

SUPREME COURT OF QUEENSLAND

CITATION: *R v F; ex parte A-G (Qld)* [2003] QCA 70

PARTIES: **R**
v
F
(respondent)
EX PARTE ATTORNEY-GENERAL OF QUEENSLAND
(appellant)

FILE NO/S: CA No 284 of 2002
DC No 590 of 2001

DIVISION: Court of Appeal

PROCEEDING: Reference under s 669A(1A) *Criminal Code*

ORIGINATING COURT: District Court at Beenleigh

DELIVERED ON: 28 February 2003

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2003

JUDGES: Davies and Williams JJA and Cullinane J
Separate reasons for judgment of each member of the Court;
Davies and Williams JJA concurring as to the orders made,
Cullinane J dissenting

ORDERS: **1. Appeal allowed**
2. Order granting a permanent stay set aside

CATCHWORDS: CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – MENS REA – STATUTORY OFFENCES – EFFECT OF PARTICULAR WORDS – OTHER WORDS – where respondent charged with kidnapping along with another offender – where other offender sexually assaulted complainant – where permanent stay ordered due to ambiguity in s 354(2) *Criminal Code* in relation to meaning of “procure” – whether facts relied on by prosecution capable of supporting a conviction

Criminal Code 1899 (Qld), s 217, s 417, s 354(2)

Attorney-General’s Reference (No 1 of 1975) [1975] QB 773, considered

Deutsch v The Queen [1986] 2 SCR 2, considered

Gough v Rees (1929) 46 TLR 103, considered

In re Royal Victoria Pavilion (Ramsgate) [1961] Ch 581, considered

Re Broadfoot (1976) 64 CrAppR 71, considered

COUNSEL: R G Martin for the appellant
S J Hamlyn-Harris for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

- [1] **DAVIES JA:** I agree with the order proposed by Williams JA. The central question in this appeal is whether the word "procure" in s 354(2) of the *Criminal Code* means merely "enable" or "facilitate" or, on the other hand, "compel" or "induce". The provision is in the following terms:
- "A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person."
- [2] In my opinion in the above context the word "procure" means no more than "enable" or "facilitate". Once that conclusion is reached it follows that, on the facts stated by Williams JA which I adopt, a conviction could be sustained because those facts could establish that the respondent took part in forcibly detaining the complainant with intent to enable A, his co-accused, to sexually assault her. The following are my reasons for that conclusion.
- [3] The word "procure" is a plain English word. It is not a term of art. However its meaning may change depending on the context in which it is used. In particular the degree of proximity between procurement and what is procured may vary depending on the context in which the word is used. This may be illustrated by a useful comparison.
- [4] Compare the phrase in s 354(2) "procure anything ... to be done by any person" with a phrase such as "procure any person to do an act". In the first of these what is procured is a result (something done); in the second a person is procured to do something.
- [5] It may reasonably be thought that a person can be procured to do an act only by compelling or inducing that person to do that act. On the other hand an event may be procured in a number of ways. And where that event is the doing of an act of another person who is already willing to do it, the event may be procured by enabling that willing person to do that act.
- [6] *R v Broadfoot*¹ and *Deutsch v The Queen*,² referred to by Cullinane J, whose reasons I have had the advantage of reading, are cases in which the offence involved procuring a person to do an act. They are also cases in which procurement or attempted procurement was the act constituting the offence rather than, as in this case, merely an element of the intention with which the act is performed. They are therefore of no assistance in the present context.

¹ (1976) 64 CrAppR 71.

² [1986] 2 SCR 2.

- [7] It is also useful for this purpose to look at the history of s 354. In the explanatory note to the Act introducing s 354 in its present form³ it is said that:
 "Clause 25 repeals section 351 (Abduction). Instead, the conduct has been incorporated into the offence of kidnapping (section 354) ...
 ...
 Clause 27 replaces the offence of kidnapping, so that it now includes the conduct previously contained in section 351 (see clause 25) ...
 ... "
- I think it is self-evident, in any event, that s 354 was intended to cover at least the ground covered by the previous s 351 and s 354.
- [8] The former s 351 relevantly provided:
 "(1) Any person who -
 (a) with intent ... to cause (a woman) to be married or carnally known by any other person, takes her away, or detains her, against her will; ...
 ...
 is guilty of a crime, and is liable to imprisonment for 7 years.
 ... "
- [9] It can be seen that the relevant word here is "cause" rather than "procure" but the former word is, in my opinion, equally flexible in terms of proximity, depending on its context, as is the latter. Otherwise the phrase is materially similar; the intention is to cause an event, the marriage or carnal knowledge of the complainant rather than to cause a person to do any particular act.
- [10] It would seem to me inconceivable that that section could have operated, to take the alternative of marriage, only where the person who took or detained the complainant against her will did so with the intention of compelling or inducing another person to marry the complainant; but not where that other person had already expressed an intention of marrying the complainant if she were taken or detained and the accused took or detained her with the intention and for the purpose of enabling or facilitating that. I can see no reason why "procure" in s 354 should be given a narrower meaning than "cause" in the former s 351.
- [11] For reasons which I think are now self-evident, I do not think it useful to see how "procure" has been construed elsewhere in different statutory contexts. For the reasons which I have given, I think that s 354(2) contains no ambiguity and that "procure" in that section means "enable" or "facilitate". I agree with Williams JA that it is unnecessary to consider whether, in that event, what is alleged here comes within the phrase "intent to gain anything from any person" within the meaning of that section.
- [12] **WILLIAMS JA:** The *Criminal Code* was amended by Act 43 of 2000 which came into operation on 27 October 2000. It repealed s 354 which created the offence of kidnapping; that offence was limited to the situation where a person was forcibly taken or detained with intent to compel that person to work for either the kidnapper or some other person against the detained person's will. That Act also repealed s 351 which created the offence of abduction; as defined that offence relevantly covered the situation where a female was detained against her will with intent on the

³ Explanatory Notes to the Criminal Law Amendment Bill 2000, p 9 to p 10.

part of the person detaining her either to marry her or carnally know her or to cause some other person to marry her or carnally know her. Those repealed provisions were replaced by a new s 354 which, according to the Explanatory Notes, was designed to include in the one general provision all that had previously been encompassed by the old ss 354 and 351. Indeed the intention appears to have been to extend the reach of the law so that it caught factual situations beyond the range of the original provisions.

[13] Section 354 now provides as follows:

“Kidnapping

- (1) Any person who kidnaps another person is guilty of a crime.
Maximum penalty – seven years imprisonment
- (2) A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person.”

[14] It should be noted in passing that s 354A of the Code creates the offence of kidnapping for ransom which carries as the maximum penalty in certain circumstances imprisonment for 14 years. It appears clear that the elements of the offence of kidnapping for ransom would be caught by the wording of s 354 but that is of no concern for present purposes.

[15] An indictment was presented against F (“the accused”) charging him with a number of offences relating to a young woman named J. Count one alleged an offence against s 354. On a hearing pursuant to s 592A of the Code counsel for the accused contended that the facts relied on by the prosecution could not support a conviction for kidnapping. The learned District Court judge concluded there was “a serious ambiguity” in the section and it should be read down in favour of the accused. In consequence he upheld the submission of counsel for the accused that there should be a permanent stay of the kidnapping charge. From that decision the Attorney-General has appealed to this court pursuant to s 669A(1A) of the Code.

[16] To resolve the issues raised by the appeal it is necessary to refer to the facts relied on by the prosecution. Ultimately the question is whether or not those facts could sustain a conviction under s 354. Statements by both J and the accused are before the court; though there are some differences in detail a clear picture is common to both.

[17] J was a 19 year old single woman who had been in a relationship with a man named A for about two years prior to 13 February 2001. She left the place where they had been residing and that effectively ended the relationship. Thereafter until about 5 March 2001 A regularly contacted J to the extent that she made arrangements to make a formal complaint to the police about his conduct. The accused was a friend of A’s and J had known him for about a year prior to the events in question. A few days prior to the events in question A said to F: “I want to kill and rape J”. Also a few days before the events in question A said to F: “We’ll kidnap her, take her down the Coast to the Spit, rape her, book into a motel and do a couple of armed robberies on the Gold Coast. I’ll kill her, cut her up and put her in the current at the Spit because that will take the remains out to sea. ... Let’s go and get some zippy ties to go and tie her up”. The two men then drove to a hardware store; the accused stayed in the car whilst A purchased some zippy ties. It is not necessary to set out

further details of conversations between the two males, or of steps taken to obtain other items to facilitate the kidnapping of J.

- [18] On the afternoon of 5 March the two males were driving in A's car when they saw J in the company of another young man. A stopped the car, grabbed a baseball bat which was in the car, and ran to confront J and the young man. The young man ran off. A restrained J by placing his arm about her shoulder and neck. A punched J twice in the face with a closed fist in the accused's presence. At about that time A said to the accused: "Make sure she doesn't go anywhere. I'm going to get the car. ..." According to J the accused held her by keeping his arms wrapped around her. A returned and punched her approximately three times to the head. Both men then pushed her into the car.
- [19] Again it is not necessary to detail all that occurred shortly thereafter. A did produce a gun which caused J to be frightened of what was going to happen to her. After some time J was again forced into the motor vehicle and her wrists were tied with what she described as some thin rope before the vehicle drove off. A was driving. The accused was in the back seat of the vehicle with J. Ultimately after driving for a considerable time the vehicle stopped at a remote location. F got out of the car and A got into the back with J. She made an attempt to escape but was caught. It is not necessary to recount in detail conversation between A and J. The males smoked some cannabis and ultimately, after repeated requests, J's wrists were untied. She also smoked some marijuana.
- [20] After another interval of time A and J were alone in the backseat of the car. A began touching J's breasts and she struggled and screamed. That resulted in A tying her wrists together again. He then called on the accused to hold her legs, and while that was done A pulled down J's shorts and underpants. The accused assisted. A then fondled J's breasts and vagina. Ultimately he inserted a finger into her vagina. Throughout that time J was struggling. Her resistance was limited because of the way her wrists were tied. In the course of that episode the accused also touched J on the breast. A persisted in further assaulting J, but then desisted.
- [21] After J was dressed the car drove off. That driving continued for some time. J asked to be taken back to her mother's home but that request was denied. After some time the vehicle again stopped in a remote locality. J's hands were still tied. A said that he would have to leave her at that location for some three hours; she was crying uncontrollably. The men allowed her request that she ring her mother on her mobile phone and let her know she was all right. Her hands were still tied and she was screaming out requests for them to get the ropes off her. A said he would only take the ropes if she agreed not to tell anyone what had happened. She purported to agree with A's demands so her wrists were untied.
- [22] The ordeal did not end there, but it is not necessary to recount further details for present purposes. Suffice it to say the episode ended back at A's residence about 6 am on 6 March with police intervention. The accused was present throughout the whole episode.
- [23] Before the hearing in the District Court the prosecution was asked to provide particulars of the element of intent for purposes of s 354 so far as the accused was concerned. The written response was relevantly as follows:

“There is clearly knowledge of his co-accused’s intent to kidnap the complainant, and by being involved in that kidnapping, and the subsequent offences, your client is a party to those offences. The intent referred to in s 354(2) is not limited to an intent for your client to gain anything personally, only for his intent to be that something is gained from any person, or to procure anything to be done”.

- [24] Before the judge the prosecution particularised the intent as “the intention of procuring the sexual assault by the co-offender on the complainant”.
- [25] The learned District Court judge did not expand on his reasons for concluding that there was a “serious ambiguity” in s 354. However it is clear from observations he made in the course of submissions by counsel that his real concern was that the words “procure anything to be done or omitted to be done by any person” did not clearly catch the conduct of the accused.
- [26] In this court counsel for the Attorney-General, whilst not abandoning particulars of the relevant intention relied on in the District Court, also contended that it could be said that “the intention was to gain sexual gratification from the complainant”, or that “the intention was to procure A to have sexual contact with the complainant”.
- [27] It seems to me that, given the facts of this case, the critical words of the section are: “... with intent ... to procure anything to be done ... by any person.” There is clearly a prima facie case that the accused and A forcibly took J from a street near her residence and detained her against her will for some 12 hours. The real question is whether or not the facts establish a prima facie case that the accused had an intent which would bring the case against him within s 354. The strongest case for the prosecution is that the accused’s intent was that the detaining of J would enable A to sexually assault her. That clearly would be something done to J by a person. The real issue is whether the facts establish that there was an intent to “procure” that to be done.
- [28] The term “procure” is found on a number of occasions throughout the Code, but it does not appear to have any uniform legal meaning. It is first found in s 7, the provision defining who is a principal offender. Any person who “procures” any other person to commit an offence may be charged with actually committing it. To my mind the term “procure” in s 354 is used in the same way, and with the same meaning. I will return to that meaning in a moment.
- [29] Section 217 of the Code creates the offence of procuring a person to engage in carnal knowledge. For purposes of that section the term “procure” is defined as meaning “knowingly entice or recruit for the purposes of sexual exploitation”. That definition cannot strictly apply to the use of the term in s 354 but, in my view, it is significant to observe that the words “entice or recruit” fundamentally involve the notion of bringing about or causing the particular result – for s 217 that result being sexual exploitation.
- [30] Section 417 of the Code is headed “Procuring Execution of Deed by Threats”, but neither the term “procure” nor one of its derivatives is used in the section itself. Relevantly the section is in the following terms:
 “Any person who, with intent to defraud, and by means of any unlawful violence to, or restraint of, the person of another, or by means of any threat of violence or restraint to be used to the person

of another, ... compels or induces any person ... to execute ... any valuable security ... is guilty of a crime”.

- [31] The critical words there are “compels or induces” and again those words connote some causal connection between the conduct directed towards the person and the act in question of that person. It is those words which justify the use of the term “procuring” in the description of the offence.
- [32] A consideration of ss 217 and 417 strongly suggests that procuring means bringing about or causing the relevant result.
- [33] The New Shorter Oxford English Dictionary gives a number of meanings for “procure”; relevantly it gives the following definitions: “bring about ... cause to be done ... prevail on or persuade ... try to induce.”
- [34] There is not a lot of authority on the meaning of the term “procure” in the criminal law. It was specifically considered by the Court of Appeal in *Attorney-General’s Reference (No 1 of 1975)* [1975] QB 773. The facts of the case are not relevant for present purposes. Lord Widgery CJ (with whom Bristow and May JJ agreed) said at 779-80:

“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. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two

You cannot procure an offence unless there is a causal link between what you do and the commission of the offence

Giving the words their ordinary meaning in English, and asking oneself whether in those circumstances the offence has been procured, we are in no doubt that the answer is that it has. It has been procured because, unknown to the driver and without his collaboration, he has been put in a position in which in fact he has committed an offence which he never would have committed otherwise”.

- [35] That reasoning was applied by the Court of Criminal Appeal (Shaw LJ, Cusack and Slynn JJ) in *Broadfoot* (1976) 64 CrAppR 71. Relevantly the court said at 74: “His first complaint is that the learned judge told the jury that the word “procure” was really equivalent to the word “recruit”. Let it be said at an early stage that the word “procure” in the statute is not a term of art. It is a word in common usage and a word which a jury is well able to understand. Each case in which it is alleged that there has been a procurement or attempted procurement must be related to the facts of that particular case. It is essential for a jury to make up their minds, when they have heard the evidence and decided what to accept, whether what they do accept does amount to “procuring”.

Counsel has quoted to the Court several decisions dealing with the interpretation of the word “procure” in cases involving quite

different facts. The Court does not find those references, though no doubt attention has properly been drawn to them, particularly helpful in this case; nor indeed do the dictionary definitions of the word have much bearing upon what has to be decided.

Perhaps a useful guide is to be found in *Attorney-General's Reference (No 1 of 1975)* ...

There is another expression which can be used as guidance in determining what should be decided on particular facts. During the course of argument in this Court, Shaw LJ suggested that “procuring” 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.

It is essential ... that the interpretation of the word is a matter of common sense for the jury concerned, and 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 thought on this particular issue”.

- [36] It is interesting to note that the term “recruited” referred to in *Broadfoot* is the word used in s 217 of the Code. I also mention that the reasoning of Lord Widgery was cited with approval by Bowen CJ, Lockhart and Beaumont JJ in *Yorke v Lucas* (1983) 49 ALR 672 at 681.
- [37] Those cases to my mind indicate the relevant considerations here. In the context of this case it would be open to a jury to conclude that an intent to bring about, cause, or facilitate an assault by A on J was a sufficient intent to constitute the offence defined in s 354.
- [38] As used in ss 7, 217 and 417 of the Code, and in cases such as *Attorney-General's Reference* and *Broadfoot*, the term procure is used in the context of procuring a person to do something. In that context it may often be relevant, at least from an evidentiary perspective, that the person would not have done the act “spontaneously of her own volition” to use the language quoted above from *Broadfoot*. That may particularly be so for s 217 of the Code given the statutory definition, but that need not be answered authoritatively now.
- [39] However it seems that such a qualification is not universal. In *Gough v Rees* (1929) 46 TLR 103 the proprietor of a bus was charged with counselling and procuring the conductor, his employee, to commit the offence of allowing more than a specified number of passengers to be on board the bus. Lord Hewart CJ, with the concurrence of Swift and Branson JJ, said (105):
- “... it is said that a man cannot counsel or procure unless he knows and intends what is to be done ... In form that statement is correct. But it is clear that the appellant knew what would happen unless he took precautions. He took no precautions and was rightly held responsible for the consequences. That which he did and that which he omitted to do seem to me as much a counselling and procuring as if he had called the conductor and instructed him to overload to his utmost capacity and best opportunity”.

That strongly suggests initial unwillingness of the person to do the act intended to be procured is not always an essential element of procuring.

- [40] Section 354 speaks not of procuring a person to do something, but of procuring an act to be done by someone. If the essence of the offence is the doing of an act, ensuring that an act is done, it is difficult to see why whether or not the person procured to do the act was initially willing to do it was a relevant consideration. *Yorke v Lucas* was a case concerned with contravention of a provision of the *Trade Practices Act 1974* (Cth). Section 75B of the Act included in the phrase “a person involved in a contravention” any person who “aided, abetted, counselled or procured the contravention”. There, as with s 354, the procurement was of an act. As already noted the court considered Lord Widgery’s formulation of the test for procurement was apposite.
- [41] Some assistance can be gleaned from the discussion of Pennycuik J in *In re Royal Victoria Pavilion, Ramsgate* [1961] Ch 581. There on the sale of a number of properties, mainly theatres, the vendor covenanted with the purchaser to “procure that until ... [a certain date] ... the premises known as ... shall not (a) be open to the public between ... [certain dates] ... except for entertainment by living actors ... and ... any entertainment by means of cinematography ... shall be deemed to be specifically precluded”. Subsequently the plaintiff purchased the subject premises from the vendor and the question for the court was whether he was bound by the covenant given by the vendor to the purchaser of the other properties. At 587 the following was said:
- “The word “procure” is defined in the Oxford English Dictionary ... as meaning; “obtain by care or effort”, and can be more simply paraphrased as “see to it”. The obligation undertaken by ... is to see to it that a certain state of affairs prevails during the specified term”.
- [42] Again that was a case of procuring an act, namely the continuance of certain state of affairs, and the context demonstrates, as acknowledged in *Broadfoot*, that the word is not a term of art and its meaning is to be derived from its usage on a particular occasion.
- [43] When s 354 is carefully analysed, though the wording at first glance is strange, it contains no ambiguity. For the reasons given I am of the view that the facts relied on by the prosecution are capable of supporting a conviction on the basis that the accused detained J with intent to procure, that is to facilitate, a sexual assault on her by A.
- [44] As noted above, in this court counsel for the Attorney also sought to bring the case within the first limb of s 354(2); the intent was for A to gain sexual gratification from the complainant. In the circumstances it is not necessary to decide this case on the basis of that submission and, as in my view the facts do not comfortably come within those words, I would prefer to leave for another day consideration of what might be encompassed by the expression “gain anything from any person” in the section.
- [45] For those reasons the appeal should be allowed and the order granting a permanent stay set aside.
- [46] **CULLINANE J:** I have had the advantage of reading the reasons for judgment of Williams JA and respectfully adopt his statement of the facts and the issues.

- [47] In summary, it can be said that the man A had, to the respondent's knowledge, decided to abduct the complainant and (at least) sexually assault her. The respondent had agreed to participate in the abduction and did so.
- [48] Section 354 of the *Criminal Code* provides as follows:
"Kidnapping
(1) Any person who kidnaps another person is guilty of a crime.
Maximum penalty – seven years imprisonment.
(2) A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person."
- [49] Whilst before the learned judge at first instance, the appellant particularised the case against the respondent as falling with the second limb of s 354(2), an argument was advanced before us based upon the first limb. It was said that on the facts before the court the respondent had taken or detained the complainant with intent that A sexually assault her and that this amounted to a taking with intent "to gain something from a person, namely the complainant". I do not think that these facts satisfy the ordinary and natural meaning of the language used in the first limb of the provision.
- [50] Before us, the appellant's argument was substantially (and before the court at first instance wholly) directed towards the second limb of the subsection. The case particularised in this respect was that the respondent took the complainant with intent to procure a sexual assault on her by A.
- [51] The question is whether an intention by the respondent to facilitate such an assault satisfies the second limb.
- [52] The definitions of "procure" to be found in the dictionaries indicate that the word can have a wide variety of meanings. It is necessary to determine what its meaning is in the context of s 354(2). This must largely be a matter of impression derived from the context in which it is used and the scope and nature of the provision in which it appears.
- [53] In my view, in order to satisfy the requirement of an intention to procure in the sense in which that word is used in the section, it is necessary to establish that the person concerned intended to effect or produce the result alleged, namely the assault by A on the complainant. This, in my view, requires an intention that the taking of the complainant induce or persuade the person concerned to do the act alleged. In this case it would be necessary to establish that the respondent, in taking or detaining the complainant, intended that A be thereby induced or persuaded to sexually assault her. The taking or detention of the complainant by the respondent with the intention of thereby facilitating or making possible the carrying out by A of his already determined intention to assault the complainant would not be sufficient.
- [54] Whilst care needs to be taken when considering authorities in which similar words are used in different contexts, I think some support for this approach is found in some of the cases.

[55] In *R v Broadfoot*,⁴ the relevant legislation made it an offence for a person to procure someone to adopt a course of action, namely to become a common prostitute.

[56] The charge in fact was one of attempting to procure a woman to become a common prostitute.

[57] At 74 Cusack J said:

"Counsel has quoted to the Court several decisions dealing with the interpretation of the word 'procure', in cases involving quite different facts. The Court does not find those references, though no doubt attention has properly been drawn to them, particularly helpful in this case; nor indeed do the dictionary definitions of the word have much bearing upon what has to be decided.

Perhaps a useful guide is to be found in *Attorney-General's Reference (No 1 of 1975)* (1975) 61CrAppR 118, [1975] QB 773, where in the course of the judgment the Lord Chief Justice, dealing with quite another topic altogether, not a charge of this nature, used the following words at p 121 and p 779 of the respective reports: '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.'

There is another expression which can be used as guidance in determining what should be decided on particular facts. During the course of argument in this Court, Shaw LJ suggested that 'procuring' 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."

[58] The suggestion by Shaw LJ referred to in that passage that "procure" could be regarded as bringing about a course of conduct which the person concerned would not have embarked upon spontaneously of her own volition is, in my view, the sense in which it should be understood in s 354(2).

[59] In the case of *Deutsch v The Queen*⁵ the Canadian Supreme Court had to consider the meaning of "procure" in a statute which made it an offence to attempt to procure a person to have illicit sexual intercourse with another person. Le Dain J (who delivered a judgment on behalf of himself and three other members of the court and with whose judgment the remaining members agreed, said at p 26-27 (para 32):

"In the case at bar the Court of Appeal agreed with the trial judge on the applicable meaning of 'procure'. The meaning selected by the trial judge and approved by the Court of Appeal was 'to cause, or to induce, or to have a persuasive effect upon the conduct that is alleged.' Martin JA expressed his agreement at p 49 with the following statement of the issue by the trial judge: 'The question for decision is did Mr Deutsch attempt to cause or attempt to induce or attempt to have a persuasive effect upon the woman in question to have illicit sexual intercourse with another person ...'. I agree that

⁴ (1976) 64 CrAppR 71.

⁵ [1986] 2 SCR 2.

the sources referred to by the trial judge and Martin JA support the meaning given by them to the word 'procure'."

- [60] The present case is plainly not one in which, on the facts placed before the learned judge at first instance, it can be said that the respondent intended in forcibly taking or detaining the complainant that A be thereby induced to effect the sexual assault upon her or to put in terms similar to that used by Cusack J in the passage set out above, with the intention of bringing about conduct on the part of A (namely the sexual assault) which he would or may not have embarked upon of his own volition.
- [61] Here, as I have already said, A had already determined upon the assault and so far as the facts reveal it would have been a matter of indifference to the respondent whether after the complainant had been taken and detained A had abandoned his plan to assault her.
- [62] I do not think that the section should be read so that "procure" is construed so as to include "facilitate" or "permit".
- [63] At the least, it seems to me that it is not possible to say that the second limb of s 354(2) unambiguously applies to the respondent's conduct in this case.
- [64] I would dismiss the appeal.