22/98

SUPREME COURT OF VICTORIA

DPP v ROGERS

Harper J

5 May 1998

LIQUOR CONTROL – BREACH OF CONDITION OF LIQUOR PERMIT – NOMINEE ABSENT AT TIME OF ALLEGED BREACH – MANAGER IN CHARGE – WHETHER NOMINEE PERMITTED BREACH TO OCCUR – "PERMIT" – MEANING OF – WHETHER MAGISTRATE IN ERROR IN UPHOLDING 'NO CASE' SUBMISSION AND DISMISSING CHARGE: *LIQUOR CONTROL ACT* 1987, S122.

R. was the licensed nominee of an hotel. A condition of the licence was that no more than 500 patrons were permitted to be in the disco area of the hotel at any one time. On one occasion when R. was absent and a manager W. was in charge, police found that more than 800 patrons were present in the disco area. R. was later charged with permitting liquor to be sold and consumed in breach of the licence condition. At the hearing, the magistrate upheld a 'no case' submission and dismissed the charges on the ground that as R. was not present when the condition was breached there was no evidence that R. had permitted the breach to occur. Upon appeal—

HELD: Appeal allowed. Dismissals quashed. Remitted for further hearing.
1. The word "permit" is defined to mean amongst other things, "allow, suffer", "not to prevent" and "to give leave or opportunity". The question for the magistrate was whether R. "allowed" or "suffered" the breach to occur or "gave leave (or provided the opportunity)" to do so.

2. On the evidence, the *prima facie* conclusion was that R. either gave the manager W. express permission to breach the condition of the licence or failed to instruct W. about his duties. In either case, it was open to conclude that R. "allowed" or "suffered" the breach to occur or "gave leave or opportunity" for its occurrence. In those circumstances the magistrate was in error in upholding the 'no case' submission.

HARPER J: [1] "Bobby McGee's" is a discotheque operated at 186 Exhibition Street, Melbourne. A liquor licence is held in respect of those premises. The licensee is Rydges Hotels Limited. The present respondent, Jordan Michael Rogers, is the nominee of the licensee for the purposes of the *Liquor Control Act* 1987 (the Act). The licence in question is a general class 1 licence. It has been given number 31917098. A condition is attached to that licence. That condition is that no more than 500 patrons be permitted in the disco area of the hotel at any one time. In these circumstances, s122 of the Act is relevant. Sub-s1 of that section provides - and I paraphrase - that a licensee must not, except in accordance with the relevant licence and in accordance with the Act itself, permit liquor to be sold or disposed of or consumed on the licensed premises.

At 11.55 pm or thereabouts on 25 November 1996, members of the Victoria Police entered the relevant area of Bobby McGee's. A count of the number of those present was then undertaken. That count, which was verified by a second count taken immediately after, indicated that more than 800 patrons were then present. At the same time, the police observed that liquor was being served and consumed on the premises. Mr Rogers was not then in attendance. The premises were, nevertheless, under the control of a person who, in the absence of any evidence to the contrary, one must **[2]** infer was appointed by Mr Rogers for that purpose. The appointee was a Mr Brett Wilson who was the general manager of the discotheque on the night in question.

Mr Rogers was subsequently charged with offences under s122 of the Act. The matter then came before the Magistrates' Court at Melbourne. Although the evidence called by the Crown has not in my opinion been set out satisfactorily in the affidavit in support of this appeal, nevertheless the relevant facts are now agreed in terms which I trust I have accurately set out in my recitation above. At all events, it is admitted by Mr Rogers that liquor was sold and consumed on the licensed premises on the occasion in question, and that there were then more than 500 persons present.

Having heard the Crown case, His Worship then heard submissions apparently directed at a "no case" submission put by counsel for the present respondent. His Worship upheld the no

case submission and accordingly the charges were dismissed. According to the affidavit filed in support of the appeal, His Worship held that the respondent should not be liable for any breach of s122 because he was not present at the time that the police visited the premises and was therefore not present when a number of persons in excess of those permitted by the licence were present. The affidavit goes on to state that according to His Worship there was no evidence that the licensee permitted the premises to be overcrowded. The prosecution case, according to His Worship, was based upon the premise that the defendant had permitted a breach of the licence but there was no evidence to support that **[3]** contention.

The word "permit" is defined in the *Oxford English Dictionary* second edition as, amongst other things "allow, suffer". It is also defined, amongst other things, as "not to prevent" and "to give leave or opportunity". The question, then, is whether Mr Rogers "allowed" or "suffered" liquor to be sold, disposed of or consumed on the licensed premises when more than 500 persons were present, or gave leave (or provided the opportunity) to do so. The evidence before the magistrate at the point where the Crown case closed can, I think, be summarised as follows. First that Mr Rogers was the nominee of the company which was the licensee of the discotheque; that Mr Wilson was placed in charge of the discotheque at the relevant time; that liquor was then sold or consumed on the premises; and at that time, there were on the premises more than 500 persons. On those facts it seems to me that the appellant had made out a prima facie case. It was open to the magistrate on those facts to find, as a prima facie conclusion, that Mr Rogers had authority, which he exercised, to appoint Mr Wilson to the position which Mr Wilson then held, that Mr Wilson permitted liquor to be sold and consumed on the premises at that time, and that Mr Wilson also permitted more than the requisite number of persons to be in attendance.

The conclusions thus stated are, in my opinion, appropriate on the basis of inferences which it was open to the magistrate to draw. Indeed, were the evidence left in that state, the magistrate could not in my opinion draw any other inference but that Mr Wilson was properly in **[4]** charge of the premises under authority conferred upon him by Mr Rogers, that Mr Wilson knew that an excess number of persons were present and that Mr Wilson had the express or implied permission of Mr Rogers to allow a number of persons in excess of those permitted by the licence to be present on the premises. The last proposition should perhaps be developed. It flows from the premise that subordinates generally obey their superiors. Had Mr Rogers done what he should have done, namely, inform Mr Wilson of the condition of the licence, and instructed him that it must not be breached, Mr Wilson would probably have put those instructions into effect. If, therefore, there is at the end of the prosecution case evidence that a breach of the licence occurred and that Mr Wilson was, or ought to have been, aware it had occurred (and, if one is present, one ought to be aware that a limit of 500 persons has been exceeded by more than 300) then the prima facie conclusion to which a tribunal of fact must come is that the person ultimately in charge (that is, Mr Rogers) either gave Mr Wilson express permission to breach the condition of the licence, or failed to instruct him properly about his duties. Either way, Mr Rogers "allowed" or "suffered" the breach to occur or "gave leave or opportunity" for its occurrence.

Of course, should the case go back to the magistrate and the defendant wish to call evidence, it will be open to the defendant to call evidence that defeats the prima facie case established by the Crown. The defendant may be able to establish, for example, that he specifically drew Mr Wilson's attention to the provisions of the licence and **[5]** forbade him from permitting more than 500 persons to be present when liquor was sold or consumed. Even if the defendant cannot establish those or other exculpatory facts, it would of course be sufficient were he to throw doubt upon the Crown case such that the magistrate were no longer in a position to accept it beyond reasonable doubt. But those are matters for the future. For the present, it seems to me clear that it was not open to the magistrate to uphold a no case submission on the evidence then before him.

A number of authorities have been drawn to my attention. That most directly relevant seems to me to be the case of *Chappell v A. Ross & Sons Pty Ltd* [1969] VicRp 48; (1969) VR 376. I quote from the head note:

> "Defendant R, a company, was the owner of a commercial goods vehicle in respect of which its driver, an employee of the defendant, committed breaches of Division 3 of the *Motor Car Act* 1958 in failing to have prescribed hours of rest and in failing to have in his possession a prescribed log-book. R was charged with permitting these offences contrary to s37H(2) of the Act. On the hearing of the charges evidence was given of an interview by a witness for the prosecution with a director of R at its

> registered office from which it appeared that the defendant had not checked the log-book kept by its driver, that it was not in fact aware of the offences by the driver, that drivers were given seven days in which to travel from Adelaide to Sydney and return, but were not otherwise supervised, and that the only instruction as to compliance with the law given to employee drivers of the defendant was that any fines imposed on them relating to driving hours, speed or overloading would not be paid by the defendant. The defendant having been convicted of "permitting" the offences by the driver it was held by the Full Court (Winneke CJ and Smith J; Gowans J dissenting): though actual knowledge by the defendant company of the offences committed by the driver had not been proved, the magistrate was entitled to find on the evidence that there was a *prima facie* case to answer, and in the absence of any evidence by the defendant, to convict the defendant."

[6] That case it seems to me is analogous to the present case. It is certainly true that the appellant did not prove before the magistrate that Mr Rogers knew that more than 500 persons were present at the discotheque at the relevant time. That however is not the point; and the case of *Bond v Reynolds* [1960] VicRp 93; [1960] VR 601 is therefore distinguishable. The point is that Mr Rogers knew or ought to have known that if he did not instruct those left in charge of the premises that the relevant licence contained particular restrictions as conditions of the operation of the license, and that those restrictions must be obeyed, then it was likely that a breach of the licence would occur. In those circumstances Mr Rogers could not be said to do other than permit a breach of the licence were he not to provide such instruction to his subordinates.

On the facts put forward by the appellant in this case in the Magistrates' Court it was not only open to the magistrate to infer as a prima facie conclusion that Mr Rogers had permitted the breach; unless and until Mr Rogers called evidence to the contrary such as to raise a reasonable doubt about an essential element of the prosecution case, the magistrate would be entitled to convict.

For these reasons, in my opinion the appeal should be allowed and the matter remitted to the magistrate for the calling of such evidence by the respondent as the respondent may be advised. It is unnecessary for me, I think, to add to what I have just said that of course the normal rules of evidence would apply to the case as remitted.

APPEARANCES: For the appellant: Ms K Judd, counsel. P Wood, Solicitor for Public Prosecutions. For the respondent: Mr K Oderberg, counsel. Christopher Bunnett, solicitor.
