47/77

SUPREME COURT OF VICTORIA

BOOTH v VENEZIA & SAVINO

Lush J

13 September 1976

LIQUOR CONTROL – SHOP OWNER SOLD LIQUOR WITHOUT A LICENCE – EVIDENCE GIVEN THAT THE LIQUOR WAS READILY AVAILABLE AND OFFERED FOR SALE IN THE VICINITY OF THE SHOP – "TRIFLING OFFENCES" – CHARGES DISMISSED ON THE GROUND THEY WERE TRIVIAL – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT*, S58.

Venezia, a proprietor of a hamburger shop, was charged "with selling liquor without licence" and "did in a refreshment place permit liquor to be consumed". (s114 & s45 of *Liquor Control Act* 1958). Savino, a customer of an espresso bar, was charged, "that in a refreshment room he consumed liquor". (s45). The evidence of sale and consumption was clear and uncontradicted. The Magistrate found liquor described as "cherry brandy" or "cherries in brandy" was liquor within the meaning of the Act. In the case of each defendant at the end of the evidence of the leading relevant police witness, the Magistrate asked the witness if he was aware that "cherries in brandy" were openly displayed for sale in unlicensed grocers, supermarket, etc., not only in the area but generally. He got a uniform answer, that the witness believed that the articles were on display in some unlicensed premises but he had not made any enquiries whether they were for sale.

The Magistrate found the charges were proved, but said they would be dismissed because the articles concerned in the charge were readily available and offered for sale in the vicinity in unlicensed grocers' shops and supermarkets in the same area as the subject premises in the present case without restriction to the general public. Upon Order Nisi to review—

HELD: Order absolute. Dismissals set aside. Convictions imposed.
1. The Magistrate came to the conclusion that the offences were trifling because there was evidence to be found in the partial concurrence of the police witnesses with the Magistrate's own suggestion that a number of other persons in the same geographical area were selling the same product in breach of the same Act and had not been prosecuted.

2. In considering the offences trivial, the Magistrate took into consideration irrelevant matter, that is that other people may have been committing a similar offence in relation to the same goods in the same area and had not been prosecuted. Also, the discretion miscarried in that the result achieved was such that upon consideration it could not possibly be right.

3. What the Magistrate decided was that to sell an article which was liquor within the meaning of the *Liquor Control Act* over the counter of a hamburger shop was a trifling offence. The liquor laws of this State standing as they do, such a proposition was wholly untenable and could not have been adopted as the result of any proper approach to the assessment of triviality.
***Farrelly v Little* [1970] VicRp 2; [1970] VR 18, applied.**

LUSH J: The situation confronting the Magistrate was this, that having found the charges proved he could either proceed to conviction and impose an appropriate penalty, though he may well have considered that there were matters to be taken into consideration, not necessarily conclusive, pointing in some of the cases at least to light penalties; or he could have turned to the application of s58 of the *Magistrates' Court Act* which deals with situations in which the Court thinks that the offence, though proved, is in the particular case, of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment.

The Magistrate did not express himself as relying upon s58 for authority for the course which he took. Mr Meagher contended that this circumstance might justify the inference that the Magistrate in fact made a decision about the trifling quality of the offence without ever directing his mind to the factors relevant to deciding whether the offence was trifling or not. However, Mr Meagher presented his argument on what, if I may say so, was the rational assumption that in fact the Magistrate had contemplated exercising the power given by s58. It would seem that there was no other power which he could have contemplated exercising.

If that is so, the learned Magistrate came to the conclusion that the offence was trifling because there was evidence to be found in the partial concurrence of the police witnesses with the Magistrate's own suggestion that a number of other persons in the same geographical area were selling the same product in breach of the same Act and had not been prosecuted.

In *Farrelly v Little* [1970] VicRp 2; [1970] VR 18, Little J pointed out at p21 that the decision whether an offence was trifling involved a discretionary judgment which was only appealable or reviewable upon the well known grounds, which may be summarised as saying that it must be shown that irrelevant matters were taken into consideration, relevant matters were omitted from consideration, mistake of fact was made, that the respective weight attached to different considerations was demonstrably wrong, or that finally, even if no specific error in thought can be isolated, the ultimate result achieved speaks for itself so that it can be inferred that there must have been some miscarriage of appreciation to produce that result.

Mr Meagher submitted that it was only necessary to state the proposition that the prevalence of an offence made it trifling in the individual case in order to appreciate its falsity, and that submission I would adopt. It is of interest to note that similar propositions were put in *Farrelly v Little*. I do not propose to go into the facts of that case which were very different and perhaps could be said to be much more favourable to the defence than the facts in the present case. But the considerations raised in that case which could be put alongside the consideration of availability for sale which appears to have dominated the cases before me were dismissed by Little J as being of a relevance that was almost unarguable and therefore not to be taken into consideration in the assessment of triviality.

In my opinion, it being assumed that the Stipendiary Magistrate in this case acted as he did for the only reason that he could so act, namely that he considered the offences trivial, he took into consideration irrelevant matter, that is that other people may have been committing a similar offence in relation to the same goods in the same area and had not been prosecuted. I would also hold that the discretion miscarried for the last of the reasons that I referred to as being available in the review of discretionary judgments, namely that the result achieved is such that upon consideration it cannot possibly be right. What the learned Magistrate decided in Venezia's case was that to sell an article which was liquor within the meaning of the *Liquor Control Act* over the counter of a hamburger shop was a trifling offence. In my opinion, the liquor laws of this State standing as they do, such a proposition is wholly untenable and could not have been adopted as the result of any proper approach to the assessment of triviality.

Accordingly, in each case the orders will be made absolute, the order of dismissal on each of the three informations will be set aside, and there will be an order in each case that the defendant be convicted. The informations are remitted to the Brunswick Court for the imposition of an appropriate penalty.
