Supreme Court Notes

by Anita Del Medico

ADMINISTRATIVE LAW - Judicial Review of decision of Liquor Commission - Refusal to grant licence - whether orders in the nature of certiorari warranted - *Supreme Court Rules* Order 56.

STATUTORY INTERPRETATION - prescribed powers and duties of Liquor Commission in determining licence applications - "...the Commission shall have regard to ... the needs and wishes of the community" - whether reasons given for the exercise of discretion to refuse licence disclosed jurisdictional error - Liquor Act (NT) s32(1)(d). Joondanna Investments Pty Ltd -v- The Liquor Commission of the NT and Lariat Enterprises Pty Ltd and Liquorland (Aust) Pty Ltd

29.07.94 Angel J

The applicant/plaintiff ("P") sought orders in the nature of certiorari to quash a decision of the Liquor Commission refusing a licence in respect of proposed tavern premises at Palmerston. P had applied for the grant of liquor licences pursuant to s24 of the *Liquor Act* in respect of a proposed tavern and supermarket at Palmerston, for which planning approval had been granted. At the hearing of the applications before the Liquor Commission in November and December 1993, the second and third defendants appeared and led evidence as objectors.

The former owned the extant Palmerston Tavern; the latter operated a takeaway liquor shop associated with an existing supermarket. The NT Hotels and Hospitality Associations Inc. also objected to the applications. In December 1993, the Liquor Commission granted a licence in respect of the supermarket but refused the tavern application. Written reasons for the refusal were published in March 1994. (Section 29(2)(b) *Liquor Act.*)

P's attack on the decision of the Liquor Commission was made on a number of grounds. First, the reasons for the refusal were inadequate in that they did not disclose why and how the conclusion adverse to P was reached, and that this justified certiorari: *Commonwealth of Australia -v- Pharmacy Guild of Australia* (1990) 91 ALR 65 at 88, per Sheppard J. The defendants reminded the Court that, dealing as it is with a specialist tribunal principally comprised of lay persons, the Court should not be overly fastidious in its requirements but should look at the whole of the reasons as a matter of substance: *McAuliffe -v- Secretary Dept of Social Security* (1992) 28 ALD 609 at 614 ff. If the reasons were inadequate - which the defendants contested - the only proper remedy was mandamus to require the furnishing of further and better reasons: *Repatriation Commission -v- O'Brien* (1984 - 85) 155 CLR 422 and 445, per Brennan J.

P further submitted that the reasons of the Liquor Commission disclosed jurisdictional error in that they clearly indicated that it had failed to comply with s32 of the *Liquor Act*. This provision spells out the factors which the Commission must take into account when deciding a licence application. In its written reasons for refusing the applications in this case, the Commission held that it should only grant a licence that would lead to such a high density of licensed bars and takeaway facilities "... in circumstances of overwhelming and unambiguous evidence of community support for such a proposal...". It found there was no such vidence before it. Furthermore, as there was "...no overwhelming and unambiguous demonstration of the needs and wishes of the community..." in evidence before it, even if the Commission was minded to grant a tavern licence conditional upon the development of an adjoining supermarket, the application must fail. Section 32 (1)(d) of the *Liquor Act* states, as is relevant, that "... the Commission shall have regard to ... the needs and wishes of the community". P argued that this part of s32 could not be translated as requiring "overwhelming and unambiguous demonstration of the needs and wishes of the community" before a grant of licence is made. The defendants submitted that as a specialist tribunal with wide ranging power to import all sorts of conditions (s31), the Commission was able to inform itself in its own manner and from its own experience. The comments complained of related to standard of proof - a matter of procedure - and it had nothing to do with jurisdictional error. If there was an error (not admitted here), it was within jurisdiction.

HELD, quashing the Liquor Commission's decision refusing P's application for a liquor licence and ordering the Commission to consider and deal with the said application in accordance with law:

(1) The court's role in determining whether orders for certiorari and for mandamus should be made has long been settled: *R -v- War Pensions Entitlement Appeal Tribunal; exparte Bott* (1993) 50 CLR, 228 @ 242, 243 per Rich, Dixon and McTiernan JJ.

(2) The provisions of s32 of the *Liquor Act* prescribe and limit the jurisdiction of the Commission. In so far as s32 requires that the Commission has regard to "the needs and wishes of the community", it is clear that this includes members of and sections of the relevant community. Not unexpectedly, individual and group needs and wishes will be diverse and in conflict. The necessary task in each case is to "balance" those needs and wishes and this requires the Commission to assess their respective worth and the reasons given therefor. "Sometimes, thoughtfully expressed reasons for an individual wish will make more sense than the clamour of a crowd. The relevant task under s32 is not to ascertain and treat as determinative a majority view (overwhelming or otherwise) but to ascertain the various wishes and needs and to 'balance' them." *R -v- Liquor Commission; ex-parte Pitjantjatjara Council Inc* (1984)31 NTR 13 at 18, 19 per Muirhead J, followed.

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(3) In this instance, the Liquor Commission had misconstrued its task by placing a wrong construction upon the statute upon which its jurisdiction depends. "... If the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity", per Lord Diplock in In re Racal Communications Ltd [1981] AC 374 at 383.

There being jurisdictional error, s56 of the *Liquor Act* which ensures inter alia, the finality of the Commission's decision, can have no application.

Application for judicial review of administrative decision pursuant to 0.56 of the *Supreme Court Rules*.

C. McDonald, instructed by Barr Moore & Co, for the plaintiff.

P. Meegan, instructed by the Solicitor for the NT, for the first defendant.

J. Reeves, instructed by Philip & Mitaros, for the second defendant.

APPEAL - CRIMINAL LAW - Crown appeal against ruling of autrefois acquit - Criminal Code, s414 (1)(b).

STATUTORY INTERPRETATION - "similar offence" - "conduct therein impugned" - Criminal Code Ss17, 18.

R -v- Hofschuster

29.07.94 CCA: Kearney, Angel JJ and Gray AJ

In October 1993 the respondent ("R") had pleaded autrefois acquit of the same offence and autrefois acquit of the same or a similar offence to the alternative charges of attempted murder and grievous harm, and dangerous act, respectively. Accepting R's contention that he had previously been acquitted within the meaning of s18 of the *Criminal Code*, the trial judge had ordered that R be discharged. The Crown, authorised to appeal as of right pursuant to s414 (1)(b) of the *Criminal Code*, did so against the ruling upon R's s18 application.

The facts giving rise to the charges contained in the October 1993 indictment (and preceding indictments laid by the Crown), comprised several distinct episodes. On the night in question, R and the victim had been drinking with a group of others in R's caravan. Following an argument, R went to the bedroom of the caravan, picked up and loaded a .303 rifle, pointed it at the victim and pulled the trigger. The rifle jammed and failed to fire. The victim fled, but returned about half an hour later. R was waiting behind a tree with his rifle. He shot the victim at close range; the latter ran off into the darkness but soon after collapsed and died. After a further interval, three policemen arrived. One of them was carrying a torch; R fired at the light, later claiming he believed that the victim had returned to the scene.

In November 1992, an indictment had been presented before the court which contained four counts: Counts one and two alleged attempted murder and grievous harm and related to the first episode in the caravan. Count three alleged murder - the fatal shooting episode. Count four alleged attempted murder and related to the shooting at police. The learned trial judge acceded to an application that there be a separate trial of Count three. The reasons for so ruling concerned the complications that would have arisen in directing the jury on a four-count indictment as presented. Counsel for the Crown had argued that were the trial judge to allow severance, the Crown may thereafter face the contention that Counts one and two and Count four charged "similar offences" within the meaning of s18. But his Honour said that such a contention had no foundation; he expressed the opinion that there was no risk that, if the accused was acquitted of murder, he could not be convicted on the other counts. Subsequent to the ruling for severance, the Crown presented a fresh indictment in December 1992 charging one count of murder, based on the second episode - the fatal shooting. Evidence was led concerning the incident in the caravan as being evidence tending to show that R had the requisite intent to kill or to do grievous harm at the time of the fatal shooting. R was acquitted of murder, manslaughter and dangerous act. The Crown then laid the indictment containing the three charges which gave rise to the plea of autrefois acquit, now the subject of this appeal.

Section 18 of the Code provides, interalia, that it is a defence to a charge of any offence to show that the accused has already been acquitted of

(a) the same offence;

(b) a similar offence ...Section 17 defines "similar offence" as meaning an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar.

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HELD, per curiam, allowing the appeal and ordering that R's plea of "already acquitted of the same or similar offence" was no defence to any of the counts contained in the October 1993 indictment; that the order discharging R in respect of the indictment be quashed and that the proceedings on the said indictment continue and R be tried thereon:

(1) R had been acquitted of the charges relating to the alleged unlawful killing (the second episode). It was the Crown's intention to prove the charges contained in the October 1993 indictment by relying on the first factual episode. Each of the three episodes comprising the entire factual scenario was quite distinct, in both a factual and temporal sense. There was no overlapping or intermingling of the facts which constituted each episode; there was a substantial interval of time between each. As the court has been advised that the evidence the Crown proposes to lead at the trial will not deal with events subsequent to the victim's departure from the caravan after the attempted shooting, there will be no Crown evidence touching the transaction of which R has been acquitted of criminal liability. Thus, there will be no question of R not getting the full benefit of his acquittal.

(2) The construction of s18 and the s17 definition of "similar offence" do not give rise to any ambiguity. The provisions appear to substantially reproduce the common law doctrine as laid down in the judgment of Lord Morris of *Borth-y-Gest in Connelly -v- DPP* [1964] AC 1254 @ 1305 - 6. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct. If R were hereafter convicted of any of the offences charged in the present indictment, he will not have been prosecuted in breach of the stated principle. "Conduct impugned" refers to the acts and accompanying states of mind which constitute the elements of an offence. In this case, in raising his defence, R had relied on conduct which related to an entirely distinct factual episode from that which was to be relied upon by the Crown to prosecute the charges contained in the October 1993 indictment. R's conduct in the caravan, to which the Crown seeks to attach criminal liability, is conduct which is separate in time and dissimilar in kind to that relied upon in the first instance on the charge of murder. The offence, if any, committed in the caravan, is neither the same, nor a similar, offence as that of which R was previously acquitted.

(3) The fact that the Crown had, in the previous trial, led evidence relating to the first episode in the caravan in order to prove the charge of murder (this evidence was clearly relevant to show that R had the requisite intent at the time of the fatal shooting), does not mean that R's conduct in the caravan was "... conduct impugned" within the definition of "similar offence", as to establish the statutory defence of previous acquittal. This argument gives a construction to the definition of "similar offence" which is of almost limitless width. It amounts to a contention that any conduct of R's which provides evidence that he has committed an offence is conduct "therein impugned". "Conduct therein impugned" means the facts alleged to constitute the legal ingredients of the offence and does not include facts which merely provide evidence tending to prove the presence of the essential ingredients. In the course of the previous trial, R's conduct in the caravan was not impugned in the relevant sense. It was merely used by the Crown for the purpose of impugning R's conduct in relation to the later fatal shooting. It is commonplace for evidence in support of one count in an indictment to be used in support of a different count. But that circumstance does not produce the result that the two offences are "similar" for the purposes of the defence of autrefois acquit.

Crown appeal against ruling pursuant to s414 (1)(b) of the Criminal Code.

R. Wild QC, instructed by the ODPP, for the appellant.

C. R. McDonald, instructed by NTLAC, for respondent.

Simpler Corporate Bill released for comment

Federal Attorney-General Michael Lavarch has released the first Corporate Law Simplification Bill for public comment.

It is the first in a series being prepared by the Corporations Law Simplification Task Force, which comprises an experienced private commercial lawyer, a leading expert in plain English, a senior legislative drafter and a senior policy officer from the Attorney-General's Department. The task force works closely with a private sector consultative group comprising a wide range of users of the Corporations Law.

"The draft Bill makes significant improvements to this law covering share buy-backs, proprietary companies and company registers," Mr Lavarch said. "It is in plain English — clear layout, style and language make it easy to use and understand."

Five public seminars will be held to facilitate discussion of the draft Bill. The first of these will be held in Brisbane on September 7.

Comments on the draft Bill should be sent to the Corporations Law Simplification Task Force, Attorney-General's Department, Barton, ACT 2600 by October 28.

A copy of the draft Bill is available from The Law Society offices and all Commonwealth Government bookshops.