complainant-Respondent**

And now between

Rosemary Judy Perera

Accused-Appellant-Appellant

Vs

Democratic Socialist Republic of Sri  
Lanka

Complainant-Respondent-Respondent

**Before:** Buwaneka Aluwihare PC, J.  
L. T. B. Dehideniya J. &  
Preethi Padman Surasena J.

**Counsel:** Rienzie Arsecularatne PC with Chamindri Arsecularatne for  
the Accused-Appellant-Petitioner.

Ayesha Jinasena PC ASG for the Attorney-General.

**Argued on:** 21.03.2019

**Decided on:** 14.12.2020

## JUDGEMENT

Aluwihare PC. J.,

1. The Accused-Appellant-Petitioner (hereinafter referred to as the ‘Accused-Appellant’) was indicted for the offence of ‘procuration’ under Section 360A (1) of the Penal Code (as amended). By judgement dated 9<sup>th</sup> November 2012, the Appellant had been convicted by the High Court and a sentence of 3 years simple imprisonment and a fine of Rs. 25,000/- carrying a default sentence of a further 6 months simple imprisonment was imposed on her. Aggrieved by the said judgement and sentence, the Accused-Appellant appealed to the Court of Appeal. By judgment dated 17<sup>th</sup> January 2014, the Court of Appeal dismissed the appeal and affirmed the conviction and sentence imposed by the High Court. The Accused-Appellant had preferred the present appeal to this Court and was granted Special Leave to Appeal on the following questions of law;

*(a) Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the words “whoever procures or attempts to procure any person to become a prostitute” in Section 360A (1) of the Penal Code mean that the procurement is done to do the work of a prostitute.*

*(b) Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the Prosecution can establish the charge of procuration of Priyangika to become a prostitute under Section 360A(1) of the Penal Code without calling Priyangika as a witness to testify she was not engaging in prostitution or she was not a prostitute at the time of the alleged procuration.*

*(c) Whether their Lordships of the Court of Appeal misdirected themselves in law by failing to consider that in order to prove a charge*

*under Section 360A (1) of the Penal Code it is essential that the said Priyangika in fact engaged in prostitution as a result of the alleged procurement.*

*(d) Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that even a prostitute can be procured to become a prostitute.*

### **The Facts**

2. Acting on an information received, the officers of the Colombo Crime Division [CCD] had arrested the Accused-Appellant, for providing women for sexual intercourse for a payment. She had been arrested together with eight other women in an apartment of the Liberty Plaza Shopping Complex in Kollupitiya. The raid had been carried out by using a decoy who obtained one of the women present there, for sexual intercourse by payment of Rs. 3000/-. Police Constable Douglas, who acted as the decoy and Police Constable Rohana who accompanied him had been allowed admission into the said premises by the Accused-Appellant. Upon the payment of Rs. 3000/- being made to the Accused-Appellant, eight women had been called out from an inner room. The decoy having chosen one of them, the Accused-Appellant had taken the decoy and the woman he had chosen to another room within the apartment down a flight of stairs. After entering the room with the woman [later identified as one Priyangika] and locking the door, PC Douglas had given a call (a “ring cut” as commonly referred to) to the main investigating officer Inspector of Police, Indra Deepal, which was the pre-arranged signal. IP Deepal had then entered the apartment with other officers and arrested the Accused-Appellant, as well as Priyangika, seven other women, and six men who were suspected of having come there for the purpose of obtaining the services of a Prostitute.

### **The Offence of ‘Procuration’ and its Legislative Development**

3. Before I proceed to consider the questions of law on which Special Leave to appeal was granted, it would, in my view, be pertinent to consider at the outset whether the impugned “conduct” of the Accused-Appellant is caught up in the ‘*actus reus*’ contemplated in Section 360A (1) of the Penal Code.
4. The Penal Code (Amendment) Act No. 22 of 1995 sought to update the law on various offences including procuration among other offences such as rape, incest, sexual harassment and trafficking.

### **Pre-amendment, Section 360A**

5. Subsection (4) of Section 360A of the Penal Code [prior to the 1995 amendment] corresponds with subsection (1) of Section 360A introduced by the 1995 Amendment.

The original subsection (4) of Section 360A reads as follows;

*“Any person who- procures or attempts to procure any girl or woman (whether with or without her consent) to become, within or without Sri Lanka a common prostitute;”*

[ Legislative Enactments 1956]

After the 1995 Amendment, subsection (1) to Section 360A reads as follows;

*“Whoever- procures or attempts to procure, any person, whether male or female of whatever age (whether with or without the consent of such person) to become, within or outside Sri Lanka, a prostitute; commits the offence of procuration.”*

6. Thereby the offence of procuration has been made gender neutral, widening the scope of the victims of procuration to include “any person, whether male

or female of whatever age”. Further the term ‘common prostitute’ was replaced with ‘prostitute’. The proviso to Section 360A, requiring corroboration in some material particular, has also been done away with.

7. It is significant to note that Section 360A was not in the original Penal Code, but was added by way of an amendment in 1924 and the Indian Penal Code, which is substantially the same as ours (prior to independence) does not carry a penal provision that corresponds to Section 360A.

#### **Analysis of the Constituent Elements of the Offence of ‘Procuration’**

8. In the instant case, if the evidence of the police officers is to be accepted and acted upon, it is apparent that the Accused-Appellant had offered women [prostitutes] for the purpose of the commission of sexual acts and/or for sexual intercourse, for a fee. Broadly speaking, the issue before this court is, as to whether the said act or acts done by the Accused-Appellant, could be said to be *‘procuring a person to become a prostitute’* as contemplated in Section 360A (1) of the Penal Code. Both the High Court as well as the Court of Appeal has determined that it is so.
9. The issue, as I see it, is bereft of complications; **if it can be said** with certainty that the ‘act of offering women for lewdness [sexual acts or sexual intercourse] in return for a payment’, is subsumed within the meaning of *‘procuring a person to become a prostitute’* then the Accused-Appellant should be guilty as charged. It also must be noted that there is no legislative definition given to the term ‘procuring’ and in the circumstances, the construction that can be given to this legislative provision is a literal one. In the twelfth edition of Maxwell on the Interpretation of Statutes by St. J. Langan [at page 28] it is stated that “ *the most elementary rule of*

*construction is that, it is to be assumed that the words and phrases of technical legislation are used in the technical meaning if they have acquired one, and otherwise in their ordinary meaning.”* In the absence of a ‘technical meaning’, the word ‘procuring’ must be construed in its ordinary meaning.

10. At this point it would be apt to consider provisions in other legislation which have been enacted to solve mischief of a similar kind from which the legislative intent could be gleaned.

11. In this context, Section 9(1) of the Vagrants Ordinance No.4 of 1841 appears to be relevant to appreciate the legislative thinking behind the mischief it intended to address. Archaic one may say, but this legislation is very much a part of the prevailing law.

Section 9(1) of the Ordinance is as follows;

*“Any person who-*

*(a) Knowingly lives wholly or in part on the earnings of prostitution;*

*(b) Systematically procures persons for the purpose of illicit or unnatural intercourse shall be deemed to be an incorrigible rogue within the true intent and meaning of this Ordinance, shall be liable...”*

12. What is clear from the above penal provisions is that the legislature had prohibited two distinct courses of conduct, that is, **one**; making earnings out of prostitution, [in technical terms, a person who lives on the avails of prostitution] and **the other**; procuration of persons for prostitution. If one argues that the former [conduct] is subsumed in the latter, I do not see a reason for the legislature to enact a separate provision in order to prohibit the conduct in paragraph (a) of Section 9(1) of the Ordinance.

13. In the instant case, when one considers the facts presented before the trial court, what is apparent is that the Accused-Appellant had been living on the avails of prostitution by offering women for prostitution, clearly, a conduct prohibited under Section 9(1)(a) of the Vagrants Ordinance and I do not think one could say that she had also violated Section 9(1)(b) of the Ordinance for the reason that the conducts are distinct and carry separate elements.

14. However, what we are now called upon to do is to consider Section 360A(1) of the Penal Code. In the absence of any precedents directly on the issue by our courts, I have considered decisions by courts in other jurisdictions, in particular common law jurisdictions.

15. **The Sexual Offences Act 1956 in the UK**, Section 22(1)(a), makes ‘causing prostitution of women’ an offence.[This section has now been replaced by Section 52 of the Sexual Offences Act 2003, which makes “causing or inciting prostitution for gain” an offence.]

**Section 22; Causing prostitution of women**

- (1) *It is an offence for a person*
  - (a) *to procure a woman to become, in any part of the world, a common prostitute; or*
  - (b).....
  - (c).....
- (2) .....

16. The words highlighted in Section 22 (1) (a) above, occurs in Section 360A (1) of the Penal Code as well and as such any interpretation of the provision would be relevant in deciding the meaning that should be attributed to Section 360A (1).

17. In the case of **R v. Joseph James Broadfoot** (1977) 64 Cr. App. R. 71 where the accused was charged under Section 22 referred to above, Cusack J. was of the opinion that “Procuring” in the said Section *“could perhaps be regarded as bringing about a course of conduct which the girl in question would not have embarked upon spontaneously of her own volition.”* (at page 76). His Lordship, having noted that it is essential that the interpretation of the word [procuration] is a matter of common sense, held that *“this court can see nothing wrong in the judge having suggested to the jury the word “recruited” as being a useful expression to consider in deciding what they [the jury] thought on this particular issue”* (emphasis is mine). Cusack, J. further observed that *“The Act is not aimed at brothel-keepers who give girls an opportunity, if they come in there, of carrying on that trade. It is aimed at people who get girls by some fraud or persuasion.”* (emphasis is mine) Cusack J.’s conclusion was based on Attorney General’s reference (No. 1 of 1975) (1975) 61 Cr. App. R. 118, [1975] Q. B. 773 which stated- though not specifically in relation to the offence of procuration- *“To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening.”* Thus, the legal position would be, where a person becomes a prostitute of that person’s own free will, the question of procuration does not arise.

18. In **Regina v. Morris-Lowe** 1985 1 WLR 29, where the accused was again charged under Section 22(1)(a) of the same Act, the court considered the case of **Broadfoot** (*supra*) in deciding the meaning that should be attached to the word “procure”. It was stated that *“The word “procure” in these particular circumstances may simply mean to persuade...”*. The thinking referred to, fortifies the position that the word ‘procure’ should be given its plain meaning. This, to my mind leads to the interpretation that ‘procure’ as used in Section 360A(1) refers to a situation where a person who was not

previously engaged in prostitution is obtained or persuaded to engage in the profession of prostitution.

19. There is another aspect of the offence [360A(1)] that needs to be focused on. If a person is to be found guilty under this offence, it is also necessary to establish that the procurement must have been done for that person to *“become, within or outside Sri Lanka, a prostitute”*. Thus, the question arises if a person who is already engaged in the profession [of prostitution] is offered to a person seeking the services of a prostitute, as in the instant case, whether that could amount to *procurement* as contemplated in Section 360A(1) of the Penal Code.

20. In this regard, the consideration given to this aspect in the case of **R v. Ubolcharoen (Phanda) and Thonarin (Buppha)** (2008) [2009] EWCA Crim 3263, is worthy of reference. Both Ubolcharoen and Thonarin were charged for several counts under the Sexual Offences Act 2003 [UK] including the count of arranging or facilitating the arrival in the United Kingdom of a person for sexual exploitation and the count of intentionally causing or inciting another person *to become a prostitute* in any part of the world pursuant to Section 57(1) and Section 52 of the said Act.

21. The facts [in Ubolcharoen], albeit, briefly, are as follows; The accused, with the help of Thonarin’s sister Puwi in Singapore, had arranged and facilitated the arrival into the United Kingdom of two women, known as June and Sindy both of whom were of Thai nationality, to work as prostitutes in the United Kingdom and control them as such. Both June and Sindy had been working in massage parlours in Singapore.

22. The Court held that, to make a finding of guilt in respect of the offence, one has to be sure of two things: first, that June and Sindy had *never acted previously anywhere in the world as a prostitute*, even on a single occasion; and secondly, that the *accused knew that June and Sindy had not done so*. Otherwise the Appellants (Accused) could not have caused or incited June and Sindy *“to become prostitutes”*.

23. Taking into account the rationale in the cases referred to above, I shall now address the questions of law on which Special Leave was granted.

#### **The Questions of Law**

24. I find that the questions of law referred to in (a) and (d) are interwoven and as such wish to consider both these questions together.

25. In its judgment the Court of Appeal stated that the *“words in Section 360A(1) of the Penal Code ‘whoever procures or attempts to procure any person to become a prostitute’ mean that the procurement is done to do the work of a prostitute. The words in Section 360A (1) of the Penal Code ‘to become a prostitute’ mean to do the work of a prostitute. Thus, even a woman who had done prostitution can be procured to do the work of a prostitute. Therefore, the contention that a prostitute cannot be procured to become a prostitute fails. For the above reasons, I hold that ‘any person’ in Section 360A (1) of the Penal Code includes even a prostitute.”*

26. Considering the wording of Section 360A(1) of the Penal Code and the decisions referred to above, I am of the view that this reasoning of the Court of Appeal cannot stand when one resorts to a plain reading of the Section as

supported by the definitions of the words ‘prostitute’ and ‘procuration’ as applicable to the context of the Section.

27. As decided in the case of **R v. Ubolcharoen** (*supra*) referred to earlier, a Section 52(1) offence {Sexual Offences Act 2003 [UK]} which is similar to that of Section 360A(1), cannot be committed if the complainant [the person] has already been involved in prostitution, either home or abroad.

28. I am of the view that the same interpretation as above, is applicable in the Sri Lankan context as well. In the Penal Code (Amendment) Act No. 22 of 1995, Section 360A(1) is placed under the heading ‘**Of kidnapping and abduction**’. This classification also supports the meaning which can be derived from a plain reading of Section 360A(1); that the offence of procuration is committed where a person who is not a prostitute is employed anew in prostitution rather than a person who is already a prostitute.

29. It has further been submitted by the learned President’s Counsel for the Accused-Appellant that the words ‘to become’ as interpreted in the case of **Shaw Wallace and Hedges Ltd v. Palmerstone Tea Co. Ltd. And Others** 1982 2 SLR 427 mean a change of condition i.e. entering into a new state or condition and that in the present case “to become” has to be interpreted as a person who is not a prostitute changing their status or condition to become a prostitute.

30. The learned President’s Counsel for the Accused-Appellant cited ‘Archbold Criminal Pleading, Evidence and Practice’ 1997 Edition, pages 1745-1746 “*If a woman is already a common prostitute, she cannot become one and accordingly cannot be procured to become one.*” Albeit regarding the offence

of procuration in terms of minor girls, a similar stance was taken in the Indian case of **Ramesh v. The State of Maharashtra** 1962 AIR 1908, 1963 SCR (3) 396;

*“But where a woman follows the profession of a prostitute, that is, she is accustomed to offer herself promiscuously for money to “customers”, and in following that profession she is encouraged or assisted by someone, no offence under S. 366A [procuration of minor girl] is committed by such person, for it cannot be said that the person who assists a girl accustomed to indulge in promiscuous intercourse for money in carrying on her profession acts with intent or knowledge that she will be forced or seduced to illicit intercourse.”*

31. Thus, from the three judgments cited immediately above, it follows that the offence of procuration cannot be committed with regard to a person who is already a prostitute.

32. Considering the above, I answer both, the question (a) and (d) on which special leave to appeal was granted, in the affirmative.

### **The Question of Law Referred to in Paragraph (b)**

33. The Prosecution did not call Priyangika as a witness. The learned President’s Counsel for the Accused-Appellant argued that the person alleged to have been procured must be called to testify if it is to be established that she was not a prostitute at the time of alleged ‘procuration’ by the Accused-Appellant. It was also contended on behalf of the Accused-Appellant, the fact that Priyangika came and stood in front of the decoy along with the other women indicates that she was already engaged in prostitution at the time the alleged procuration was made. Briefly stated, it was the position of the learned

President's Counsel that the evidence of the 'person procured' is *sine qua non*, to establish a charge of procuration.

34. The learned Additional Solicitor General argued that it is unnecessary to lead the evidence of the victim as the burden on the prosecution can successfully be discharged by leading either direct and/or circumstantial evidence on this point. It has been submitted that the only requirement of the penal provision is to establish that 'a person' had been procured and, in the instant case the procuration of a person has been established by the Prosecution through the evidence of the decoy PC Douglas and the main investigating officer IP Deepal and as such there was no necessity to call Priyangika to testify. The Respondent in their written submissions has pointed out that, if it is mandatory to lead the evidence of the person alleged to have been procured in order to prove the charge, then a charge of procuration can never be preferred under Section 360A(1) where a victim had been sent abroad subsequent to procuration.

35. As I have set out earlier in this judgment, in order to establish the offence of procuration it must be proved that the person procured was not a prostitute before the alleged procuration. The burden is on the prosecution to establish that fact beyond reasonable doubt, the degree of proof required in criminal cases, which is an evidentiary burden. I do not think that one could say that there is a legal burden to establish that fact by placing the testimony of the person procured before the court. This court also appreciates the challenge the prosecution may face in discharging its burden in instances where a person may fairly be said to be living in whole or in part on the earnings of prostitution, that is to say when there is parasitic relationship between the prostitute and the "tout", "the bully", "protector" or "the pimp" as one may

call the other. In the case of **Canada (Attorney General) v. Bedford** (2012) ONCA 186, this aspect [the need for the prostitute to testify] was considered. The court observed *“This question is complicated by s. 212(3) of the Criminal Code, which establishes a rebuttable presumption that a person who lives with, or is habitually in the company of, a prostitute, lives on the avails of prostitution:*

*Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph 1 (j)....”*

36. The court went on to observe that *“This presumption is intended to facilitate the prosecution of pimps without the need for the affected prostitute to testify. This is important because prostitutes are notoriously, and understandably, reluctant to testify against the people who control them.”*
37. In view of these considerations, I do not think that this court should set down a rule that in proving a charge of procuration under Section 360A(1) of the Penal Code, that it is necessary to lead the evidence of the affected prostitute and accordingly I answer the question of law (b), in the negative.

### **The Question of Law Referred to in Paragraph (C)**

38. In the case of **Regina v. Johnson (Gerald)** 1964 2 QB 404 cited on behalf of the Accused-Appellant, it was the opinion of the Court of Criminal Appeal of England, that in order to prove the offence of *procuring a woman to become a common prostitute*, it must be clearly established that she became a prostitute. It was contented by the learned President’s Counsel for Accused-Appellant that accordingly, to establish a charge under Section 360A(1) it

was necessary to prove that Priyangika in fact became a prostitute and that was as a consequence of her being procured by the Accused-Appellant to become a prostitute.

39. It was submitted on behalf of the Accused-Appellant that their Lordships of the Court of Appeal misdirected themselves in law by failing to consider that it is necessary for the prosecution to establish that Priyangika, after procurement, in fact had engaged in prostitution in order to prove the offence under Section 360A(1). The way the case for the prosecution was presented in the instant case, the position taken on behalf of the Accused-Appellant appears to be correct when one considers the words in Section 360A(1) “procures...any person.... to become.....a prostitute.” I say so for the reason that if it can be established that an attempt was made to procure for the same purpose, still the offence is constituted. The court of Appeal, however, had held that even if a prostitute is procured, the offence is established, a conclusion with which I respectfully disagree. For the reasons stated earlier in this judgement, I answer the question of law referred to in paragraph (c) also in the affirmative.

40. Upon an analysis of Section 360A (1), it appears to me that the desire of the legislature had been in safeguarding the public interest in morality than the chastity of the individual. The objective [of the legislature] is to impose penal sanctions, to discourage people from luring or inducing persons who are hitherto not engaged as prostitutes to join the profession of prostitution.

41. For the reasons set out above, I answer the questions of law referred to in paragraphs (a), (c) and (d) in the affirmative and the question of law referred to in paragraph (b) in the negative.

42. In view of my finding above, I set aside the conviction and the sentence imposed on the Accused-Appellant by the High Court and acquit the Accused-Appellant.

*Appeal Allowed.*

Judge of the Supreme Court

JUSTICE L. T. B. DEHIDENIYA

*I agree.*

Judge of the Supreme Court

**P. Padman Surasena J.,**

I had the privilege of reading in draft form, the judgment of His Lordship Buwaneka Aluwihare PC J. I regret my inability to agree with the conclusion and reasoning set out in His Lordship's judgment. I would therefore pronounce my views separately in this judgment.

The Accused-Appellant-Appellant (hereinafter referred to as the "Accused-Appellant") was indicted under S. 360 A (1) of the Penal Code as amended by Act No. 22 of 1995. After the trial, the learned High Court Judge convicted the Accused-Appellant and sentenced her to three years simple imprisonment and also to a fine of Rs. 25,000/= to which a default sentence of six months simple imprisonment was also attached.

Being aggrieved by the said conviction, the Accused-Appellant had appealed to the Court of Appeal. At the conclusion of the argument of the appeal, the Court

of Appeal by its judgment dated 17-01-2014, dismissed the appeal and affirmed the conviction and the sentence imposed on the Accused-Appellant.

The learned President's Counsel who had appeared for the Accused-Appellant had sought to argue in the Court of Appeal that if a woman is already a prostitute she cannot be procured to become a prostitute. Another argument advanced on behalf of the Accused-Appellant was that the prosecution failed to prove the charge as it failed to call Priyangika as a witness to testify. The Court of Appeal rejecting the above contentions has taken the following views in its judgment.

- i. The words "whoever procures or attempts to procure any person to become a prostitute" in Section 360 A of the Penal Code mean that the procurement is done to do the work of a prostitute.
- ii. Thus, even a woman who had done prostitution can be procured to do the work of a prostitute.
- iii. Therefore, the contention that a prostitute cannot be procured to become a prostitute fails.
- iv. 'Any person' in Section 360 A (1) of the Penal Code includes even a prostitute.
- v. Under Section 360 A (1) of the Penal Code, the prosecution should prove that the accused procured or attempted to procure any person to do the work of a prostitute.
- vi. To prove the above, it is not necessary for the prosecution to call the woman who agreed to perform the work of a prostitute. This can even be proved with the evidence of the male person.

Being aggrieved by the judgment of the Court of Appeal, the Accused-Appellant filed an application for special leave to appeal in this Court. This Court, when the said special leave to appeal application was supported, having heard the submissions of the learned Counsel for both parties, by its order dated 04-09-

2014, has granted special leave to appeal in respect of the following questions of law.

- a) *Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the words “whoever procures or attempts to procure any person to become a prostitute” in Section 360A (1) of the Penal Code mean that the procurement is done to the work of a prostitute.*
- b) *Whether their Lordships of the Court of Appeal misdirected themselves in law by holding that the prosecution can establish the charge of procuration of Priyangika to become a prostitute under Section 360 A (1) of the Penal Code without calling Priyangika as a witness to testify she was not engaging in prostitution or she was not a prostitute at the time of the alleged procuration.*
- c) *Whether their Lordships of the Court of Appeal misdirected themselves in law by failing to consider that in order to prove a charge under Section 360 A (1) of the Penal Code it is essential that the prosecution establishes that said Priyangika in fact engaged in prostitution as a result of the alleged procuration.*
- d) *Whether Their Lordships of the Court of Appeal misdirected themselves in law by holding that, even a prostitute can be procured to become a prostitute.*

Before I commence focusing on the above questions of law let me briefly set down below, the facts of the case.

The Accused-Appellant was arrested consequent to a raid organized by Inspector of Police Deepal (hereinafter referred to as ‘IP Deepal’) attached to the Colombo Crimes Division. This was sequel to a receipt of an information.

Police Constable Douglas (hereinafter referred to as ‘PC Douglas’) was arranged to be sent as a decoy, together with Police Constable Rohana (hereinafter referred to as ‘PC Rohana’) to the 11<sup>th</sup> apartment situated in the 8<sup>th</sup> floor of the Liberty Plaza building in Kollupitiya.

Responding to the ringing of the bell (by the two police constables clad in civil clothes) the Accused-Appellant had opened the front door of the said apartment. Upon being briefed regarding the purpose of the visit, the Accused-Appellant had wanted a payment of Rs. 3000/= to supply a woman. As the two Police officers had agreed to the offer, the Accused-Appellant had offered them a seat on the settee in the front hall.

After few minutes, the Accused-Appellant had brought before them, eight females for their selection. PC Douglas then had selected the female with a lean body. The Accused-Appellant had then asked PC Rohana as to whether he too was in need of another female. However, PC Rohana had responded in the negative. Thereafter, PC Douglas had made the payment of Rs. 3000/= to the Accused-Appellant who was then seen depositing the cash received, in a drawer behind the counter.

PC Douglas was then led by the Accused-Appellant into a room on the floor below them through a wooden staircase. After closing the room door, PC Douglas had instructed the female to go to the bathroom and return after cleaning herself. It was during that time PC Douglas, through his mobile phone had passed a signal to IP Deepal who was the team leader of the raid. PC Douglas had then started talking to the female who returned from the bathroom clad in a white towel. This was to spend more time to facilitate the arrival of his team in the room. A few moments later, PC Douglas upon hearing a tapping on the door, had opened the door of the room. IP Deepal, the Accused-Appellant and WPC Liyanage had entered the room. IP Deepal having arrested the Accused-Appellant had also recovered from the drawer behind the counter, the currency notes handed over to the Accused-Appellant by PC Douglas.

Let me now focus on the questions of law a glance through which, would show that the Accused-Appellant has not sought to canvass the facts of this case. This is because the said questions only revolve around the ingredients of the offence, which the prosecution is obliged to prove. Thus, for the purpose of this

judgment, it would suffice to state that the evidence adduced in this case, has established that the Accused-Appellant, on the request of PC Douglas (the decoy), had made available a female (“Priyangika”) to engage in sexual activities with PC Douglas for a payment of Rs. 3000/=.

As all questions of law are centred around the interpretation of section 360 A (1) of the Penal Code as amended, it would be convenient at the outset, to reproduce the said section as amended.

360 A.

*Whoever-*

*1) Procures, or attempts to procure, any person, whether male or female of whatever age (whether with or without the consent of such person) to become, within or outside Sri Lanka, a prostitute;*

*2) .....*;

*3) .....*;

*4) .....*;

*5) .....*;

*6) .....*,

*commits the offence of procuration and shall on conviction be punished with imprisonment of either description for a term of not less than two years and not exceeding ten years and may also be punished with a fine.”*

In interpreting the above section for the purposes of the instant judgment, it would be opportune first to ascertain the meaning of the words “*procure*” and “*prostitute*” as they are the key words in the section. In addition, I also have to advert to the question as to what is meant by “to become” in the section.

Black’s Law Dictionary (11<sup>th</sup> Edition) defines those two words in the following manner.

***Procure.*** *1. To obtain (something), especially by special effort or means. 2. To achieve or bring about (a result). 3. To obtain a sexual partner for another, especially an unlawful partner such as a minor or a prostitute.*

*Prostitute. Someone who engages in sexual acts in exchange for money or anything else of value. – Also termed sex worker.*

When I consider the facts of the instant case in the light of the above definitions I have no doubt that the Accused-Appellant, on the request of PC Douglas (the decoy), had procured a female (“Priyangika”).

The purpose of the said procurement of said female (“Priyangika”) is for PC Douglas to engage in sexual activities with her. It is also clear that PC Douglas had already paid Rs. 3000/= for this purpose. This clearly means that said female (“Priyangika”) became a prostitute for PC Douglas for that time.

In my view, “to become, within or outside Sri Lanka, a prostitute” cannot necessarily refer to a person who was not engaging in prostitution (or she was not a prostitute) at the time of the procurement referred to in the section. Such an interpretation would amount to a substitution of the words “any person who was not engaging in prostitution before” in place of the words “any person” in the section. In my view that it is not the plain meaning of the section.

Moreover, as per the plain meaning of the section, it is clear that the intention of Parliament is to prohibit persons being procured for the purpose of becoming an unlawful sexual partner for another. (i.e. to become a prostitute for the latter). It does not refer to a period of time during which such former person must remain as a prostitute. What matters is that the person must be procured to do the work of a prostitute. Moreover, the section does not qualify the term “any person” but merely states, “*Procures, or attempts to procure, any person,<sup>1</sup>*”. Therefore, there is no justification to exclude persons who are already engaging in prostitution from the meaning of the words “*any person*” in section 360 A (1) of the Penal Code. Thus, the question whether that person was engaging in prostitution before, does not become relevant. For the above reasons, I am of the view that even a prostitute can be procured to become a prostitute within the

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<sup>1</sup> Emphasis is mine.

meaning of section 360 A (1) of the Penal Code. Therefore, I answer the questions of law set out in paragraphs (a), (b) and (d) in the negative.

What remains for me to consider is the question of law set out in paragraph (c). Section 134 of the Evidence Ordinance states that no particular number of witnesses shall in any case be required for the proof of any fact. Section 3 of the Evidence Ordinance defines the term ‘proved’ in the following manner.

*“A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”*

Thus, the fact that the Accused-Appellant, had procured a female (“Priyangika”) to become a prostitute for PC Douglas, is proved when, the court after considering the matters before it, either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that it exists. One must bear in mind that the charge has focused on the procurement of a prostitute and not on engaging in prostitution as such.

Therefore, I am of the view that it is not essential that the prosecution establishes that said Priyangika in fact engaged in prostitution as a result of the alleged procurement in order to prove a charge under section 360 A (1) of the Penal Code. What must be proved by the prosecution under Section 360 A (1) of the Penal Code is that the accused procured or attempted to procure any person to do the work of a prostitute. Once such procurement is done, the commission of the offence is completed.

In the light of the above, I proceed to answer the question of law set out in paragraph (c) also in the negative.

For the foregoing reasons, I proceed to affirm the judgment of the Court of Appeal dated 17<sup>th</sup> January 2014.

Before I conclude, I would briefly state here the grounds, which led me to refrain from agreeing with the conclusion and reasoning, set out in the judgment of His Lordship Justice Aluwihare PC.

His Lordship Justice Aluwihare PC, has relied on the judgment in the case of Shaw Wallace and Hedges Ltd Vs. Palmerston Tea Co. Ltd and Others <sup>2</sup> in interpreting the words ‘to become’ in section 360 A (1) of the Penal Code. It is section 42(B)(5)(a) of the Land Reform Law which was to be interpreted in that case. It reads thus:-

*“42(B)(5)(a) Subject to the provisions of paragraph (b), where any estate land is vested in the Commission, the rights and liabilities of the former owner of such estate land under any contract or agreement, express or implied, which relates to the purposes of such estate land and which subsist on the day immediately prior to the date of such vesting, and the other rights and liabilities of such owner which relate to the running of such estate land and which subsist on such day, **shall become**<sup>3</sup> the rights and liabilities of the Commission; and the amounts required to discharge all such liabilities shall be deducted from the amount of compensation payable in respect of such estate land.”*

At the outset, it must be noted that the above section refers to the transition of the rights and liabilities of the former owners of the estates vested in the Land Reform Commission by operation of law. Thus, one must bear in mind that the ‘change of condition’ referred to in that case is a change that enters into a new state or condition which implies a sense of permanency in the said change.

However, the question arises as to whether it is possible for a human being to change permanently entering into a new state or condition. For example, a prostitute as a person will not be engaging in prostitution while engaging in its personal matters (such as, attending to domestic work, children and family matters, shopping in a supermarket, visiting parents etc). Furthermore, a prostitute

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<sup>2</sup> 1982 2 SLR 427.

<sup>3</sup> Emphasis is mine.

can also engage in prostitution intermittently leaving longer durations of time in between. It is possible for a person to engage in prostitution only once or twice during that person's lifetime. Such an engagement could occur due to a sudden but short-lived urgent financial need. As a prostitute will engage in prostitution only when there is money exchanged for that specific service,<sup>4</sup> becoming a prostitute cannot presuppose becoming a prostitute for ever.

Thus, it stands to reason to conclude that the words 'to become' in section S. 360 A (1) of the Penal Code is a reference only to the specific moments of one's engagements in the acts of prostitution. Therefore, in my view, there is no justification to adopt the interpretation given to section 42(B)(5)(a) of the Land Reform Law in the above case to interpret the words 'to become' in section S. 360 A (1) of the Penal Code.

His Lordship Justice Aluwihare PC, in presenting his view, has also placed much reliance on the judgments of Courts in UK. This could be seen particularly from paragraphs 15, 16 and 17 of His Lordship's judgment.

The genesis of the phrase "*The Act is not aimed at brothel-keepers who give girls an opportunity, if they come in there, of carrying on that trade. It is aimed at people who get girls by some fraud or persuasion*" referred to by His Lordship Justice Aluwihare PC, could be traced back to the judgment in Rex v. Christian and Another.<sup>5</sup> It is a case where the Defendant in that case had been indicted under section 2 of the Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69). The said section is as follows.

*"2. Any person who-*

*1. Procures or attempts to procure any girl or woman under 21 years of age, not being a common prostitute, or of known immoral character,<sup>6</sup> to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or*

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<sup>4</sup> As per Black's Law Dictionary (11<sup>th</sup> Edition) definition of "Prostitute".

<sup>5</sup> (1913) 23 Cox C.C. 541.

<sup>6</sup> Emphasis is mine.

2. *Procures or attempts to procure, any woman or girl to become, either within or without the Queen's dominion, a **common**<sup>7</sup> prostitute; or ...*".

This is a case, which was heard in the Central Criminal Court in 1913. It was in the course of interpreting the above section that the following remarks were made by Bosanquet, common sergeant.

*"..... The girl wanted no procuring at all. It must, be real procurement. No one could have sat in this Court so long as I have without knowing that there are girls who do not want procuring at all. There is no need to stretch this statute; if you have got facts to meet it, well and good. This girl says she went of her own free will. The Act is not aimed at brothel-keepers who give girls an opportunity, if they come in there, of carrying on that trade. It is aimed at people who get girls by some fraud or persuasion, or by inviting them to it if they cannot get money in any other way—turning them on to the streets. It would be absurd to stretch this Act to meet the case described by the girl herself. ...."*

The above phrase may hold true as regards several provisions of that Act.<sup>8</sup> Section 2(1) is one such provision, which deals with a procurement of *"any girl or woman under 21 years of age, not being a common prostitute, or of known immoral character"*. It can also be seen that separate and distinct offences are defined for the situations where procuring is done by threat, fraud or administering drugs. Section 3 of the said Act defines one such offence. It is as follows.

### Section 3

*"Any person who-*

- 1) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion either within or without the Queen's dominions; or*

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<sup>7</sup> Emphasis is mine.

<sup>8</sup> Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69).

2) *By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or*

3) *Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.*

*Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused."*

However, it is significant that section 2(2) of the Act has deliberately omitted any such qualification to the phrases "*any woman or girl*" or "*Procures*" found in that section. Thus, one should not interpret section 2(2) in the same way as section 2(1) or 3 of the above Act. This is because of the deliberate omission of any phrase such as "*any girl or woman under 21 years of age, not being a common prostitute, or of known immoral character*" in section 2(2) and the presence of only the word "*procures*" without any descriptions thereto, as in section 3 of that Act. Therefore, in my view the mischief section 2(1) is attempting to remedy is not the same mischief that is sought to be remedied by section 2(2) or 3 of the above Act.<sup>9</sup> Thus, in my view the remarks of Bosanquet, common serjeant which is a common reference to the above Act as a whole, cannot be adopted to interpret the provision in section 360A (1) of the Penal Code of Sri Lanka.

As stated by His Lordship Justice Aluwihare PC in paragraph 17 of his judgment, section 22 of the Sexual Offences Act 1956 in the United Kingdom states;

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<sup>9</sup> Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69).

Section 22

1) *It is an offence for a person*

a) *to procure a woman to become, in any part of the world, a **common prostitute**;<sup>10</sup> or*

b) *.....*

c) *.....*

Section 22 (1) (a) of the Sexual Offences Act of 1956 in the United Kingdom is more or less the same as section 2(2) of the Criminal Law Amendment Act 1885 (48 and 49 Vict. C 69). Thus, for the same reasons mentioned above, in my view, the remarks of Bosanquet, common serjeant in Rex v. Christian and Another,<sup>11</sup> is also not applicable to interpret the provision in section 22 (1) (a) of the Sexual Offences Act of 1956 in the United Kingdom.

As observed by His Lordship Justice Aluwihare PC in paragraph 5 and 6 of his judgment, the term “common prostitute” in section 360 A (4) of the Penal Code in its original form has been deliberately dropped by the Sri Lankan legislature.

The above facts indicate that the mischief that is sought to be remedied by section 360A (1) of the Penal Code of Sri Lanka is not exactly those of the United Kingdom referred to above. This is further clear from the phrase “*whether with or without the consent of such person*” in section 360 A (1) of the Penal Code as amended.

Further, it is the duty of our Courts to suppress the mischief the section 360A (1) of the Penal Code of Sri Lanka is aimed at and advance the remedy.

In Sri Lanka, section 2 of the Brothels Ordinance No. 5 of 1889 states that any person who keeps or manages or acts or assists in the management of a brothel to be committing an offence. Indeed the Brothels Ordinance No. 5 of 1889 states at its very commencement that it is an ordinance to provide for the suppression of

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<sup>10</sup> Emphasis is mine.

<sup>11</sup> (1913) 23 Cox C.C. 541.

brothels. Thus, whatever may be the legal status in England and Wales, the procurement of sexual services is certainly illegal in this country.

Therefore, in my view we should not place undue reliance on the interpretation provided by UK Courts to section 22 of the Sexual Offences Act of 1956 of the United Kingdom in interpreting section 360 A (1) of the Penal Code of Sri Lanka, the deep rooted culture of which is different from that of the United Kingdom. For those reasons, I respectfully beg to disagree with the views expressed by His Lordship Justice Buwaneka Aluwihare PC.

**JUDGE OF THE SUPREME COURT**