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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR.78/84

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BETWEEN GARTHWAITE

Appellant

A N D POLICE

Respondent

Hearing: 20 November 1984

Counsel: Appellant in Person
N.J. Scott for Respondent

Judgment: 19 December 1984

JUDGMENT OF HARDIE BOYS J

On this appeal against conviction and sentence on six charges alleging breaches of the Sale of Liquor Act 1962, the appellant was denied legal aid, and although that was no doubt for good reason it has considerably increased the burden of determining the appeal.

The charges were that on two separate occasions, 10 and 16 November 1983, the appellant committed three separate offences on the premises of the Lazybones Spa and Gym in Sophia Street, namely:

(1) that in breach of s 264 he, being the occupier of the premises used them as a place of resort for the consumption of liquor;

(2) that in breach of s 262 he exposed liquor for sale - this charge being brought in reliance on the presumption created by s 272(1) which deems the occupier and the manager, until the contrary is proved, to have committed an offence against s 262, if the Police enter the premises pursuant to a warrant and find liquor there.

(3) that he as an occupier was privy to the sale of liquor, and so by virtue of s 263 was liable to the penalties imposed on persons for the unauthorised sale of liquor.

The property in question was leased to Mrs Garthwaite, the appellant guaranteeing performance of her obligations as lessee. He stated in evidence that the lease was arranged in this way in order to avoid any complications that might arise as a result of financial difficulties he had had with another business. It was a matter of prudence and convenience, and clearly did not reflect the actual business relationship. Mrs Garthwaite operated a laundrette in part of the premises, and upstairs the appellant set up the spa and gym business, in which he said his wife also was involved. There was some conflict in the evidence as to the extent of her involvement, but that does not matter for present purposes, for there was ample evidence to show that he was an occupier, even if not the sole occupier, and despite the ambivalence with which the charges described him as both an occupier and the occupier there can be no doubt that liability must attach to him as a joint occupier, equally as if he had been the sole occupier.

The appellant in his submissions to me placed some reliance on the fact that when his anticipated insolvency did occur, on 25 November 1983, the Official Assignee concluded that the business was not his, but his wife's. This, the appellant said, was inconsistent with the basis upon which the Judge had held that he was the occupier, which was that the business was his and that he was the person beneficially entitled to its income. I do not of course know what led the Official Assignee to his view of the matter, but whatever it may have been that cannot affect the conclusion either of the Court below or of this Court which in each case must be based on the evidence presented at the hearing. On the appellant's own evidence, he set up the business and was primarily in charge of it, even though he was endeavouring to transfer the management to another. Irrespective of whether he was entitled to the income, or indeed owned the assets, it is abundantly clear from his evidence that at least this was a joint enterprise such as to make him at least a joint occupier.

That fact having thus been established, the first charge, that under s 264, turned on whether the premises were used as a place of resort for the consumption of liquor. Subsection (7) makes it clear that it is no defence to show that entry is limited to particular persons or classes of persons, although it is not an offence for liquor to be consumed at social gatherings if the conditions prescribed by s 219 are met. The appellant stated that he had endeavoured to operate the premises in accordance with that section, by setting up the enterprise as a club, primarily centred on the gymnasium, whose members brought their own liquor, which they

left on the premises. The principal evidence that he did not succeed in keeping to the confines of s 219 was given by two undercover police officers and by a Mrs M who said she was employed by the appellant as manageress, primarily responsible for tending the bar. Two months before the hearing of the charges against the appellant, she pleaded guilty to and was convicted of offences against the Act arising out of the performance of her duties at the premises, and so she was an accomplice, and her evidence had to be treated with the care the law requires of such evidence. But no one seems to have thought of that and it is certainly not mentioned in the District Court Judge's decision. It is therefore important to consider what other evidence there was. The undercover police officers had both gone separately to the premises on 10 November. Both paid an entrance fee of $5, which included the cost of a spa. During the course of the evening, one of them purchased and consumed two, and the other several, bottles of beer from a bar set up in one of the main rooms. Besides themselves, some foreign seamen were drinking there, but they did not see them actually pay for what they drank. One of these constables returned on 16 November, and by that time a card system was operating, involving the purchase on entry of a card for a given price, showing the value of drinks that could be purchased, and the marking off of the squares as purchases were made. He bought a card, and with it had obtained one drink before the Police raiding party arrived. When he arrived, two other people were drinking at the bar, but he did not see them make any purchases. They were drinking spirits.

On that evidence, it is I think clear that s 219 did not apply to what happened on the two evenings in question, and further that the premises were being used as a place of resort for the consumption of liquor. Whether or not that is so in a given case depends on the circumstances: see Browne v Police [1962] NZLR 801. In that case, Richmond J held that evidence of two occasions, and a set-up indicative of the occurrence of more, was sufficient, and he also concluded that it is enough for drinking to be one of the purposes for which the premises were used, even if ancillary to another more dominant purpose. In the present case, one of the constables had a spa, but apart from that there was no indication that the premises were being used for any purpose other than drinking during the hours they observed what was happening. I therefore consider that the Judge was right to hold that the premises were being used as a place of resort.

It is also necessary when a charge is brought under s 263 to establish some overt act of user on the part of the occupier - e.g., the provision of a bar - showing that he has induced those present to drink there: see Wilson v Graham [1940] NZLR 989. It is not sufficient if he merely passively permits them to do so. In this case, a bar was set up by the appellant, he employed Mrs M to manage it and the liquor was provided from a stock on the premises. According to one of the constables, whose evidence the Judge preferred to the appellant's denial, the appellant also saw some of the purchases that constable made. On that basis, the appellant was in my view rightly convicted, even if the evidence of Mrs M is disregarded altogether. And in respect to this

charge, it need not be, for it went only to confirm the evidence of the constables that the appellant did indeed use the premises as a place of resort. Her evidence as to that was thus amply corroborated by theirs.

The effect of s 272(1) is that it was for the appellant to satisfy the Court on the balance of probabilities that he had not committed the offence of exposing liquor for sale (he was not charged with selling it or keeping it for sale). Apart from that of Mrs M[illegible] the prosecution evidence relevant to this charge was that of one of the undercover policemen who were there on 10 November, who said merely "I can remember there were some bottles of spirits on a shelf behind the bar", and that of members of the raiding party on 16 November who not only described but took photographs of what they found. They found some liquor in a storage room off the main office and in a staff-room/kitchen between the bar and the main office, but it was clearly not exposed for sale. The only liquor in the bar area was two casks of wine on a shelf behind the bar counter, several bottles of beer in a refrigerator under the counter, and a dozen bottles of assorted spirits, one of each kind, (these were the ones the constable had seen)at one end of a shelf, at the other end of which were bottles of coca-cola, and beneath which was a shelf filled with bottles of soft drink and mineral water. These shelves were fitted into a corner made by the wall behind the bar and a side wall, but they were not directly behind the counter, which projected part way across the room from the other side wall, but were to one side of it, and several feet away. A curtain was fitted so as to conceal the shelves when drawn, but when

the police party arrived it was open, hanging at the end of the shelves furthest from the back wall, thus screening the liquor bottles from persons not more or less directly opposite them: i.e. who were not seated or standing at or near the counter. On the wall immediately behind and above the bottles was a hand printed notice "Staff Only". Behind the counter, alongside the wine casks, were shelves containing a number of glasses, and at its wall end was a tea and coffee dispensing machine. No prices were displayed, but in a cupboard under the counter were a number of cards with drink prices printed on them. The charge under s 262 was directed to the spirit bottles on the shelf.

Mr Garthwaite's explanation was that all the liquor on the premises was either purchased for use by club members at private functions, or had been brought there by members and left for their use on future visits, or belonged to him and was for his own use. He said he had given instructions that no liquor was to be sold and that he was not aware that any was being sold. The notice "Staff Only" was to make it clear that the liquor on that shelf was not for sale. His evidence was generally confirmed by a member of the staff. But Mrs M who confirmed that liquor was sold on both nights, on the first for cash and on the second by the card system, stated that this was being done quite regularly, spirits as well as beer being sold, and that the appellant knew full well about it. Then at the conclusion of her evidence, in answer to questions put by the Judge, for these were topics that had not been adverted to at all in her evidence to that point, she said that spirits were sold from the bottles on the shelf beside the bar, and

that the notice "Staff Only" had been put there only on the night of 16 November when the appellant became aware that the Police were about to come. The undercover policeman could not depose to these matters, and the Judge believed Mrs M and not the appellant. Indeed, he went so far as to reject the appellant's entire explanation as to the source of the liquor, whereas the location and appearance of at least some of that in the private rooms did not suggest it was being kept for the purpose of sale.

I find the position with this charge unsatisfactory. Although the burden of proof lay on the appellant, the Judge's decision that he had not discharged it was largely based on the evidence of Mrs M who was, but does not appear to have been recognised as, an accomplice. Apart from her evidence, it was based on the assumption that because the spirits were visible from certain angles, they were therefore exposed for sale. Obviously all the circumstances had to be taken into account, but as no sales of spirits were observed, and there was nothing in the way of a stock of spirits, I am not sure that this assumption can safely be made. The usual course in such circumstances would be to direct a rehearing of the charge, but as I have concluded that the third charge, as well as the first, was properly established, and the point of the prosecution is thereby made, and as the events are already a year old, I consider that the proper course is simply to allow the appeal in respect of this charge.

Proof of the third charge, which relates to the sale of beer to the undercover constable, did not depend on the evidence of Mrs M for there was sufficient in the

evidence of the policemen themselves. In preferring their evidence to that of the appellant, the Judge exercised his particular advantage in seeing and hearing the witnesses, and this Court cannot interfere with the conclusion as to credibility at which he arrived as a result.

The appeals against conviction on the charges under ss 264 and 263 are therefore dismissed, but that on the charge under s 262 is allowed.

On the charge under s 264, the appellant was fined $200 and on the other two charges he was sentenced to six months' non-residential periodic detention, the Judge taking the view that it had to be that or prison, for the charges were too serious for fines. The appellant had had no previous convictions, and the evidence disclosed only a modest operation in the illicit liquor trade. Imprisonment would in my view have been an inappropriate and excessive penalty. The appellant can pay fines, although he may have to arrange to do so by instalments. Periodic detention creates considerable difficulty, for it clashes with a job he has been able to arrange and which it is important, for the sake of his creditors and his family, that he keep. Community service presents difficulties with transport. In all the circumstances I consider the proper course is to substitute for the sentence of periodic detention a fine of $200, a large enough sum for a man in the circumstances of this appellant.

Finally, I am asked to review the order for forfeiture, which applied to all the liquor seized on the premises, including the spirits in the bar and what was in the other rooms, some of which the appellant says was for his own

personal use and some of which belonged to others. The effect of s 263 is I think that the power to order forfeiture conferred by s 262(2) applies to a conviction under s 263. It does not however apply to a conviction under s 264. The charge under s 263 was brought only in respect of the beer and therefore the forfeiture should be limited to that, especially as it is quite clear that at least some of the spirits was for personal use.

The appeal against sentence on the charge under s 263 is accordingly allowed, the sentence of periodic detention is quashed and in its place the appellant is fined $200. The order of forfeiture is varied, so as to apply only to the beer. The fine imposed on the charge under s 264 is to stand.

Solicitors:

Crown Solicitor, TIMARU, for Respondent.