BHAGAUTI PRASAD

A **v.**

THE STATE

[HIGH COURT, 1989 (Fatiaki J) 21 April]

Appellate Jurisdiction

B *Crime: offences- selling liquor after hours- whether actual delivery of the liquor a necessary ingredient of the offence- Liquor Act (Cap. 192) Sections 48, 49 (3), 50 and 54 (1).*

Words and phrases- "sells or supplies"- Liquor Act (Cap 192) Section 49 (3)- Sale of Goods Act (Cap 230).

C *Crime: procedure- principles governing application of the proviso to Section 319 of the Criminal Procedure Code (Cap. 21).*

On appeal to the High Court against his conviction for selling liquor after hours the appellant submitted that since the liquor was not actually delivered to the purchaser it had not been sold and that therefore the charge against him was defective. Dismissing the appeal, the High Court HELD: (i) that the essence of
D the offence was sale, not delivery and (ii) that the defect in the charge was merely technical and not the cause of any prejudice to the appellant; accordingly the proviso to S 319 of the CPC would be applied.

Cases cited:

E *Bryant v. Eales* (1916) NZLR 1065
DPP v. Vijay Prasad (FCA Reps 86/191)
Mano Datt Sharma v. R 15 FLR 136
McVitie v. R (1960) 44 Cr. App. R 201
Pletts v. Beattie (1896) 1 QB 519
R v. Ayres [1984] 1 AC 447
F *Stephenson v. Rogers* 80 LT 193
Thompson v. R 9 Cr. App. R 252
Titmus v. Littlewood [1916] 1 KB 732

R. Chand for the Appellant
J. Naigulevu for the Respondent

G Appeal against conviction in the Magistrates' Court.

Fatiaki J:

The appellant was convicted by the Suva Magistrates' Court on the 7th of June 1988 of the following offence:

Statement of Offence

Selling liquor after hours: Contrary to Section 49(1)(a) and (3) of the Liquor Act, Cap 192.

Particulars of Offence

Bhagauti Prasad (s/o Shiu Dutt) on the 28th day of November, 1987 at Nasinu in the Central Division, sold one Carton of Fiji Beer from an off-Licence premises to one Valuone Rogoyawa after the permitted hours, namely 7.15pm.

Upon his conviction the appellant was sentenced to pay a fine of $50 in default 50 days imprisonment.
The appellant appeals against his conviction on the following grounds:

"(a) That the Learned Trial Magistrate erred in law and in fact in failing to consider the defence submission that the Petitioner was charged under the wrong section.

(b) That the Learned Trial Magistrate erred in law and in fact in failing to consider the conflicting evidence of PW1 and PW2.

(c) That the Learned Trial Magistrate erred in law and in fact in failing to consider the defence submission that the sale was not completed in law and in fact.

(d) That the Learned Trial Magistrate erred in law and in fact in failing to consider the Petitioner's defence."

At the trial the prosecution called 3 witnesses. The purchaser, the Secretary of the Central Liquor Tribunal and the investigating officer. The appellant who was not cross-examined testified on oath denying any knowledge of the sale.

The short facts of the case are that the purchaser arrived at the appellant's shop in a taxi and requested and paid for a carton of beer which the vendor offered to carry to the taxi. The carton was brought from the liquor bulk store of the shop and was taken out of the shop to be loaded through an already opened door of the waiting taxi in which the purchaser was then seated. Before the carton of beer could be loaded into the taxi by the vendor, a police constable who had been observing the scene arrived and in the words of the constable the vendor "turned and dashed off with the carton of beer inside the shop."

At the trial learned counsel for the defence (who is also the appellant's counsel) is recorded as having made three submissions at the end of the evidence as follows:

"(1) PW1 says that he went to shop and paid for beer, came outside and waited for taxi -beer not identified. Property did not pass -there was no sale. The sale takes place when PW1 takes

delivery.

A (2) Off-licence premises: are premises where licence is given & doesn't comprise the whole shop - for an offence to occur it should be an offence if sold from the actual licenced premises only. There was no evidence as to where liquor came from.

(3) Charge is defective."

These were further elaborated in 4 pages of closely-typed submission filed on the
B 30th of May, 1988.

In his judgment which was delivered on the 7th of June, 1988 the learned trial magistrate rejected all of the defence submissions and convicted the appellant.

The typed judgment which comprised 10 short paragraphs contains 2 paragraphs dealing specifically with the first and second submissions of learned defence
C counsel.

The paragraphs in the judgment reads:

> "Counsel for accused says that since carton of beer did not physically pass to PW1 no sale took place. I cannot accept that argument.
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> D The second contention of defence counsel that in order to prove its case the prosecution must prove that sale occurred from the licensed premises and that the sale here did not emanate from the liquor shop itself. However I reject this argument - any other interpretation here would make a mockery of the law."

E It is patently obvious that in rejecting the defence submissions no reasons whatsoever were given. Furthermore the learned trial magistrate appears to have completely ignored the third submission that the charge was defective as elaborated in several paragraphs in page 2 of the written submissions provided by defence counsel.

F Section 155(1) of the Criminal Procedure Code provides (inter alia) that:

> "Every judgment shall .... contain the point or points for determination, the decision thereon and the reasons for the decision".

In this case whilst the learned magistrate's judgment does contain most of the points for determination raised by learned counsel for the defence together with
G the decision thereon, as has been pointed out, no reason has been given for the decision.

Thompson A/J. in Mano Datt Sharma v R 15 FLR 136 in referring to the predecessor of Section 155(1) stated at p.138:

> The Magistrates' courts are called upon to deal with large numbers of cases and to do so expeditiously. This undoubtedly militates against the writing of lengthy judgments. Nevertheless, there is a degree of brevity beyond which a judgment ceases to comply with Section 154(1) and ceases to show that the Magistrate has applied his mind properly to the defence raised."

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I respectfully echo those sentiments as similarly applying in this case and although learned counsel conceded that the magistrate's judgment did not strictly comply with the requirements of Section 155 of the CPC. nevertheless, as it was not a ground of appeal and as it was a matter raised by the court, the appellant's appeal was proceeded with.

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However before leaving the learned magistrate's judgment it should be pointed out that the second contention of defence counsel cannot be accepted not because it would make a mockery of the law but rather because it is not the law.

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This much is obvious from a cursory examination of Sections 50 and 54(1) of the Liquor Act which makes in patently clear that the "licensed premises" is not one and the same as the liquor store which is an area set apart within the licensed premises for the secure storage of liquor.

At the hearing of the appeal learned counsel for the appellant only argued grounds (a), (c) and (d) and therefore ground (b) does not fall to be considered.

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Furthermore learned counsel was constrained in the light of the recent decision of the Fiji Court of Appeal in DPP v Vijay Prasad (FCA Reps 86/191) to also concede that ground (d) was unarguable.

Ground (d) is drafted in very general terms however in the course of argument it transpired that the issue raised was to the effect that the prosecution's evidence revealed that the liquor was sold by the appellant's son in the absence of the appellant and without his knowledge or authority and therefore the appellant could not be vicariously liable.

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In DPP v Vijay Prasad (op cit) in which a similar factual situation as the present arose, the Fiji Court of Appeal said p.2:

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> "The charge preferred against (the licensee) 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."

and later after referring to section 21(c) of the Penal Code (Cap 17) the Court said p.5:

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> "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 is deemed to have committed it does not extinguish the fact that the respondent (employee) was an actor in bringing about that result."

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In the light of the above dicta counsel's argument could not be sustained and was properly conceded. Ground (d) is accordingly dismissed.

In respect of ground (c) learned counsel for the appellant argued that as a matter of law there had not been a sale of liquor because there was no actual delivery of liquor as agreed by the parties to the transaction. It is argued that at most there had only been an attempt.

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The evidence on this aspect is to the effect that delivery of the liquor was to be effected by the seller placing the carton of beer in the taxi in which the purchaser (PW1) was seated outside the shop. It is undisputed that the delivery of the liquor was aborted when the person carrying the liquor outside the shop recognised an aproaching plain-clothes policeman as he was nearing the taxi.

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No authority was cited by learned counsel for the appellant in support of his submissions which purport to be based on well known legal principles applicable in the law of contracts and sale of goods in general.

Learned State counsel in opposing this ground of appeal relied on the meaning of "sell or supply" in the Licensing Act 1921 (UK) to be found in the 25th definition occurring under the principal words "Sale, Sell, Sold" in Vol 5 of *Strouds Judicial Dictionary* (4th edtn) and which reads (inter alia):

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> "There was a sale within the meaning of this Section in the licensed premises when exciseable liquor which had been bought and paid for was separated from stock (Sinclair v Beattie 1934 S.C. (J) 24)."

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I prefer however to approach the interpretation of the word "sells" in Section 49(3) of the Liquor Act (Cap 192) in the manner in which a similarly worded provision in the Licensing Act 1872 (UK) was approached by Wills. J. in Pletts v Beattie (1896) I QB 519 when he said at p.523:

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> " Sale and delivery are two distinct elements in a contract for the sale of goods ..... A "sale" may be something incomplete in itself, and the expression "sale" may be satisfied although the actual delivery of the goods still remains to be carried out. The provisions of the Licensing Act were not framed with a regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered; those provisions are satisfied if the substantial elements of a sale take place on the licensed premises, though the beer is consumed or delivered off them .... I think in the present case that the sale on the premises was complete although the delivery remained to be performed."

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Three years later Channell J. in Stephenson v Rogers 80 LT 193 explained the result of the above approach in the following terms when he said after quoting the above citation at p.197:

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> "the result seems to be that you are to look at the substance of the thing and not at the technicality, and, even if in law the whole transaction were not complete until the goods were delivered, yet, if the substance of the matter took place before delivery, then the sale is to be taken for the purposes of these statutes to be before the delivery."

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In a similar vein is the approach of Chapman J. in Bryant v Eales (1916) NZLR 1065 (CA) to a provision in the Licensing Act 1908 (NZ) forbidding the sale or exposure for sale of any liquor. The learned judge said at p.1080:

> "What we have to construe is a popular expression addressed to the whole public and the question is how it should be read. It is not a term of art, but an ordinary phrase. To "sell" or "expose for sale" is prohibited, any person selling or exposing for sale is in the circumstances described subjected to penalties. The act of exposing for sale can only be committed where the liquor actually is, but it is evident that the act of selling may be committed without the liquor being seen or present. According to the way the expression is used "to sell" may vary in its meaning. It is argued that here it must have some meaning which includes an act or acts whereby the property passes to the purchaser. I do not think that such a restriction can be read into this Act."

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In this latter case the New Zealand Court of Appeal comprising 5 judges held that a complete executory contract for the sale of beer was sufficient to constitute an offence although the property in the goods did not then pass. Further that the words "sells" and "sale" in the Licensing Act must be interpreted according to their popular signification and therefore comprises all transactions which are popularly called sales, whether or not they come within the legal definition of "sale" in the Sale of Goods Act (Cap 230).

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In the judgment of Stout C.J. in Bryant v Eales (op cit) the following appears at p.1072:

> "The words that have to be considered in the section are "sell" and "selling" not the word "sale" ..... In the Sale of Goods Act (which is in terms identical to our Cap 230) there is a definition of the word "seller", and it means "a person who sells or agrees to sell goods." That statute recognizes that a man may be a seller of goods even though only an agreement to sell goods has been entered into. In my opinion that is how the word "sell" ought to be construed in the Licensing Act. Were it not so construed effect could not be given to

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the Licensing Act legislation in which the words "to sell" are used."

(see also the critical analysis of the contrary decision of the English Court of Appeal in Titmus v Littlewood [1916] 1KB 732 by Edwards J at pp.1076 and 1077).

In my view it is noteworthy that in Section 48 of the Liquor Act which sets out what the holder of an off-licence is authorised to do, there is a clear distinction drawn by the legislature between "selling" and "delivery". A similar distinction is also expressly drawn in Section 49(1) pursuant to which the appellant was charged in this case.

If it is correct that delivery is inherently and commonly understood as being a part of "selling" then the distinction is meaningless and ought to be ignored. Fortunately however this court is not driven to that view.

If I am wrong in so interpreting the word "sell" I would nevertheless hold that there had been, on the evidence led in this case, an appropriation of specific goods sufficient to complete the agreement to sell a carton of beer. The fact that delivery was only attempted, as it was aborted or frustrated by the presence of a police officer, does not detract from the clear evidence that there was already an appropriation of specific goods in a deliverable state which the carrier (vendor) of the carton admitted to the police officer had been bought by the purchaser.

I am more than satisfied that on the particular facts of this case the appellant did "sell" the carton of beer after permitted hours from the licensed premises albeit through the agency of his son. Ground (c) is accordingly dismissed.

This brings me to the first and final ground of appeal urged on behalf of the appellant, namely that the appellant was charged under the wrong section.

The basis for this simple submission is a fairly straightforward one in that the date of the offence charged is the "28th day of November 1987" and although no evidence was led at the trial as to what day of the week that was, judicial notice may be taken that that date fell on a Saturday.

Learned counsel for the appellant argues that Section 49(1)(a) of the Liquor Act which was included in the Statement of Offence, specifically relates to and concerns the selling of liquor: "between 8 a.m. and 6 p.m. on week days other than Saturdays". It is therefore submitted that the appellant should have been charged pursuant to Section 49(1)(b) which paragraph specifically permits between 8am and lpm, the sale of liquor from an off-licence on Saturdays.

Learned State counsel although conceding that the Statement of Offence incorrectly refers to paragraph (a) whereas it should have been paragraph (b), nevertheless argues that it was a typographical error and therefore the proviso (a) to Section 319 of the Criminal Procedure Code (Cap.21) should be applied as "no substantial miscarriage of justice has actually occurred".

In opposing the application of the proviso learned counsel for the appellant points to the fact that from the evidence led by the prosecution it was clear that the liquor was in fact sold on a Saturday and more importantly, this defect in the charge was fully and clearly canvassed in his oral and written submissions to the learned trial magistrate and both the prosecution and the learned trial magistrate ignored his submissions on this point and failed to take any remedial action by amending the charge.

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With respect to learned counsel for the appellant I cannot agree. The appellant was represented at his trial in the Magistrates' Court and pleaded not guilty to the charge. The Particulars of Offence were entirely appropriate even for a sale of liquor contrary to paragraph (b) and the prosecution's evidence was more than sufficient to support the appellant's conviction. Needless to say whatever the day of the week selling liquor at 7.15p.m. from any premises covered by an off-licence is an offence.

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It is noted that the submission to the learned trial magistrate was only made after the close of the defence case when the charge could not be legally amended and in any event Section 214(2) of the Criminal Procedure Code (Cap.21) provides (subject to an inapplicable proviso) that:

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> "Variance between the charge and the evidence produced in support of it with respect to the date or time at which the alleged offence was committed... is not material and the charge need not be amended for such variation."

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In my view 'the charge' in this section includes both the Statement of Offence and the Particulars of Offence.

Furthermore in the Statement of Offence the offence in question has been correctly described and the section creating the offence, namely Section 49(3) of the Liquor Act Cap. 192, has been correctly included in accordance with the provisions of Section 122(a)(ii) of the Criminal Procedure Code relating to the mode in which offences are to be charged.

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Section 49(1) does not create the offence and strictly speaking need not have been included in the Statement of Offence. By its inclusion the charge can at most be said to have been rendered technically defective.

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It is noteworthy that the appellant's only defence to the charge was that he personally did not know anything about the sale of the liquor because at the time it was allegedly sold he was upstairs at home and not in the shop. No dispute was raised as to the time or date when the offence was alleged to have been committed.

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As long ago as 1913 in England in the case Thompson v R 9 Cr. App R.252 the full Court of Criminal Appeal stated at p. 260 of a section in identical terms to proviso (a) in our Section 319 of the CPC that:

> "One of the objects of Section 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the Legislature was that justice should be done in spite of a wrong decision, and that the court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice."
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> (applied in McVitie v. R (1960) 44 Cr. App. R 201)

More recently Lord Bridge in the House of Lords in R v. Ayres [1984] 1 AC 447 reaffirmed this criterion for the application of the proviso when he said at pp. 460 and 461:

> "In a number of cases where an irregularity in the form of the indictment has been discussed in relation to the application of the proviso a distinction, treated as of crucial importance, has been drawn between an indictment which is "a nullity" and one which is merely "defective". For my part, I doubt if this classification provides much assistance in answering the question which the proviso poses. If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."

In this case no question of the appellant being misled or deceived arises, nor has it even been suggested, and there is no reason for this court to refuse to apply the proviso.

The appellant's appeal is accordingly dismissed.

(Appeal dismissed.)