

THAKOR LAL

v.

REGINAM

[SUPREME COURT, 1977 (Grant C. J.) 13 May]

Appellate Jurisdiction

*Liquor licensing—selling liquor without a licence—whether persuasive burden of proof on prosecution or defence to show accused holder of a liquor licence—Liquor Ordinance (Cap. 167) ss.76(1)(a), 96—Criminal Procedure Code (Cap 14) s. 144A.*

*Criminal law—evidence and proof—liquor licensing—selling liquor without a licence—whether persuasive burden of proof on prosecution or defence to show accused holder of a liquor licence—Liquor Ordinance (Cap. 167) ss.76(1)(a), 96—Criminal Procedure Code (Cap. 14) s.144A.*

*Criminal law—evidence and proof—accomplice—whether purchaser who illegally buys liquor per se particeps criminis in respect of offence of illegally selling liquor—Liquor Ordinance (Cap. 167) ss.76(1)(a), 96—Criminal Procedure Code (Cap. 14) s.144A.*

Liquor Ordinance s.76 was to be construed as a general prohibition against the selling of liquor with an exemption in respect of a licence holder and it was for the accused to prove possession of a licence if he had one.

Criminal Procedure Code s.144A had overruled the case of *Ah Ben ats. Police*, but in any event the common law position had also been clarified in *R. v. Edwards* with the result that both by common law and statute the burden fell on the accused to show he had the requisite licence.

Although the purchaser of liquor from a vendor who does not hold a licence may well be committing an offence of illegally purchasing liquor, the mere fact of his purchasing liquor did not make him *per se particeps criminis* in respect of the offence of illegally selling liquor. (*R. v. Mulji Shanji* followed and applied; *R. v. Rup Chand* distinguished)

Cases referred to:

*Ah Ben ats. Police* (1940) 3 F.L.R. 272.

*R. v. Durga Bania* (1965) 11 F.L.R. 55.

*R. v. Edwards* (1974) 59 Cr. App. R. 213.

*Davies v. Director of Public Prosecutions* [1954] 1 All E.R. 507; [1954] A. C. 378.

*R. v. Mulji Bhanji* 1947) 14 E.A.C.A. 108.

*R. v. Hari Narayan Singh* (1959) 6 F.L.R. 95.

*R. v. Rup Chand* Criminal Appeal 51 of 1975 (unreported)

Appeal against conviction in the Magistrate's Court for selling liquor without a licence.

GRANT C. J.: [13 May 1977]—

A On the 6 December 1976 at Suva Magistrate's Court the appellant was convicted after trial of selling liquor without a licence contrary to section 76(1)(a) of the Liquor Ordinance.

The appellant has appealed against conviction, the first ground pursued at the hearing being that there was no evidence that the appellant was not a person B holding a licence authorising him to sell liquor.

Counsel for the appellant drew attention to the decision in *Ah Ben ats. Police* (1940) 3 F.L.R. 272 where it was held in respect of a similar charge that the prosecution must call evidence that the person charged was not the holder of a licence to establish prima facie an offence. However, in *Reg. v. Durga Bania* (1965) 11 F.L.R. 55 it was held that this was no longer of any application in view of the C wording of section 205 of the Criminal Procedure Code, a statutory provision which was not in force in 1940. It was further held that section 96 of the Liquor Ordinance, which was the relevant section in that case, should be construed as a general prohibition against the keeping of liquor in circumstances indicating an intention to make commercial use of it, with an exemption in respect of licensed premises, that the possession of a licence is a qualification or exemption available D to the accused and therefore that it is for him to adduce evidence of the possession of a licence if he has one.

Although section 205 of the Criminal Procedure Code was repealed in 1969 it was at the same time replaced by section 144A of the Criminal Procedure Code which is to the same effect and provides as follows:

E "Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Ordinance creating such offence, and whether or not specified or negatived in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution."

F Section 76 of the Liquor Ordinance, under which the appellant was charged, should be construed accordingly, as a general prohibition against the selling of liquor, with an exemption in respect of a licence holder, it being for the accused to prove possession of a licence if he has one.

G Further, quite apart from the statutory position, the common law position has also been clarified since the decision in *Ah Ben ats. Police (supra)* by the English Court of Criminal Appeal in *R. v. Edwards* (1974) 59 Cr. App. R. 213, which was another case of an accused selling liquor without a licence. As stated by Lawton L. J. at 221:

H "... over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of

specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.

In our judgment its application does not depend upon either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great *Treatise on Evidence*, this concept of peculiar knowledge furnishes no working rule (1905 ed., Vol. 4, p. 3525). If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the Courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and "secondly, what shifts is the onus; it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden.

When the exception as we have adjudged it to be is applied to this case, it was for the appellant to prove that he was the holder of a justices' licence, not the prosecution."

Thus, both by common law and by statute, the persuasive burden of proof that he was the holder of a licence to sell liquor was on the appellant, not the prosecution, and this ground of appeal must fail. I need hardly add that the decision in *Ah Ben ats. Police (supra)* does not represent the law and should not be followed.

On the hearing of this appeal counsel for the appellant was permitted to raise as a further ground that the purchaser of the liquor should have been, and was not, treated as accomplice; counsel submitting that there was a decision of this Court in its appellate jurisdiction to that effect, namely *R. v. Rup Chand* (Suva Criminal Appeal No. 51/75). However, a perusal of the judgment therein reveals that this Court did not decide, and was not required to decide, whether a purchaser of liquor from a vendor who is selling liquor without a licence is an accomplice in the offence of selling liquor without a licence. It was not in issue in that appeal, the position being that in the circumstances of that particular case the trial magistrate treated the purchaser as an accomplice and found corroboration of his evidence in other evidence adduced by the prosecution. The point taken on appeal was that the trial magistrate erred in convicting the seller after holding that the purchaser was an accomplice without stating in which material particular the evidence of the purchaser was corroborated by other evidence. This Court, in dealing with that point, held that the trial magistrate had properly found corroboration in the

- evidence of a particular prosecution witness; and surmised that the reason why the trial magistrate had treated the purchaser as an accomplice was because of an amendment to the Liquor Ordinance on the 18 December 1975 which created an additional offence of illegally purchasing liquor. If that was the reasoning of the trial magistrate it was quite wrong, but that was not the point this Court had to decide on that appeal.

The classic definition of an accomplice is contained in the judgment of Lord Simonds in *Davies v. Director of Public Prosecutions* [1954] 1 All E.R. 507 at 513 which held that, apart from two special categories which are not opposite, accomplices are "persons who are *particeps criminis* in respect of the actual crime charged" (the emphasis being mine). While the purchaser of liquor from a vendor who does not hold a liquor licence may well be committing an offence of illegally purchasing liquor, the mere fact of his purchasing liquor does not per se make him *particeps criminis* in respect of the offence of illegally selling liquor. This is clearly illustrated by a judgment of the Court of Appeal for Eastern Africa in *R. v. Mulji Bhanji* (1947) 14 E. A. C. A. 108, which was a case in which an appellant was convicted on three counts of selling sugar to one Ali Saidi at a price exceeding the maximum price, the appellant submitting that the trial court had wrongly accepted the uncorroborated evidence of Ali Saidi and that as he was an accomplice his evidence must be corroborated. In dealing with the principle governing the evidence of accomplices the judgment of the East African Court of Appeal stated that:

"it can have no application whatever to Ali Saidi who is the one person in the world who could not possibly be actually guilty of the offences charged in these three counts for the very simple reason that the offences charged are sales at excessive prices to Ali Saidi.

The purchaser obviously could not possibly under any circumstances be actually guilty of selling at excessive prices to himself and he therefore could not be any accomplice, within the meaning of this rule, to the offence of selling to himself which is the only offence charged. To make a person an accomplice within this rule it is necessary to shew that his activities in connection with the offence charged amount to actual guilt of the offence.

In buying the goods in the present case at the excessive price Ali Saidi was doubtless committing an offence, but it was a different offence from that charged in this case and that does not make him an accomplice in the offence charged in this case for the purpose of the rule as to corroboration. The fact that his evidence that the accused committed the offence charged implies a confession that he himself was guilty of another different offence under a different sub-regulation would seem to be a reason for accepting rather than rejecting his evidence."

The same reasoning applies to the sale of liquor without a licence, and was adopted in Fiji in *R. v. Hari Narayan Singh* (1959) 6 F.L.R. 95 at 97.

For the reasons given, this appeal is dismissed.

*Appeal dismissed*