

IN THE SUPREME COURT OF FIJI  
Appellate Jurisdiction  
LABASA CRIMINAL APPEAL NO. 5 OF 1981

000388

Between:

1. SHIU SAMI NAIDU s/o  
Venkataiya Naidu

2. DEOKI NAIDU w/o  
Shiu Sami Naidu

APPELLANTS

- and -

R E G I N A M

RESPONDENT

Miss A. Prasad with Mr. A. Singh  
for the Appelants.

Mr. R. Lindsay for the Respondent.

J U D G M E N T

The appellants who are husband and wife were on the 27th January, 1981, convicted by the Magistrate's Court Labasa of keeping Liquor in a retail store contrary to section 96(1) (a) and (2) of the Liquor Ordinance and each fined \$25 in default 6 weeks imprisonment. The first appellant was on the same day convicted of the offence of illegal sale of liquor contrary to section 76(1)(a) of the Liquor Ordinance and fined \$25 in default 6 weeks imprisonment.

They appeal against convictions and sentences on two grounds :

- (a) The Learned Trial Magistrate erred in law and in fact in convicting your petitioners on the first count as there was insufficient evidence to support a conviction.
- (b) The Learned Trial Magistrate erred in law and in fact in convicting your petitioners on the second count when there was no evidence adduced by the prosecution to show that the liquor was stored or kept in a part of the shop to which the public had access."

2.

The first count was the charge against the husband of the illegal sale of liquor. His main argument is that the prosecution did not establish that he had no licence to sell liquor. There was ample evidence that on the day in question the first appellant sold liquor. Not only was there the evidence of the two Fijians who purchased the liquor but the sale to these two Fijians was witnessed by the police who were watching the store. The prosecution having established the sale of the liquor it was for the first appellant to establish that he had a licence issued under the provisions of the Liquor Ordinance authorising him to sell the liquor.

Section 76(1)(a) of the Liquor Ordinance provides :

"76(1) Subject to the provisions of this Ordinance, if any person -

- (a) sells or exposes for sale or exposes for supply any liquor without holding a licence authorising him to sell that liquor.....he shall be guilty of an offence".

It is illegal to sell liquor unless licensed to do so.

Section 123(b)(ii) of the Criminal Procedure Code provides:

"it shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or proviso or qualification to the operation of the enactment creating the offence".

As the Court stated in R. v. Edwards 59 Cr. App. Reports at page 218 when referring to a similar provision to section 123(b)(ii) quoted above :

"If it is not necessary to specify or negative exceptions and the like in a count, it is difficult to see on principle why it should be necessary to prove an element in the offence charged which has not been set out in the Count."

The Court in Edwards case which was a case of selling intoxicating liquor without a licence set out the law in the following terms:

" In our judgment this line of authority establishes that 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."

There is no merit in the first ground of appeal. The second ground of appeal relates to the second count charging both appellants with an offence under section 96(1)(a)(2) of the Liquor Ordinance.

Section 96(1)(a) of the Ordinance is as follows :

"96.(1) Any person owning or managing any shop, whether licensed under the Licence Ordinance or not, if the premises are not licensed under this Ordinance -

(a) shall not store or keep or permit to be stored or kept, any liquor in any part of such shop to which the public normally have access or in any adjoining building to which the public normally have access."

In the instant case it was alleged that the two appellants were owners and managers of the retail store in which were found two bottles of liquor. The Magistrate found as a fact that both appellants managed the shop and both were in the shop when the liquor was sold.

While there was evidence in the second appellant's statement to the police that she owned the premises, there was no evidence that I can find in the Record that the two appellants jointly owned and managed the store. There was evidence that the first appellant had procured and kept the

two bottles of liquor in the store because he was sick and had to drink liquor. There was no evidence that the second appellant had anything to do with the storing of this liquor or that she was managing the store. The section under which both appellants were charged is intended to cover the owner of a shop who stores liquor in a store or in the alternative the manager of the store. The owner could be both owner and manager and can be charged in either capacity but if the owner is not the manager both cannot in my view be charged unless it can be established that both were responsible for storing liquor in the store.

In my view the second appellant should not have been convicted of the offence and would not have been if the Magistrate had not erred in holding that both appellants managed the shop. Her presence in the shop with her husband when he sold the liquor was not evidence that she co-managed the shop.

As to Mr. Singh's argument that the liquor which was found under the counter in the store was not in any part of the store to which the public has access, there is no merit in that argument. The liquor was in the store to which the public had access. The fact that the public could not see the liquor and normally does not come behind the counter is immaterial. It is not the public's access to the liquor which is material but storing it in any part of a shop to which the public have access.

I allow the appeal so far as it relates to the conviction of the second appellant for the offence of keeping liquor in a retail store. Her conviction is quashed and the fine if paid is to be refunded to her.

The first appellant's appeal against his conviction on the two counts is dismissed.

As to his appeal against sentence I consider the Magistrate dealt with him very lightly indeed. However,

since Crown Counsel has not commented on the sentence,  
I do not propose to increase the fine on the first count.  
The first appellant's appeal against his conviction and  
sentence is dismissed.

*R. G. Kermode*

(R.G. KERMODE)

ACTING CHIEF JUSTICE

SUVA,

9<sup>TH</sup> JUNE, 1981.