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SUPREME COURT OF VICTORIA

BROWN v BADE and ORS

Murphy J

29, 30 November 1983 — [1985] VicRp 17; [1985] VR 182

LICENSED PREMISES – UNAUTHORISED DISPOSAL OF LIQUOR – HOTEL – MEALS AVAILABLE – NONE CONSUMED – WHETHER SALE OF LIQUOR LINKED WITH CONSUMPTION OF MEAL: *LIQUOR CONTROL ACT* 1968, S26.

At about 10.35 p.m. Brown went to an hotel where he purchased a "meal voucher" for $1. There were about 200 other people drinking alcohol; however, none was eating anything. At 11.30 p.m. Brown was served a meal which constituted a substantial refreshment. At about 12.28 a.m. Brown spoke to the person in charge of the hotel to the effect that the only suppers served that night had been to the Police Officers. Charges were laid alleging that an unauthorized disposal of liquor took place. When the matter came on for hearing, the defendants' solicitor submitted that the charges should be dismissed on the ground that refreshment was available on request to patrons. The Magistrate agreed and dismissed the charges. On order nisi to review—

HELD: Order nisi absolute.
(1) A permit to sell or dispose of liquor under s26(2) of the *Liquor Control Act* 1968 authorizes sale or disposition ancillary to as well as with substantial refreshment.

(2) The test to be applied is whether the defendants believed that the liquor was sold for consumption with or ancillary to substantial refreshment.

(3) As none of the defendants held this belief at the time of the sale of the liquor, then they were guilty of the offences charged.

MURPHY J: *[After setting out the facts, His Honour continued]:* ... **[6]** The section of the *Liquor Control Act* 1968 (hereinafter termed "the Act") which was being considered by the magistrate was s26(1)(d) which, omitting formal parts, reads:

> "... An hotelkeeper's licence shall authorize the licensee to sell and dispose of liquor on the premises specified in the licence
> (d) where a permit under sub-s(2) is in force for the purposes of this paragraph, subject to and in accordance with the permit, for consumption with or ancillary to a *bona fide* meal or substantial refreshment between the hours of 10 in the evening and 1 in the following morning on any day..."

[7] I think it is important to remark that the words of s26(1)(d) of the Act vary in a material respect from the words appearing in the earlier *Licensing Act* 1958 s8(1)(b) as substituted by s2(1) of the *Licensing Act* 1965 No. 7319. The words of s8(1)(b) of the 1958 Act as substituted were, "for consumption with or ancillary to a *bona fide* meal or with substantial refreshments". Newton J when considering these last words in *Sharp v Hotel International Ltd* [1969] VicRp 12; (1969) VR 103 said,

> "I do not agree with the stipendiary magistrate's view that the words 'ancillary to' in s8(1)(b) apply to the words 'substantial refreshments'. In my opinion they apply only to the words 'a *bona fide* meal'".

His Honour did not explain further why it was that he held this opinion, but it appears to me that he did so because the words "or with" preceded the words "substantial refreshments" and pointed to a dichotomy to be found between on the one hand consumption with or ancillary to a *bona fide* meal and on the other hand consumption with substantial refreshments. Section 26(1)(d) of the *Liquor Control Act* 1968 omits the second "with" and thus allows – and in my view demands – the construction that the words "with or ancillary to" qualify both "a *bona fide* meal or substantial refreshments". Thus in my opinion, if a permit to sell or dispose of liquor under sub-s(2) of s26 is in force, it authorizes sale or disposition for consumption ancillary to substantial refreshments, as well as with substantial refreshment. Therefore, it permits sale for consumption prior to but as a

subservient or sub-ordinate adjunct of substantial refreshment. Ancillary is a word taken from the Latin, "ancilla" **[8]** meaning a handmaiden, and means subservient or subordinate. Consumption of the liquor is not to be the dominant feature taken, say, with a salted peanut or a salted biscuit to whet the appetite for more liquor. But if the liquor is sold for consumption as a subordinate or, as it were, an aperitif lead-up to or even a follow-up to the substantial refreshment, then its sale is permitted under s26(1)(d). Whether in any particular case the sale is for consumption ancillary to substantial refreshment will involve considerations of matters of degree, fact and finally law. In the present case, the fact that the substantial refreshment was available is, as Mr Golombek submitted, a red herring.

Here, the question is whether at the time of the sale of the liquor for consumption, the licensee or the persons concerned with the sale believed that the liquor sold would be consumed as a preliminary to substantial refreshment. Unless they did so believe, this permit did not allow them to sell it. Although on this construction of the section consumption of liquor is permitted prior to or as a subordinate adjunct to a meal or substantial refreshment, (even as an after-dinner drink), the essence of the legality of its sale lies in whether the sale was made by or with the authority of the person charged believing that consumption of the liquor was to be enjoyed by the purchaser in this way.

Just as Newton J did, I also leave the question open whether any such belief need be shown to be entertained on reasonable grounds. On the uncontradicted evidence in the present case, **[9]** it was not, in my opinion, open to find that the defendants or any one of them entertained such a belief at the time of sale of liquor on this Friday night to the hundreds of Port Melbourne patrons of the Fountain Inn. "They don't come here to eat, unfortunately", said Mr Willing, the person in charge. One has a good deal of sympathy for the solicitor for the defendant's submission when he emphasized to the magistrate, "You can't force them to eat".

No questions have been raised here such as were raised in another case dealing with the *Licensing Act*, *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104. The magistrate applied, I believe, the wrong test. He should have applied the test whether, when considering each case against each defendant, the belief was held by that defendant that in selling liquor to these patrons in Port Melbourne between 10.35 pm. and 1 a.m., the liquor was sold for consumption with or ancillary to substantial refreshment. The answer, of course, to such a question must be in this case, "No". I do not see that any other answer was open. Counsel appearing for the respondents before me to show cause submitted no argument suggesting the contrary. I will make absolute each order nisi. I order that the orders of the Magistrates' Court be set aside.

Solicitor for the applicant: D Yeaman, Crown Solicitor. Solicitors for the respondents: Mahony and Galvin.
