

IN THE FIJI COURT OF APPEAL

Criminal Case No. 56 of 1986

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- A N D -

VIJAY PRASAD
s/o Narayan Prasad

Respondent

M.D. Scott for Appellant
H. Lateef for Respondent

Date of Hearing: 21st October, 1986

Delivery of Judgment 31st October, 1986

JUDGMENT OF THE COURT

O Regan, J.A.

The Respondent and his father Narayan Prasad were charged with the offence of supplying liquor from premises licensed as off-licence outside the hours specified in S.49 of the Liquor Act (Cap.192). Narayan Prasad was the holder of the off-licence for such premises and the respondent was in his employ. The learned magistrate held that the respondent did sell three bottles of beer outside the specified time for sale and that finding is not in controversy in this appeal.

The parts of S.49 relevant to this appeal read as follows:

- "(1) Liquor may be sold at-----the premises specified in the off-licence -
- a) between 8a.m. and 6p.m. on weekdays other than Saturdays;
- b) between 8a.m. and 1p.m. on Saturdays

(2) -----

(3) Any licensee who sells or supplies liquor at or firm----- licensed premises in contravention of the provisions of this section shall be guilty of an offence-----".

The charge preferred against Narayan Prasad has its foundation in the inveterate proposition of law that a licensee is liable for the acts of his servant done within the general scope of his employment.

Narayan Prasad died before the day appointed for the hearing of the case against him. It is common ground, however, that, having regard to the findings of the learned magistrate, he must have been found guilty if he had survived.

The charge against the respondent was founded on the proposition that in selling the liquor he aided and abetted the commission of the offence by Narayan Prasad and was thus guilty as a party by virtue of S.21(1)(c) of the Penal Code (Cap.17).

In the appeal brought by the appellant in the Supreme Court, the learned Judge upheld the submissions of Mr. Lateef first that subsection (3) of section 49 renders it an offence for the licensee and the licensee alone to sell or to supply liquor outside the appointed hours and secondly that, as the respondent performed all the acts which constituted the offence he could not, as a matter of logic, be said to have aided and abetted the commission of the offence. The Judge put it thus:

"----who is the servant aiding and abetting? He could not aid and abet the licensee as all the acts pertaining to the offence were done not by the licensee but by him".

In this Court, Mr. Scott brought to notice the case of Rakesh Chand 1979 - 1980 F.L.R. 848 in which Grant C.J. reached a contrary conclusion. Unfortunately, this case was not brought to the notice in either of the courts below and

accordingly was not considered.

The facts in Rakesh Chand are on all fours with the facts in the present case. In giving judgment the learned Chief Justice said:

" Certainly by the wording of subsection 3 of section 47 of the Liquor Ordinance it is only the licensee who can be liable as principal in the first degree; but the trial magistrate held that the applicant was a principal in the second degree and rightly convicted him of aiding and abetting the licensee under the provisions of section 21 (1) (c) of the Penal Code, which is declaratory of the Common Law and which provides that every one who aids and abets another person in committing an offence is deemed to have taken part in its commission and to be guilty of the offence and may be charged with actually committing it.

The application of this principle is well illustrated by Griffiths v. Studebakers Ltd. (1924) 1.K.B. 102 and Ross v. Moss (1965) 3 ALL E.R. 145, in the former a servant of a licensee and in the latter a licensee's father and two other persons being convicted of aiding and abetting the licensee in contravening the provisions governing the licence".

We have considered both these cases. The circumstances and facts in Griffiths v. Studebaker Ltd. bear a marked similarity to these in the present. The regulation in question made the holder of the license responsible for contravention of its provisions and the contravention complained of was that of its servant whose conviction was upheld by the Divisional Court. The judgments however, deal mainly with the case of licensee, the only reference to the position of the servant being in the final sentence of the judgment of Hewart CJ. who said:

"On these facts there ought to have been a conviction of the respondent and also of the driver as an aider and abettor".

Sankey and Salter JJ, the other two members of the Court without any reference to the point, expressed their general agreement with the judgment of Hewart CJ. We note also that Counsel for the respondents conceded in his argument that if the licensee should have been convicted the driver was liable as an aider and abettor.

In Ross V. Moss, the statutory provision under consideration rendered the license-holder and not his servants or agents liable to conviction but the Divisional Court presided over by Lord Parker CJ. held that two servants and an agent of the licensee should have been convicted of aiding and abetting the commission of the offences with which the licensee had been charged. In this case also the principal judgment is almost wholly taken up with a consideration of the question of the liability of the licensee for the acts of his delegates and there were no reasons given for the conclusion that the agent and servants should be regarded as aiders and abettors.

Both these cases provide instances where delegates of a licensee have been held to be aiders and abettors of a licensee who by the statutory provision invoked in each case was the sole person made liable to conviction for breach. No reasons were given for the decisions and in one of them the point at issue in this case was conceded by Counsel. Despite the fact that the decisions were made by eminent Judges of wide experience, in the circumstances we are unable, without more, to say that we accept and follow them. In that circumstance we turn to a consideration of S.21 of the Penal Code (Cap.17), the statutory provision dealing with the parties to offences. The parts of that section relevant to this case read:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say

- a)-----
- b)-----

- c) every person who aids and abets another person in committing the offence.

In this case the licensee, despite the fact that he himself did not do any of the acts which went to the making up of the actus reus, did commit an offence. That it was by operation of law rather than by actual commission that he was deemed to have committed it does not extinguish the fact that the respondent was an actor in bringing about that result. It does, however, render it inappropriate to apply - as the learned Judge did in the court below - canons of logic to an examination of the factual situation.

The offence having been committed by the licensee, S.21 is brought into application and the respondent can rightly be categorised as an aider and abettor.

It follows, therefore, that the appeal must succeed and it is allowed accordingly.

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 Vice-President

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 Judge of Appeal

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 Judge of Appeal