

SEXUAL CONDUCT FOR A FEE

I. PROSTITUTE

The defendant is charged with either engaging in sexual conduct for a fee, or agreeing to engage in sexual conduct for a fee, or offering to engage in sexual conduct for a fee — the activity that is commonly referred to as prostitution.

Section 53A of chapter 272 of our General Laws provides as follows:

“Any person who
engages, agrees to engage, or offers to engage
in sexual conduct with another person
in return for a fee . . .
may be punished”

In order to prove the defendant guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:

First: That the defendant either engaged, or agreed to engage, or offered to engage, in sexual conduct with another person; and

Second: That the sexual conduct (was) (was to be) done in return for a fee.

The defendant may be convicted only if the sexual conduct (was) (was to be) in exchange for a fee — that is, if the transaction was of a commercial nature.

From the passage of St. 1959, c. 304 until the enactment of St. 1983, c. 66, the punishment of “prostitutes” was provided for in G.L. c. 272, § 53. Prostitution was defined as “common indiscriminate sexual activity for hire, in distinction from sexual activity confined exclusively to one person.” *Commonwealth v. King*, 374 Mass. 5, 12, 372 N.E.2d 196, 202 (1977). See *Commonwealth v. Walter*, 388 Mass. 460, 463, 446 N.E.2d 707, 709 (1983); *Commonwealth v. United Food Corp.*, 374 Mass. 765, 767, 374 N.E.2d 1331, 1335-1336 (1978); *Commonwealth v. Cook*, 12 Met. 93, 97 (1846); *Commonwealth v. A Juvenile (No. 2)*, 6 Mass. App. Ct. 194, 196, 374 N.E.2d 335, 337 (1978) (prostitution comprises both “the performance of indiscriminate sexual acts for hire and the indiscriminate solicitation or agreement to perform sexual acts for hire”). Acts of prostitution are not constitutionally protected, since “[c]ommercial sex is performed for profit and the sexual contact involved is incidental to that profit The decision to engage in the business of sex for money is not the type of intimate, personal decision which is protected by the right to privacy” under either Federal or Massachusetts law. *Walter*, 388 Mass. at 465, 446 N.E.2d at 710.

Statute 1983, c. 66 removed the word “prostitutes” from G.L. c. 272, § 53, and created a new statutory offense (§ 53A) which punishes both the prostitute and the prostitute’s client. *Commonwealth v. An Unnamed Defendant*, 22 Mass. App. Ct. 230, 234-235, 492 N.E.2d 1184, 1187 (1986). Therefore, it is no longer necessary to define prostitution in terms of the *King* case.

II. CUSTOMER OR PROCURER

The defendant is charged with (paying) (agreeing to pay) (offering to pay) another person to engage in sexual conduct with (him) (her) (some third person).

Section 53A of chapter 272 of our General Laws provides as follows:

“Any person who

pays, agrees to pay or offers to pay

another person
to engage in sexual conduct
or to agree to engage in sexual conduct
with another natural person
may be punished”

In order to prove the defendant guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:

***First:* That the defendant (paid) (agreed to pay) (or) (offered to pay) another person; and**

***Second:* That the payment was in exchange (for that person’s engaging in sexual conduct) (or) (for that person’s agreeing to engage in sexual conduct) with (the defendant) (or) (another person).**

The defendant may be convicted only if the sexual conduct (was) (was to be) in exchange for a fee, that is, if the transaction was of a commercial nature.

See also G.L. c. 272, § 8 (soliciting for a prostitute).

SUPPLEMENTAL INSTRUCTION

***“Sexual conduct.”* The term “sexual conduct” includes (sexual intercourse) (anal intercourse) (fellatio, or oral sex involving contact between the mouth of one person and the penis of another person) (cunnilingus, or oral sex involving contact between the mouth of one person and the female sex organs — the vagina, vulva or labia — of another person) (masturbation of another person) (or) (any other intrusion of a part of one person’s body or some other object into the genital or anal opening of another person’s body).**

The term “sexual activity” . . . encompass[es] all acts commonly understood to be described by the term, including masturbation” of another as well as sexual intercourse and deviate sexual intercourse, and is not unconstitutionally vague. *Walter*, 388 Mass. at 463, 465-466, 446 N.E.2d at 709-710. See, e.g. *Commonwealth v. Gallant*, 373 Mass. 577, 584, 369 N.E.2d 707, 712 (1977) (in rape prosecution, “unnatural sexual intercourse” includes “oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person’s body or other object into the genital or anal opening of another person’s body”); *Commonwealth v. Guy*, 24 Mass. App. Ct. 783, 785-787, 513 N.E.2d 701, 702-704 (1987) (in rape prosecution, “unnatural sexual intercourse” includes female-to-female cunnilingus); *Commonwealth v. Baldwin*, 24 Mass. App. Ct. 200, 204-205, 509 N.E.2d 4, 7 (1987) (in rape prosecution, “unnatural sexual intercourse” includes digital penetration of vagina, vulva or labia).

NOTE:

Selective prosecution of females. The Massachusetts Equal Rights Amendment (art. 106 of the Articles of Amendment to the Massachusetts Constitution) requires that a § 53A charge against a female defendant be dismissed with prejudice upon an appropriate showing that the particular police department or prosecutor’s office consistently prosecutes female prostitutes but not their male customers. *An Unnamed Defendant*, 22 Mass. App. Ct. at 233-236, 492 N.E.2d at 1186-1188. See *Commonwealth v. Hackett*, 383 Mass. 888, 888-889, 421 N.E.2d 769, 771 (1981); *King*, 374 Mass. at 17-22, 372 N.E.2d at 204-207.