

22/85

## SUPREME COURT OF VICTORIA

**CHALMERS v HUNTER**

Southwell J

22 May 1985 — [1985] VicRp 65; [1985] VR 647

**LIQUOR AND LICENSED PREMISES – SUPPLY OF LIQUOR TO PERSON UNDER 18 YEARS BY EMPLOYEE OR LICENSEE – STATUTORY INTERPRETATION – WHETHER SERVANT OR AGENT OF LICENSEE CAN BE GUILTY OF SUCH OFFENCE – MEANING OF "ANY PERSON": *LIQUOR CONTROL ACT 1968*, SS3, 110, 112(1); *INTERPRETATION OF LEGISLATION ACT 1984*, SS35(a), 36.**

**The expression "any person" (where first occurring) in s112(1) of the *Liquor Control Act 1968* is to be construed as including a servant or agent of the licensee.**

**SOUTHWELL J:** [1] This is the return of an order nisi to review a decision of the Magistrates' Court at Lilydale, made 13 August 1984, whereby the Court dismissed an information alleging that the respondent was guilty of an offence under s112(1)(e) of the *Liquor Control Act 1968*, for that he supplied in the vicinity of specified premises liquor to a person under the age of 18 years.

The course of proceedings before the Magistrates' Court was odd, to say the least. Counsel appeared for the respondent and, after a prosecuting Sergeant of Police had announced his appearance, Counsel, so it appears, after his client, the respondent, had pleaded 'not guilty' to the information, was heard to make submissions that s112 did not apply to "any employee of the licensee". The affidavit filed in support of the order nisi refers to the fact that there was quite considerable discussion [2] as to whether or not "an employee of the licensee could be charged under s112 of the *Liquor Control Act 1968*". But little detail appears in the affidavit and, in particular, there appears to have been no reference to any formal concession by or on behalf of the informant. It would seem that the learned Stipendiary Magistrate must have understood that the informant was formally conceding that the respondent was "an employee" of the licensee, although it would appear that no reference was made to the question whether, at the time, he was acting as a "servant or agent" of the licensee. Be that as it may, the Magistrate, after hearing submissions from Counsel and from the prosecuting Sergeant, dismissed the information "on the basis that an employee could not be charged with an offence under s112 of the *Liquor Control Act 1968*". In other words, the information was dismissed without any evidence having been led or any argument, so it appears, as to whether evidence would have been relevant and therefore admissible that the respondent was an employee, and whether or not he was then acting as a servant or agent of the licensee.

Mr Bowden, who appeared for the applicant, in a most helpful submission referred me to the words of s3 of the *Liquor Control Act*, which refer to the objects of the Act and also state that the Act "shall accordingly receive such fair large and liberal construction and interpretation as will best ensure the attainment of the objects of this Act". He also referred to s36 of the *Interpretation of Legislation Act 1984*, which enacts that headings in legislation shall be regarded as part of the Act in which [3] they appear and so s35(a) of the latter Act, which, in substance, states that a construction that would promote the object of the Act is to be preferred to that which will not. For my part, helpful although those references were, I doubt whether they were necessary to enable the applicant to succeed in this application, which, perhaps I should earlier have said, was heard in the absence of any appearance of the respondent.

In the course of this submission, Mr Bowden, notwithstanding that Counsel for the respondent at the hearing below had informed the Court that there was no case law in support of his submission, referred me to the case of *Williamson v Norris* as being a case which might be thought, at first glance, to give some comfort to the argument which was successful in the Court below. That case, reported at [1899] 1 QB, p7, involved an information against a barman, employed in the bar of the House of Commons, it being alleged that he had sold liquor to a person who

was not a Member of either House of Parliament, the premises of which were not appropriately licensed. One would infer, from a reading of the report, that, behind the case, must have lurked some controversy as to the rights of Parliament to act as it pleases and be not subject to the provisions of the relevant *Licensing Act*. The Court of Appeal there held that the barman was not guilty of the offence. Lord Russell CJ, at p13, said that:

"On reading that section I think it is impossible not to see that, in order to bring the innocent act of a waiter or a barman within the penal clause, [4] it is necessary to put a strong gloss on the words of the section."

His Lordship went on to say that: "... the sale, which is prohibited, must be a sale by the person who ought to be licensed." With the greatest of respect to the members of that Court, I think that there is some strength in the comment of Mr Bowden that hard cases can produce a judicial gloss on some statutory provisions.

Such comfort as the respondent in this case might have obtained from those judgments is, I think, to a large extent obliterated by two subsequent decisions, to which Mr Bowden referred me, namely, *Caldwell v Bethell* [1913] 1 KB 119, where the Court was considering the meaning of s69 of the *Licensing Consolidation Act* 1910, the words of which read, "If any person sells or suffers any person under his control or in his employment to sell any intoxicating liquor, so as to contravene this section" he shall be liable to a penalty. It was there held that the words any person" are not confined to the licensee. Lord Alverstone CJ, at p123, referred to *Williamson v Norris*, saying:

"That case does not seem to me a sufficient authority for us to hold that the sale contemplated by s69 is a sale by the licensee only and that nobody else can commit the offence."

With that view, Avory J in substance agreed at p125. Finally I was referred to *Knapp v Bedwell* [1917] 80 JP 336, where, notwithstanding a plea of guilty, an information against a barmaid was dismissed, she having been charged under a regulation which stated in part, "... no person shall, either by himself or by any servant or agent, [5] sell or supply any intoxicating liquor to any person in any licensed premises for consumption on the premises unless the same is ordered and paid for by the person so supplied". On a case stated, the Court of Appeal held that the Court below should have convicted the barmaid, Lord Reading CJ, saying at p336:

"An offence is committed when the intoxicating liquor is supplied either by the licence holder or by his servant and, if the offence is committed by his servant, the licence holder is also guilty of an offence."

Accordingly, it can be seen that the expression "any person" and the expression "no person", where appearing in statutes somewhat similar to s112, have been held to refer to servants or agents of a licensee. In my view, the proper resolution of this order to review can be reached merely by a study of the relevant section of the Act and of s3 and s110. Section 110 of the *Liquor Control Act* is headed "Offences by Licensees"; sub-section (1)(i) makes it an offence for the licensee to sell or supply liquor to a person under the age of 18 years. Immediately preceding s112 is the heading "Division 2. – Offences by persons other than the Licensee" and the section then reads:

"(1) Any person who ...

(e) Subject to the provisions of sub-sections (3) and (4) supplies on or in the vicinity of any specified premises any liquor to any person who is under the age of 18 years."

In my opinion, there is, by the adoption of ordinary principles of statutory construction, no warrant for reading into the expression "any person" the words 'not being a servant or agent of the licensee'. Even before the enactment of the *Interpretation of Legislation Act*, I [6] would so have held but the matter, in my opinion, is put beyond doubt when one refers to those headings. If the argument for the respondent was correct, then it would seem that, whereas s110 referred only to licensees, s112 referred only to strangers, that is, persons who were not servants or agents of the licensee and it would follow that, where a servant or agent performed one of the acts which the sections endeavour to prohibit, he would not be guilty of an offence; in other words, that the Act remains silent in respect of the performance by a servant or agent of any of those prohibited acts. That would, in my opinion, lead to an absurd result.

For those reasons, the order nisi must be made absolute. Whilst some of the grounds are perhaps not happily phrased, it is clear that the Magistrate erred in dismissing the information upon the basis that the respondent was an employee of the licensee of the relevant premises.

Solicitor for the applicant: RJ Lambert, Acting Crown Solicitor.

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