

32/74

SUPREME COURT OF VICTORIA

SILVESTER v KORNHAUSER

Murphy J

29 March 1974

LIQUOR CONTROL – BAR-ROOM – INCLUDES DINING ROOM – ESTABLISHED AS BAR-ROOM – PLAN APPROVED AS A DINING ROOM – WHETHER INCLUDES *BONA FIDE* TRAVELLERS – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: LIQUOR CONTROL ACT 1968, s97(1)(a), (b).

The defendant, a licensed hotel keeper was charged with failing to close and keep closed to the public every bar door at all times other than during ordinary trading hours, and a further charge of permitting a person to enter and remain in a bar room at a time outside ordinary trading hours (contrary to Sections 97(1)(a) and (1)(b) of *Liquor Control Act* 1968.

It was common ground that the alleged offences occurred outside ordinary trading hours. Evidence was led by the prosecution that in a bar-room at the top of stairs in the hotel, a Senior Constable saw about 100 people drinking liquor from glasses. There was a bar in this room behind which four persons including the licensee were serving liquor. The licensee claimed the 100 drinkers were *bona fide* travellers.

Evidence was also led by the defendant from an officer of the Liquor Control Commission to the effect that this hotel had paid fees for two extra bars which he indicated on a plan of the premises tendered in evidence before the Court. (See s95(3) and (4) of the Act). The plan indicated the subject room at the top of the stairs was a dining room.

It was submitted on behalf of the defendant that the prosecution had not proven that the room in question was a bar-room and that the plans lodged with the Liquor Control Commission showed it a dining-room. The Magistrate dismissed the informations on the ground he was not satisfied that the room in question was a bar-room. Upon order nisi to review—

HELD: Order absolute. Dismissals set aside. Remitted to the Magistrate for determination according to law.

1. When the dining room was established as a room in which people were served over a counter, as distinct from a room in which people were served with liquor at meals, it became a bar-room. All the evidence was to the effect the bar-room, that is the dining room, had its door open and that in that room people in large numbers were being served liquor directly over a counter.

2. In relation to the submission that the people in the room were *bona fide* travellers, *bona fide* travellers do not cease to be members of the public within the meaning of s97 of the *Liquor Control Act* 1968 ('Act') simply because they are *bona fide* travellers.

3. Furthermore, the evidence was that the defendant and three other men were behind the bar, or counter, serving drinks, and that the door to the room in which were assembled the people who were drinking was admittedly open. This was sufficient to establish that the defendant hotel-keeper did not 'close and keep closed to the public every bar-room on his premises'. It followed that the order dismissing the information was set aside, and the matter remitted to the Magistrate for determination in accordance with law.

4. In relation to the offence against s97(1)(b) of the Act, it alleged that the defendant hotel-keeper on the day in question, 'did permit persons other than his servant or agent to enter and remain in a bar-room on the said premises at a time outside ordinary trading hours.' This information was dismissed by the Magistrate because he was persuaded to accept the argument of defence counsel that the room in question was not shown to be a bar-room. Reasons have been stated above for concluding that that was wrong.

MURPHY J: ... It is this decision which is reviewed substantially on the ground that the Magistrate should have held that the room in question was a bar-room within the meaning of the Act, and misdirected himself as to the meaning of "bar-room" in s97(1)(a) of the Act.

'Bar-room', as defined in the *Liquor Control Act* of 1968, s57 contains this definition:

"Bar-room" means—

- (a) Any room or place in licensed premises in or from which liquor is served over a counter to any person other than the licensee, his servants or agents, or
- (b) Any room or place in licensed premises declared to be a bar-room by the Commission.'

It is to be noted that this definition varies from the previous definition contained in s3 of the *Licensing Act* 1958, which read:

"Bar-room" means any room in which liquor is kept and in which or through any opening liquor is directly served to customers.'

In the *Licensing Act* 1965, Act number 7319, s9 substituted a new definition of 'bar-room'. This definition reads:

'For the purposes of this Act, "bar-room" means—

- (a) Any room in or place on licensed premises wherein or from which liquor is served to any person over a counter (other than a counter over which liquor is served exclusively to the licensee, his servants or agents or supplied to persons seated at tables in a lounge bar-room or similar place), and
- (b) Any room in or place on licensed premises declared to be a bar-room by the Licensing Court on the application of the Licensee or of a Licensing Inspector.'

Mr Chernov, for the defendant, appearing to show cause, argued that in the new definition of 'bar-room', as contained in the *Liquor Control Act* of 1968, the words 'in or from which' should not be read disjunctively, and said that it followed that the bar-room did not include the room in question in this case, which was, in fact, a dining room, and which was not the room 'in or from which liquor is served over a counter.'

He submitted that the bar-room was the room in and from which liquor was served over a counter. I cannot accept this submission. When the dining room was established as a room in which people were served over a counter, as distinct from a room in which people were served with liquor at meals, it became, in my opinion, a bar-room.

It is true that in so establishing the dining room as a bar-room, the defendant committed an offence against s95(3) of the Act, because the room was not shown as such on the plan approved by the Liquor Control Commission. But this does not, in my opinion, prevent the Licensee from establishing or maintaining the dining room as a bar-room, and the evidence shows that it was so established or maintained on the day in question.

Mr Chernov also argued that the evidence given in the Court below was too vague and did not sufficiently identify the room in question. I again cannot accept this submission. All the evidence was to the effect the bar-room, that is the dining room, had its door open and that in that room people in large numbers were being served liquor directly over a counter.

It was then submitted that, as the evidence showed the people in the room being served liquor were *bona fide* travellers, they were not, as such, members of the public for the purposes of s97(1)(a) the *Liquor Control Act* 1968, and that there was no evidence at all that the door to the room was open to the public or, rather, that there was no evidence at all that the door to the room was not closed and kept closed to the public.

Although this matter was not raised before the Magistrate, the defendant is entitled to rely on it on the return of this order in order to support the decision of the court below. I do not accept this submission, for I am of the opinion that *bona fide* travellers do not cease to be members of the public within the meaning of s97 simply because they are *bona fide* travellers.

Furthermore, the evidence was that the defendant and three other men were behind the bar, or counter, serving drinks, and that the door to the room in which were assembled the people who were drinking was admittedly open. In my opinion, this was sufficient to establish that the defendant hotel-keeper did not 'close and keep closed to the public every bar-room on his premises'. It follows, in my opinion, that the order dismissing the information should be set

aside, and the matter remitted to the Magistrate for determination in accordance with law.

The second order nisi related to an offence against s97(1)b) of the *Liquor Control Act* 1958. It alleged that the defendant hotel-keeper, at the Cecil Hotel on the day in question, 'did permit persons other than his servant or agent to enter and remain in a bar-room on the said premises at a time outside ordinary trading hours.'

This information was dismissed by the Magistrate because he was persuaded to accept the argument of defence counsel that the room in question was not shown to be a bar-room. I have already stated my reasons above for concluding that that was wrong.

The decision dismissing this information shall also be set aside and the matter remitted to the Magistrate for determining in accordance with the law as outlined herein. The orders nisi will be made absolute. The informations will be remitted for determination according to law.
