IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 10 of 1979

FULL COURT

BEFORE:

The Chief Justice

Mr. Justice Andrews

Mr. Justice Dunn

BRISBANE, 25 JUNE 1979

GARY ROBERT BIELBY

- v

ADELE MAY NASSER

ex parte: GARY ROBERT BIELBY

JUDGMENT

THE CHIEF JUSTICE: I ask my brother Dunn to deliver the judgment.

MR. JUSTICE DUNN: This is an appeal by way of order to review. The proceedings went upon the complaint of a Mr. Bielby who complained that on a specified day the holder of a licensed victualler's licence did fail to cause all waste beer in or on her licensed premises to contain either the colouring matter methyl violet in a sufficient quantity to impart to such waste beer at all times a distinct violet colour or an emulsifying oil in sufficient quantity to impart at all times a distinct milky appearance.

Before the magistrate evidence was given by the complainant and by the accused and her sister and there was a violent conflict in the evidence. The complainant asserted that on the day in question he went to the premises and saw in a container waste beer which, according to him, contained no colouring matter that he could see and, also according to him, was an amber fluid. By contrast the accused and her sister gave evidence that the complainant arrived at the premises before trading had started, that there was no waste beer in any tray and that cleaning was in process prior to the commencement of the day's trading.

The magistrate took an unusual course. He did not attempt to resolve the conflict in the evidence and said that he would proceed on the basis that the complainant's account of events was the correct version. He then went on to say that, making that assumption, he was not satisfied beyond a reasonable doubt as to whether the prosecution had proved that the waste beer was properly denatured.

The regulation in question is regulation 102 subregulation 2(a) and its terms appear from the terms of the complaint which I have read. It is clear that the intention of the regulation is to ensure that all waste beer is discernibly coloured.

The complainant's evidence, which included evidence that he had viewed the waste beer in good light, was that it was not discernibly coloured and, this being so, the conclusion of fact reached by the magistrate is in my opinion wholly insupportable. The appropriate course therefore, in my opinion, is that the matter be remitted to him with a direction that he enter any necessary adjournment and proceed according to law, that is to say he must do what he should have done at the trial; the complainant's evidence not being inherently improbable, he should have resolved the conflict of credibility and

decided, having regard to that conflict, whether the complainant's case was made out beyond a reasonable doubt.

THE CHIEF JUSTICE: I agree with the observations that have fallen from my learned brother and the opinions he has expressed and with the orders that he proposes.

MR. JUSTICE ANDREWS: I also agree.

THE CHIEF JUSTICE: The order to review is made absolute with costs and the Court further directs that the matter be remitted to the Stipendiary Magistrate with a direction that he enter any necessary adjournment and proceed according to law.

MR. MACGROARTY: I would make application under the Appeal Costs Act for a certificate of indemnity on costs.

THE CHIEF JUSTICE: We have given consideration to the foreshadowed application for a certificate of indemnity under the Appeal Costs Fund Act 1973 and are prepared, in the exercise of our discretion, to grant such a certificate. The principles which have been accepted and acted upon by this Court were laid down in Brisbane City Council v. Ferro Enterprises Pty. Ltd. in which the leading judgment was given by Hoare J., the Senior Puisne Judge Stable J. as he then was and Matthews J. agreeing. The learned Mr. Justice Hoare adopted the observations of Mr. Justice Newton of the Victorian Supreme Court which were given in Jansen v. Dewhurst 1969 Victorian Reports, 421 at 429 and 430 when he agreed with some observations made by Mr. Justice Moffatt of the New South Wales Court of Appeal in the case of Acquilina.

In summary, the view taken is that the relief by way of indemnity certificate for which the Act provides can be assumed to proceed on the assumption that the law is known so that if an error of law occurs in a court of first instance or an inferior appellate court, such error may ordinarily be attributed to a fault in the administration of justice rather than of the parties so that the costs of

having the error rectified ought not ordinarily to lie on the unsuccessful respondent to the appeal but to be paid from a fund contributed to by all litigants.

That approach was endorsed by this Full Court in Zapulla v. Perkins in which I wrote the reasons delivered on 1 June last year where it expressly adopted what had been decided by the Full Court in the Brisbane City Council v. Ferro. There have been several cases since in which that view has been adhered to and this is a case which merits a certificate and I would so order.

MR. JUSTICE ANDREWS: I agree.

MR. JUSTICE DUNN: Yes, I agree.