IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M. No. 9/84

BETWEEN DONALDSON

APPELLANT

A N D POLICE DEPARTMENT

RESPONDENT

Hearing : 16th February 1984

Counsel : A.C. Balme for Appellant
C.L. Lang for Respondent

Judgment : 16th February 1984

ORAL JUDGMENT OF CHILWELL J.

Donaldson was charged with two offences alleged to have been committed on 19th August 1983 with reference to the Cabana Hotel in Napier. The first charge was laid under Section 188(5)(a) of the Sale of Liquor Act 1962. The charge was that the appellant, being a person who had previously been warned not to enter on the premises and having been ordered by an employee of the licensee conducting the business of the licensed premises to leave those premises, refused to comply with the order. The second charge was laid under Section 23(a) of the Summary Offences Act 1981. The charge was that the appellant resisted Mark William Devon, a constable acting

in the execution of his duty.

The facts, as found by the District Court Judge, were :-

> "At all relevant times, ... Smith was a barmaid at the Cabana Hotel. The licence holder was and is Mrs Morrison. There was no bar manager employed at the hotel. The day prior to the alleged offences - which are stated to have occurred on 19 August 1983 - the defendant had been asked by the barmaid to leave the licensed premises because of disorderly conduct. She barred him, or purported to bar him, from further attending at the hotel for a week. She maintains she was entitled to do so being so empowered by the licensee having regard to the fact that there was no bar manager. However, the defendant appeared at the hotel again the next day. She asked him to leave the bar several times. He refused each time. She gave him the option of leaving the bar or of her calling the police. He refused to leave. When the police arrived, Constable Devon had the barmaid repeat to the defendant the request to leave. The defendant argued. The constable requested him to leave. The defendant refused. The constable then put it in stronger terms when he told the defendant that if he refused to leave, he would be taken out. He refused again. Then Constable Devon went to reach out to take the defendant by the arm but the defendant pulled away. The constable stepped closer and grasped the defendant who began to struggle. In fact he struggled violently and it was necessary for two policemen to escort him from the bar. The defendant was informed by the constable that he was arrested for resisting the constable in the execution of his duty."

At the conclusion of the case for the prosecution counsel for the appellant, then defendant, submitted that there was no case to answer. The District Court Judge reserved the point. He requested and obtained written submissions from counsel. When the police considered the provisions of the Sale of Liquor Act it was realised that

a person other than a licensee or manager is not possessed of the statutory authority to exclude persons from entering a bar during the time it is required to be open or to order persons admitted to leave or refuse to admit persons to any part of the licensed premises other than a public bar. It is only in respect of the refusal to sell, supply or serve liquor that an employee other than the licensee or manager has statutory authority to decline such service. This was not a case concerned with the refusal to supply but a case concerned with an order to quit. I have no doubt that Parliament, in enacting the provisions in the Sale of Liquor Act under the title "Duties and Responsibilities", intended to impose those duties and responsibilities upon persons recognised by the Act as being under the control of the authority which controls licensed premises. There is a statutory definition of a licensee; also of a manager, but so far as I can see none of a barmaid or barman. Such person is undoubtedly an employee. He or she, however, is not a licensee or manager unless the requisite licence or approval to such position has been obtained under the Act. The point, therefore, is that the police realised that the barmaid in this case had no statutory authority to order the appellant to quit the premises.

Undeterred by what was a fundamental flaw in the prosecution case the police requested and obtained from the District Court Judge leave to amend the first charge to bring it within the provisions of the Trespass Act 1980. The first charge, as amended, was laid under Section 3 of the latter Act. The charge was that the appellant trespassed

on the Cabana Hotel and after being wared to leave that place by Smith, an occupier, refused to do so. Counsel for the appellant, then defendant, persisted in his submission that there was no case to answer. He faced this new tack by submitting that the case was not governed by the Trespass Act at all. It was a case governed by the Sale of Liquor Act.

The District Court Judge, after considering the submissions put to him, decided that there was no conflict between the Trespass Act and the Sale of Liquor Act, that what the barmaid had said to the appellant in the bar was a sufficient warning to leave that place pursuant to Section 3 of the Trespass Act and he further found that the barmaid was authorised by that Act to give the warning, she being, in his judgment, an occupier of that place (that is the bar) with which this case is concerned. Accordingly, the District Court Judge found the first charge as amended proved. It therefore followed, as light would follow day, that he was obliged to find the second charge also proved.

The crux of the present appeal is simply that the case was never at any time governed by the Trespass Act but by the Sale of Liquor Act and accordingly the appellant was improperly convicted on the first charge as amended and on the basis that he was entitled to be in the bar when he was forcibly evicted by the police his activities in resisting were justified and he was accordingly wrongly convicted on the second charge.

The Sale of Liquor Act is a most comprehensive and precise code dealing with the sale of liquor. It is an enactment which regulates a specific trading activity. It controls the whole of the liquor industry and it ensures, in respect of important functions, that only responsible persons may carry out those functions. By contrast, the Trespass Act relates to all persons in New Zealand who either have the right to exclude unwanted persons from their property and to those unwanted who may desire to enter. It is a general enactment relating in its own sphere generally to law and order and good government.

Under Section 187 of the Sale of Liquor Act a licensee of a hotel, such as the one in question, is required to keep certain bar premises open for the sale of liquor during the hours when he is authorised by his licence to sell liquor to the public. Section 187(4) states :-

> "(4) The licensee or manager shall not without reasonable cause refuse -
>
> (a) To admit any person to a public bar; or
>
> (b) To supply liquor to any person in a public bar :
>
> Provided that it shall be lawful for the licensee or manager, or the spouse or any employee or agent of the licensee or manager, to refuse to supply liquor to any person if he believes that the person may be under the age of 20 years."

I do not have to decide whether that section gives adult members of the public the absolute right to enter a public bar because in this case the appellant

had entered and was consuming liquor when he was either invited or ordered to quit. However, in Lodge v Police (unreported; 29th September 1979, M.No. 451/79, Wellington) Ongley J., who has concisely and succinctly reviewed the provisions of Sections 187 and 188 of the Act said at page 3 :-

> "Prima facie any person (other than a minor) is entitled to enter and remain in a public bar during licensed hours."

That pronouncement is clearly based upon his reading of Section 187. I would not disagree with it but it is not necessary for me to approve of it in absolute terms for the reasons stated.

It is important, I think, to realise that when one has a licensed industry such as the liquor industry, controlled in the way in which it is, that when a person in the member of any person of the public has exercised his right to enter the bar and is there, that he can be excluded or ordered to quit only by persons in whom the controlling authority has confidence will maintain the integrity of the industry and its system of licensing. Hence, it is not surprising that the Statute in Section 188 is quite specific as to who may refuse admission to a public bar, as to who may order a person to other parts of the licensed premises. Also, it is important that when the power of exclusion is exercised that it be exercised on proper grounds, those grounds being specifically prescribed in

Section 188. Under no stretch of the imagination can it be said of the barmaid in this case that she was the equivalent of a manager. That determination was based on a factual statement made by the woman in question :-

> "As we have no bar manager, Mrs. Morrison empowers the bar person at the time to take any action necessary."

One thing Mrs. Morrison cannot do is to empower a person who is not a manager to exercise the right to exclude. An employee such as the present barmaid could refuse to serve liquor under Section 188(4). The reason for that is that Parliament has seen fit to say so.

When one turns to the Trespass Act one finds in Section 13 this provision :-

> "13. Savings - Nothing in this Act shall derogate from anything that any person is authorised to do by or under any other enactment or by law, or restrict the provisions of any of the following enactments and instruments :
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> (a) Section 42 of the Mining Act 1971:
>
> (b) Section 23 of the Civil Aviation Act 1964:
>
> (c) Any enactment or instrument conferring a right of entry on any land."

That, in my judgment, is a clear direction from Parliament restricting the operation of the Trespass Act in a very clear way. If that section did not appear in that form there would still be available to the appellant the argument, as a matter of statutory interpretation, that the

Sale of Liquor Act, which is a specific enactment controlling a specific industry and which in its relevant provisions provides something to the equivalent of the Trespass Act, is to be regarded as the enactment governing a situation such as the present and that the Trespass Act can have no operation except to the extent that the particular enactment might somewhere leave a gap for the general enactment to fill. From a practical viewpoint that was recognised by Parliament in Section 13 of the Trespass Act because in effect Parliament was enacting a principle of statutory interpretation otherwise well known.

It is my judgment that once the appellant had entered the public bar he was entitled to remain there. He had that right under the Sale of Liquor Act Section 137(4) unless and until he was excluded by, in this case, the licensee because in this case there was no manager. So in this hotel there was only one person who could exclude him. Consequently, it is my judgment that the Trespass Act could not be called in aid to derogate from the appellant's right to remain in the public bar until the last minute of the licensing period applicable for that day. It follows, in my judgment, that the appellant ought not to have been charged under the Trespass Act and that his conviction thereunder was wholly wrong and must be and is therefore quashed. There was a subsidiary argument addressed to me which, in view of my decision just announced, renders it unnecessary for me to determine but perhaps it might be important for the police and the liquor trade to know my view, for what it is worth.

The District Court Judge, in applying the provisions of the Trespass Act determined that the barmaid was an occupier of the bar and accordingly, as such, a person having the statutory right to give a trespass warning under Section 3 of that Act. The material provision of Section 3 states :-

> "3. Trespass after warning to leave - (1) Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so."

Section 4 deals with the situation where a person contemplates trespassing after having been previously warned to stay off and once again it is the occupier of that place who has the statutory right to give the warning. Section 5 governs the procedure for giving a warning. It states :-

> "5. Delivery of warnings - A warning under section 3 or section 4 of this Act shall be given to the individual person concerned either orally, or by notice in writing delivered to him or sent to him by post in a registered letter at his usual place of abode in New Zealand."

The word "occupier" is defined in Section 2 of the Act :-

> "'Occupier', in relation to any place or land, means any person in lawful occupation of that place or land; and includes any employee or other person acting under the authority of any person in lawful occupation of that place or land; "

Section 2(2) provides for the owner to be regarded as the occupier where there is no occupier, thus preserving the common law principle that the act of trespass is a tort affecting possession rather than ownership.

If the appellant had been in the grounds of the premises rather than in the public bar it may be that the Trespass Act would apply. If it did then the barmaid or other employee could be authorised by the licensee in terms of the definition. In this particular case the evidence was not directed to that situation but it would seem that, prima facie, a person in the position of a barmaid could be sufficiently authorised to come within the definition of occupier.

The District Court Judge drew some comfort from Allen v Police (unreported: 14th December, 1982; M.No. 277-294/82, Wellington) where Quilliam J. decided that an assistant manager of the Hotel St. George in Wellington came within the definition of occupier. Unfortunately I have not had the opportunity of reading the full judgment but only the versions of it digested and/or commented upon in 1983 Recent Law 203 and 1983 N.Z.L. paragraph 79. Lest it be thought that this decision might be authority for incorporating the provisions of the Trespass Act into Sections 187 and 188 of the Sale of Liquor Act, I make the observation that it would seem that the protectors in question were not in a public bar but were on the fourth floor and it may have been an instance where the Trespass Act applied because Section 188(2) merely gives the licensee

or manager the statutory right to refuse admission to parts of the licensed premises other than a public bar. It is silent with regard to the exclusion of persons who have gained admission. It would seem from what I have been able to read about that authority that it is readily distinguishable upon the facts.

I raised with counsel for the appellant the question whether once the barmaid and the police had made a conscious decision to deal with the eviction of the appellant under the statutory powers given under the Sale of Liquor Act it was possible for a change of tack to be made at a very much later stage and for it to be advanced in argument, as it must have been in the Court below, that what was said to the appellant was the equivalent in any event of a warning under the Trespass Act. Counsel for the appellant framed his submission along the lines that the police gave no thought to the Trespass Act at all. I agree with that statement. He then submitted that they mistakenly believed that they were acting pursuant to a Sale of Liquor Act warning which cannot subsequently be treated as a Trespass Act warning and, perhaps at my suggestion, he drew comfort from the precise wording of Section 5 of the Trespass Act earlier cited.

Counsel for the respondent conceded that there may well be instances where a distinction has to be drawn between an order to leave under the Sale of Liquor Act and a warning to leave under the Trespass Act but this is not a case where any distinction was warranted because ultimately it must be

a question of fact and if what was said complies with both statutes it is sufficient for either and may be used for the purpose of either and that it is not necessary for the recipient of the order or warning to comprehend which Act is about to be applied to him. The submission amounts to this, that as a matter of practical commonsense an order or request to leave is quite comprehensible and it does not require statutory elaboration for the recipient. In this case it is a little difficult to tell from the evidence of the barmaid whether she put her words in terms of request, command or warning so that one could possibly proceed on the assumption that the words she used were sufficient for the purpose of either Act.

While I agree that the law ought to endeavour to achieve a commonsense result one should not overlook the constitutional liberty of the subject. If there is about to fall upon him some legal consequence which can affect his liberty, whether it be momentary arrest or not, then it is my view that he ought to be placed in the position of knowing his constitutional rights on the assumption that every person is deemed to know the law. That aphorism is not as true today as it was some years ago, for those who believe in civil liberties and are concerned to preserve and enforce them have today a fairly keen appreciation of constitutional rights. Indeed, there have been books written by learned authors on such topics for the benefit of those likely to push their constitutional rights to the limit.

I take the view that there is a great deal of difference between a warning to leave and an order to leave and I also take the view that the Sale of Liquor Act, in particular, provides the citizen with specific rights in much greater detail than under the Trespass Act. It is my view that when the Sale of Liquor Act is being invoked the words used ought to comply with the requirements of the specific sections so that the person to whom the order is directed is the better able to judge that he is having the Sale of Liquor Act applied to him.

In this particular case it is my judgment that no warning under the Trespass Act was given for the reason that the person giving the warning did not have that Act in contemplation nor did the appellant, who was entitled to assume that the Sale of Liquor Act provisions were about to descend upon his head. Who knows, he may well have read the Act. He may well have known that the barmaid had no statutory power to order him to quit and he was entitled to hedge his bets on his knowledge he had of the statute. In fact he did hedge his bets. He was entirely correct and it follows, for all the reasons I have given in dealing with this appeal, that there was no authority to arrest him whatever and accordingly his arrest was unlawful and further he was entitled to resist it.

I refer now to the last paragraph in the judgment of Lodge v Police (supra) where Ongley J. said :-

> "In the circumstances of this case I think the Police acted upon a mistaken understanding of

> their powers with the result that they were not at the relevant time executing a lawful duty. The appellant was entitled to use a reasonable degree of force in resisting the force to which he was unlawfully subjected and as his detention was also unlawful he committed no offence in escaping from it." (page 5)

That passage, in my judgment, applies with equal force to this case. The conviction on the second charge is accordingly quashed.

The result is that the appeal wholly succeeds.

Solicitors :-

Appellant : Langley, Twigg & Co., Napier.

Respondent : Willis Toomey Robinson & Co., Napier.