

05/79

SUPREME COURT OF VICTORIA

BURY v LOCANTRO

Beach J

6 December 1978

LIQUOR CONTROL – SALE OF LIQUOR BY BOTTLE SHOP ASSISTANT TO A PERSON UNDER 18 YEARS OF AGE – LICENSEE CHARGED WITH OFFENCE – WHETHER SALE MUST HAVE BEEN PERSONALLY MADE BY LICENSEE – WHETHER LICENSEE PROVED TO HAVE HAD KNOWLEDGE OF SALE – WHETHER *MENS REA* IS A NECESSARY INGREDIENT OF THE OFFENCE – FINDING BY MAGISTRATE THAT SOME ELEMENT OF KNOWLEDGE HAD TO BE AN INGREDIENT OF THE OFFENCE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *LIQUOR CONTROL ACT 1968*, S110(1)(i).

1. The fact that the word 'knowingly' appeared in Section 186(1) of the *Licensing Act 1958* and was omitted from Section 110(1)(i) of the *Liquor Control Act 1968* is of itself an indication that Parliament intended that a person could be convicted of the offence in question without proof of *mens rea*.

2. What the legislature clearly intended was that there should be no onus upon an informant to prove *mens rea* on the part of a defendant, proof of the sale of liquor to a person under the age of eighteen years being sufficient to justify a conviction. Once those elements have been established the onus was then cast upon the defendant to prove that he or the person supplying the liquor believed on reasonable grounds that the person to whom he supplied it was over the age of eighteen years, thereby bringing himself within the exculpatory provisions of sub-section (5).

3. It is now clear from the authorities that when one is considering a statute such as the *Liquor Control Act* there is no presumption that *mens rea* is a necessary element of an offence under the Act although, in certain cases, it may by implication be a necessary element of an offence.

4. In the present case, *mens rea* is not a necessary element of an offence under s110(1)(i) of the *Liquor Control Act 1958*. It was not the intention of the legislature that the sale in question must have been made personally by the licensee or that such sale having been made by a servant or agent of the licensee or a person for whose acts the licensee was responsible, that the licensee must be proved to have had knowledge of the sale.

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

BEACH J: This is the return of an order nisi to review a decision of the Melbourne Magistrates' Court given on the 22nd June 1978. The defendant was charged on information and summons with an offence under Section 110(1)(i) of the *Liquor Control Act 1968* viz, that he being the person nominated and approved to be responsible as licensee on behalf of the body corporate (Young & Jacksons Pty Ltd) such body corporate being then holder of a hotel-keeper's licence in respect to premises known as Princes Bridge Hotel, situated at 1 Swanston Street, did at Melbourne on 9th March, 1978, sell liquor to a person who was under the age of eighteen years of age.

The order of the court was that the information be dismissed. On 21st July 1978 the informant obtained an order nisi to review that decision on the ground that the Stipendiary Magistrate was in error in dismissing the information in that he ought not to have held that for the defendant to have been guilty of the offence of selling liquor to a person who was under the age of eighteen years contrary to the provisions of Section 110(1)(i) of the *Liquor Control Act 1968*:

- (a) such sale must have been personally made by the defendant;
- (b) such sale having been made by a servant or agent of the defendant or a person for whose acts the defendant was responsible, that the defendant must be proved to have had knowledge of such sale.

The order nisi was obtained upon an affidavit by the informant. An answering affidavit was filed on behalf of the defendant. From those two affidavits evidence of the following matters emerged:

(1) On the 9th March 1978, Young & Jacksons Pty Ltd was a body corporate and the holder of a hotel keeper's licence in respect of premises known as the Princes Bridge Hotel situated at 1 Swanston Street, Melbourne. As at that date the defendant was the nominee of the company and as such was responsible as licensee for the conduct of the hotel. The hotel consisted of a ground floor on which were located the public bar and bottle shop, and first floor on which were located a dining room, lounge and various other rooms used in connection with the running of the hotel.

(2) On the evening of 9th March 1978, one Davidson, a bottle shop assistant employed by the Company, was in charge of the bottle shop.

(3) At approximately 7.00 o'clock on that evening Davidson sold six small cans of Carlton Draught beer to a 14 year old youth named Morgan. The sale of the six cans of liquor was made in the bottle shop and was within the scope of Davidson's employment by the company.

(4) At the time when the six cans of beer were sold to Morgan, the defendant was on the first floor of the hotel, did not know of the sale, and did not know that Morgan was under the age of eighteen.

Before the Magistrate it was contended on behalf of the defendant that before the defendant could be convicted of the offence, the informant must prove that the defendant sold the liquor to Morgan or that he authorized the sale of the liquor to Morgan or that he had knowledge of the sale of the liquor to Morgan.

For the informant it was contended that the defendant was vicariously responsible for Davidson's act, and that it was no defence that he did not know of the sale.

The Stipendiary Magistrate stated that he believed that in looking at the Act as a whole, some element of knowledge had to be an ingredient of the offence. He then proceeded to dismiss the information.

Section 110(1)(i) of the *Liquor Control Act* 1968 provides that any licensee who subject to the provisions of sub sections (5) and (6) sells or supplies, or permits the sale or supply of any liquor to any person who is under the age of eighteen years shall be guilty of an offence under the Act.

Sub section (5) provides it shall be a defence to a charge under paragraph (i) of sub-section (1) to prove that the licensee or the person supplying the liquor believed on reasonable grounds that the person whom he supplied it was over the age of eighteen years. It is a fundamental principle of criminal law that an accused person cannot be convicted without proof of *mens rea* unless from a consideration of the terms of the relevant statute and other relevant circumstances, it clearly appears that that must have been the intention of Parliament. See *Vane v Yiannopoulos* (1965) AC 486 per Lord Reid at p496; (1964) 3 All ER 820.

Authorities have established a principle of interpretation of Licensing and similar Acts however, that in certain circumstances where a licence holder is prohibited from doing or suffering certain things, vicarious responsibility must be inferred, so that the knowledge of the servant must be imputed to the licence holder.

It was contended by counsel for the informant that having regard to the terms of the sub-section under consideration and other relevant circumstances including the history of the section and the objects of *Licensing Act*, it was clearly the intention of Parliament that a licensee could be convicted of the offence in question without proof of *mens rea*, and could be criminally responsible for the Acts of his servant.

In support of this contention, counsel for the informant first drew attention to the fact that although the word 'knowingly' had appeared in the corresponding section in the 1958 Act, it no longer appeared in Section 110(1)(i) of the 1968 Act.

In support of his contention that the word 'knowingly' should not be read into the sub-section, counsel for the informant placed reliance upon the decision of the Queen's Bench Division in *Betts v Armstead* (1888) 20 QBD 771. That was a case dealing with an offence under the English *Sale of Food and Drugs Act* 1875...

In my opinion the fact that the word 'knowingly' appeared in Section 186(1) of the 1958 Act and was omitted from Section 110(1)(i) of the 1968 Act is of itself an indication that Parliament intended that a person could be convicted of the offence in question without proof of *mens rea*.

In my view what the legislature clearly intended was that there should be no onus upon an informant to prove *mens rea* on the part of a defendant, proof of the sale of liquor to a person under the age of eighteen years being sufficient to justify a conviction. Once those elements have been established the onus was then cast upon the defendant to prove that he or the person supplying the liquor believed on reasonable grounds that the person to whom he supplied it was over the age of eighteen years, thereby bringing himself within the exculpatory provisions of sub-section (5).

I turn now to a consideration of a number of authorities touching upon the matter, and upon the question as to whether such sale must have been personally made by the defendant or whether he is vicariously responsible for the act of his servant or person for whose acts he was responsible, even though that act was done without his knowledge and indeed contrary to his express instructions.

[His Honour then considered the following cases]

- (1) *Mousell Brothers v London and North-Western Railway* (1917) 2 KB 836 at p845, Atkin J as he then was)
- (2) *In Bear v Lynch* [1909] HCA 31; (1909) 8 CLR 592
- (3) *Commissioners of Police v Cartman* (1896) 1 QB 655. [*Cartman's case* has since been followed in both NSW and Victoria. Ed.]
- (4) *Garland v Devir* (1904) 20 WN (NSW) 1
- (5) *Davies v Young* [1910] VicLawRp 61; (1910) VLR 369; 16 ALR 368; 32 ALT 39
- (6) *Doia v Clune* (1920) 36 WN (NSW) 118
- (7) *Ex parte Donato* 41 WN (NSW) 96; (1924) 24 SR (NSW) 334
- (8) *Crichton v Victorian Dairies Ltd* [1965] VicRp 6; (1965) VR 49
- (9) *Goldwater v DiGiacchino* [1968] VicRp 5; (1968) VR 40; 12 FLR 122.

[After discussing these cases, His Honour continued] ... In my opinion, it is now clear from those authorities that when one is considering a statute such as the *Licensing Act [Liquor Control Act 1968]* there is no presumption that *mens rea* is a necessary element of an offence under the Act although, in certain cases, it may by implication be a necessary element of an offence.

The conclusion I have reached in this matter is that *mens rea* is not a necessary element of an offence under s110(1)(i) of the *Licensing Act 1958 [Liquor Control Act 1968]*. I am satisfied that it was not the intention of the legislature that the sale in question must have been made personally by the licensee or that such sale having been made by a servant or agent of the licensee or a person for whose acts the licensee was responsible, that the licensee must be proved to have had knowledge of the sale.

The order will be that the order nisi be made absolute with costs which I fix in the sum of \$200; that the order of the Magistrates' Court at Melbourne dismissing the information be set aside; and that the case be remitted to the Magistrates' Court to be further heard and dealt with in conformity with this judgment.