

43/74

SUPREME COURT OF VICTORIA

SILVESTER v YATES

Menhennitt J

14 February 1974 — [1975] VicRp 39; [1975] VR 397

LIQUOR CONTROL – SALE OF LIQUOR ON LICENSED PREMISES OUT OF HOURS – SUBMISSION THAT PROSECUTION REQUIRED TO SHOW WHICH PART OF THE PREMISES WERE LICENSED, THAT AN EXTRACT FROM THE LIQUOR CONTROL COMMISSION WAS REQUIRED AND PLANS OF THE PREMISES HAD TO BE PRODUCED – SUBMISSION ACCEPTED BY MAGISTRATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *LIQUOR CONTROL ACT 1968*, SS32, 47, 126, 133.

HELD: Order Absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing in accordance with the law.

1. Having regard to the form of the information, the defendant was to be taken as the holder of the licence until the contrary was shown.

2. Where there was an allegation in the information by the informant that the defendant was licensed in respect of particular premises, namely those known as David Yates, Super Value Store and situated at 799 Nicholson Street, North Carlton, and this being so s133 of the *Liquor Control Act 1968* ('Act') produced the result that that allegation was to be taken to be correct until the contrary was proved.

3. The mere fact that there was a separate liquor counter did not establish or suggest that only the area where that counter was licensed. It was quite consistent with a number of possibilities, including mere convenience of division of the premises for commercial purposes.

4. In relation to s126 of the Act the presumption that the defendant was to be taken to be the holder of the liquor licence was a presumption that the defendant was the holder of a retail bottled liquor licence in respect of the whole of the licensed premises described. Having regard to all of the grounds of this order to review it appeared that the admissions made by the defendant not only did not establish the contrary of those conclusions but indeed strongly reinforced them and may well be said on their own to have established what either s126 or s133 presumed.

5. Accordingly, the magistrate was in error in dismissing the information.

MENHENNITT J: This is the return of an order nisi to review the order made by the Magistrates' Court at Carlton constituted by Mr RK Hudspeth, Stipendiary Magistrate, on 7 August 1973, whereby it was ordered that an information be dismissed.

On the return of the order nisi there has been no appearance for the respondent who was the defendant below, but the evidence establishes that the defendant was properly served with a copy of the order nisi and the other documents referred to therein.

The information was an information that on 8 June 1973 at North Carlton in the State of Victoria the defendant, then being the holder of a retail bottled liquor licence in respect of licensed premises known as—David Yates, Super Value Store—and situated at 799 Nicholson Street, North Carlton, did permit a traffic in liquor on his licensed premises otherwise than at a time authorized on his licence.

On the hearing before the magistrate on 7 August 1973 evidence was given that at the licensed grocer's store situated at 799 Nicholson Street, North Carlton, three sales of liquor took place at about 7.15 p.m.

Section 32(1)(b) of the *Liquor Control Act 1968* provides that

"A retail bottled liquor licence shall authorise the licensee to sell and dispose of liquor...
(b) on other week days (that is than Saturdays) between the hours of nine in the morning and six in the evening".

The evidence establishes that the day in question was a Friday. At the conclusion of the case for the informant Mr B. Murphy who appeared for the defendant submitted that the police had not shown which part of the premises were licensed or that the premises were the subject of a retail bottled liquor licence, and that to do so an extract from the Liquor Control Commission and the plans of the premises should have been produced. In answer the prosecutor referred the Stipendiary Magistrate to s126 and s133 of the *Liquor Control Act 1968* and submitted that there was no need for the prosecution to produce plans.

The magistrate said that he accepted the submission of Mr Murphy and dismissed the information, and this order nisi seeks an order that that decision be reviewed. Counsel for the informant before me has drawn my attention to relevant authorities which both support his submission and might be said in some senses to point the other way and I have had the benefit of his submissions and of an analysis of the whole sections in the course of discussion with him.

In his submission either s126 of the *Liquor Control Act 1968*, or s133 of that Act, in conjunction with the information in this case, leads to the conclusion that what is alleged in the information establishes, until the contrary is shown, that the defendant was the holder of a retail bottled liquor licence in respect to the licensed premises known as—David Yates, Super Value Store—and situated at 799 Nicholson Street, North Carlton, and in my view both of those submissions are correct.

Section 126 reads:

"In all proceedings under this Act against any person in his capacity as the holder of a licence such person shall be taken to be the holder of that licence until the contrary is shown."

In the present case the information is that the defendant "then being the holder of a retail bottled liquor licence in respect of the licensed premises known as—David Yates, Super Value Store—and situated at 799 Nicholson Street, North Carlton" did commit the alleged offence. An information in that form appears to me to be a proceeding against the defendant in his capacity as the holder of the licence specified in the information and to fall precisely within the language of s126, which means that the defendant is to be taken as the holder of that licence until the contrary is shown.

Turning to s133 of the Act, it appears to me that an information against the defendant "then being the holder of a retail bottled liquor licence in respect to the licensed premises known as—David Yates, Super Value Store—and situated at 799 Nicholson Street, Carlton", makes the proceedings before the magistrate proceedings where there was an allegation in the information by the informant that the defendant was licensed in respect of particular premises, namely those known as David Yates, Super Value Store and situated at 799 Nicholson Street, North Carlton, and this being so s133 produces the result that that allegation is to be taken to be correct until the contrary is proved.

Counsel for the informant has drawn my attention to the fact that the evidence established that the premises where the sales were shown to have taken place are described as "the licensed grocer's store situated at 799 Nicholson Street, North Carlton" and that there is no reference to them being known as David Yates, Super Value Store. But it appears to me that the identification by the number of the street is an identification sufficient to identify the premises where the sales took place with those referred to in the information for the purposes of both s126 and s133.

The evidence before the magistrate established that there was a separate liquor counter at the front of the store on the left and turnstiles separated the normal grocery self-service section, but that there was no separate room for the sale of liquor. The definition of licensed premises in s5 of the *Liquor Control Act 1968* provides *inter alia* that:

"Licensed premises...in relation to any other licence (that is other than the ones referred to first) means portion or portions of the land buildings and improvements which is or are shown on the plan

approved or deemed to be approved by the Commissioners being licensed under this Act."

In my view the expression "portion" there can include the whole and the definition means no more, in my view, than that there can be licence of a portion of premises or of the whole premises.

In the present case the information refers to "the licensed premises known as—David Yates, Super Value Store—and situated at 799 Nicholson Street, Carlton". The normal and natural meaning of that phrase is, it appears to me, that the whole of those premises are licensed, and that the whole is the portion, within the meaning of the definition, in this case, which is the premises which the information alleges that the defendant is licensed in respect of. It also appears to me that in relation to s126 the presumption that the defendant shall be taken to be the holder of that licence is a presumption that the defendant is the holder of a retail bottled liquor licence in respect of the whole of the licensed premises described.

There is nothing in the evidence which establishes or even suggests the contrary. The mere fact that there was a separate liquor counter does not establish or suggest that only the area where that counter was licensed. It is quite consistent with a number of possibilities, including mere convenience of division of the premises for commercial purposes.

Having regard to all of the grounds of this order to review it appears to me that the admissions made by the defendant not only do not establish the contrary of those conclusions but indeed strongly reinforce them and may well be said on their own to establish what either s126 or s133 presumes.

In the interview with the defendant, which was on the premises at 799 Nicholson Street, North Carlton, he was asked if he was in charge of those premises and he replied in the affirmative and said he was "the owner of this store". He was asked, "How is the licence held in relation to the retailed bottled liquor licence?" and he replied, "The licence is held in my mother's name and myself as executor of the estate of John Stanley Sparrow Yates deceased".

Although the next question might if standing alone have been thought to produce some qualification on that, the answer did not, because the question was, "In other words, you are responsible for what occurs in the liquor section of this store?" to which the defendant replied, "Yes, I take sole responsibility of what happens in this shop" without drawing any distinction as to any portion of it.

Section 47(3)(a) of the *Liquor Control Act* 1968 provides that: "Where a licence is granted to two or more persons those persons shall be severally liable as licensee", which appears to me to cover the aspect of joint holding by the defendant and his mother.

For the reasons I have given, in my view the magistrate was in error in accepting the submission of Mr Murphy and in dismissing the information. In my conclusion the evidence in conjunction with the information established an entire case for the defendant to answer within the terms of the information, and the information should not have been dismissed.

However, the submission was taken at the end of the informant's case and it leaves open the possibility that the defendant might desire to call evidence. Accordingly, the appropriate order is that the matter be referred back to the Magistrates' Court at Carlton to be heard and determined in accordance with law.

The order of the Court is that the order nisi be made absolute, that the dismissal of the information be set aside and that the information be referred back to the Magistrate's Court at Carlton to be heard and determined in accordance with law.

Solicitor for informant: John Downey, Crown Solicitor.