IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 50 of 1981

FULL COURT

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice D.M. Campbell

Mr. Justice Sheahan

BRISBANE, 29 JULY 1982

TREVOR BANKART GORDON

v.

BARBARA MAY TURNBULL

Ex parte: TREVOR BANKART GORDON

ORDER

THE CHIEF JUSTICE: The Court reserves its decision in this matter.

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Ex parte: TREVOR BANKART GORDON

THE CHIEF JUSTICE

D.M. CAMPBELL J.

SHEAHAN J.

Judgment delivered by The Chief Justice and D.M. Campbell J. on the 20th August, 1982. Sheahan J. concurring.

"APPEAL ALLOWED WITH COSTS. ORDER OF MAGISTRATE SET ASIDE AND MATTER REMITTED TO THE MAGISTRATE TO ENTER UP ALL NECESSARY ADJOURNMENTS AND TO DETERMINE THE MATTER ACCORDING TO LAW."

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JUDGMENT - THE CHIEF JUSTICE

This is an appeal by way of an order to review from the decision of a Stipendiary Magistrate at Cunnamulla. The respondent was charged that on 16th April, 1981 at Wyandra in a public place, to wit, the lounge of the Gladstone Hotel, Railway Street, Wyandra, she used obscene language. Section 7(c) of *The Vagrants, Gaming, and other Offences*

Act 1931 - 1971 (the Act) provides that any person who, in any public place uses any profane, indecent, or obscene language, shall be liable to a penalty. Section 2 of the Act provides that, unless the context otherwise indicates, the term "Public place", insofar as the definition is material to the present case, has the following meaning:—

> "'Public place' includes every road and also every place of public resort open to or used by the public as of right the term also includes —
>
> (a) Any vessel, vehicle, building, room, licensed premises, field, ground, park, reserve, garden, wharf, pier, jetty, platform, market, passage or other place for the time being used for a public purpose or open to access by the public, whether on payment or otherwise, or open to access by the public by the express or tacit consent or sufferance of the owner, and whether the same is or is not at all times so open."

In the same section, the meaning given to "Licensed premises" is as follows:— "Premises licensed, whether annually or temporarily, under 'The Liquor Acts, 1912 to 1926' or any Act amending the same, including vessels if so licensed". By virtue of s. 4 of the *Liquor Act*, the term "Licensed premises" means "the premises in respect of which a license is granted", and "Premises" includes "house or place, and the curtilage thereof, and extends to every room, billiard-room, closet, sanitary convenience, cellar, yard, stable, outhouse, shed, or any other place whatsoever of belonging or in any manner appertaining to such house or place".

At the close of the prosecution case, the transcript of the proceedings shows that the solicitor appearing for the respondent submitted that the prosecution had failed to prove that the alleged words were uttered in a public place in that it had not been proven that the lounge room constituted licensed premises; and that "to prove that licensed premises, they would have had to call the licensee and for him to prove beyond reasonable doubt that the

lounge room was licensed premises" (underlining mine). In his reasons, the Magistrate stated that he was of the opinion that the words alleged were obscene, but that there was no evidence "to indicate that the lounge at that particular time was open to access by the public. If the offence was alleged to have occurred in the public bar, I feel there would be sufficient evidence". He found that there was no case to answer, and discharged the respondent. From his findings it is clear that he was satisfied on the evidence that the Gladstone Hotel itself was duly licensed under the Liquor Act.

A submission that there is no case to answer may properly be made and upheld when there has been no evidence to prove an essential element in the alleged offence; *Short v. Davey; ex parte Short* (1980) Qd.R. 412 at p. 414. An essential element of the offence here is that the language was used in a public place and this the prosecution was obliged to establish. The prosecution relied, for this purpose, on proving that the words were uttered in licensed premises.

Prior to the hearing of the charge, written particulars were supplied by the prosecutor in response to a request from the respondent's solicitor, and in those particulars the "place" was specified as "in the Licensed premises of the Gladstone Hotel in Wyandra", and the time as 9.35 p.m. The witnesses in the case for the prosecution were Mrs. Ellway and Constable Gordon. Mrs. Ellway gave evidence that she resided at the Hotel with her husband and children and that her husband was the "licensee of the Gladstone Hotel". She testified that she was behind the bar when Constable Gordon entered the lounge through the main doors and came to the bar to speak to her; the respondent was drinking beer at a table in the lounge and that others were present in the lounge; that at the time the offending words were used she was serving a man, who was with the respondent, with a carton of beer. Constable Gordon gave evidence that he arrived at the hotel very shortly after 9.30 p.m. and that he saw Mrs. Ellway serving this man with

the carton of beer from the bar. At no time during cross-examination was it ever suggested to her or to Constable Gordon that the hotel was not licensed. Indeed it appears that the case was conducted throughout on the basis that the premises of the Gladstone Hotel were licensed premises.

In my opinion, the unchallenged evidence of Mrs. Ellway, in the absence of any evidence to the contrary, is sufficient to establish that at the relevant time the Gladstone Hotel was licensed according to law, i.e. that the hotel was “Licensed premises” within the meaning of that expression in the *Liquor Act* The term “licensee” in the *Liquor Act* is expressed to mean, “In relation to licensed premises, the person who, in relation to the license in respect of those premises, is the licensee”. Consequently, there being unchallenge evidence to the effect that the words were used in the lounge room of the Gladstone Hotel, that lounge room was, by reason of the definition in the *Liquor Act*, a part of those licensed premises.

An analogous point arose in *Regina v. Carr* (1883) 9 V.L.R. 188, where the applicant was convicted of using insulting words in a public place, namely, the open bar of Potts' Bealiba Hotel. The evidence was that the informant was standing at the bar when the applicant used the words, but there was no evidence that the bar was an open bar or that Potts was a licensed publican. The Court (Stawell C.J., Higginbotham and Holroyd JJ.) when discharging the order nisi said, at p. 190:—

> “The evidence shows that the language complained of had been used in ‘Potts' public-house at Bealiba’. We think that those expressions might justify an inference that the language was used in the premises of a licensed publican, and that the bar, at which it is sworn persons had drinks in that public-house, was an open bar in such premises.”

Mr. Green, for the respondent, submitted that the evidence of Mrs. Ellway was not sufficient because the *Liquor Act* provides for several descriptions of license in

addition to a licensed victualler's license. He referred to a “limited Hotel license” Cs. 16 of the *Liquor Act*). But it seems to me that, whatever may be the kind of license applicable to particular premises, the latter are “Licensed premises” as defined in that Act: see the definition of “license” in the *Liquor Act* which includes “a license of any description or kind ... in force at any material time”; and the definition of “Licensed premises”:— “The premises in respect of which a license is granted”.

In the circumstances, there is no need to consider other points that were raised by the respondent, one of which was whether it was necessary to prove that the lounge room was at the relevant time open to access by the public. Although I consider that there was ample evidence to establish that the lounge room was open to the public at the material time, it is also unnecessary for me to deal with the point raised that the *Liquor Act* does not provide for lounges to be kept open for the sale of liquor during licensing hours.

In my opinion the appeal should be allowed, the Magistrate's order set aside, and the matter remitted to the Magistrate for the purpose of entering up all necessary adjournments and to determine the matter according to law.

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JUDGMENT - D.M. CAMPBELL J.

The uncontradicted evidence was that the respondent and a man with her named Norm were in the lounge of the Gladstone Hotel at Wyandra at about 9.35 p.m. on April 16, 1981 together with a young girl, Kathy, and some other children. Kathy was asked to leave by Mrs Ellway, the wife of the licensee, and the respondent told her to stay whereupon Mrs Ellway said she would call the police which she did. A police constable arrived and entered the lounge and noticed the respondent and the person Norm seated at a table. While the constable was speaking to Mrs Ellway the respondent came over and the constable told Kathy who was standing nearby that she should not be in a hotel at her age. Kathy left and the respondent announced that she was going to finish her beer. Mrs Ellway resumed working behind the bar serving a carton of beer to Norm. The obscene language which was the subject of the complaint was alleged to have been used by the respondent during a further conversation with the police constable. She told him to "Fuck off I'll finish my fucking beer" and she was charged with using these words "in a public place to wit the lounge, Gladstone Hotel, Railway Street, Wyandra". Upholding a submission that there was no case to answer, the magistrate said that there was no evidence to establish that the lounge was open to the public. Contrary to his view I think that a prima facie case was made out that the lounge was a public place.

Before the start of the case the prosecutor supplied written particulars of the complaint. In respect of the "place" the particulars supplied were, "In the licensed premises of the Gladstone Hotel, Wyandra". The term "public place" is defined in s. 2(a) of the Vagrants, Gaming, and Other Offences Act, 1931 (as amended) to include licensed premises. The point was taken by Mr Green at the hearing of the appeal that it was not strictly proved that the premises in question were premises in respect of which a license was in existence at that time and reference was made to provisions of the Liquor Acts. But the definition of public place as any licensed premises in s. 2(a) of the Vagrants, Gaming, Etc. Act is not exclusive. The

particulars supplied by the prosecutor simply identified the public place without introducing an additional element into the charge. The hotel was described by Mrs Ellway as the Gladstone Hotel, of which she stated her husband was the licensee.

As I consider there was evidence that the lounge of the hotel was a public place, I agree that the matter should be remitted to the magistrate.