POLICE v BERTHA AND ALFRED BETHAM

High Court Apia
19 May 1942
Herd CJ

CRIMINAL OFFENCES (Intoxicating liquor) - Possession for sale - Property or ownership must pass for a consideration - s 338 Samoa Act, 1921 as amended: Erickson v. Cattanach, 30 N.Z.L.R. 492; Bryan v. Eales [1916] N.Z.L.R. 1065; Bunker v. Mahoney [1914] V.L.R. 63, referred to.

PROSECUTION under s 338 of the Samoa Act, 1921.

Braisby for Police.
Jackson for defendants.

Cur adv vult

HERD CJ. This prosecution has been brought under section 338 of the Samoa Act, 1921 charging the defendants with having in their possession intoxicating liquor for sale. The section of the Act is as follows:-

> 338. (1.) Save so far as provided by this Part of this Act, it shall not be lawful for any person to sell, or offer for sale, or have in his possession for sale, any intoxicating liquor in Samoa.
>
> (2.) Every person who commits an offence against this section shall be liable to a fine of one hundred pounds or to imprisonment for one year.
>
> (3.) For the purpose of this section a contract of barter, or any other contract under or by virtue of which the property in any intoxicating liquor passes to any other person, shall be deemed to be a contract of sale.

By section 14 of the Samoa Amendment Act, 1923 the burden of proof is shifted from the prosecution to the accused. The section reads as follows:-

> 14. In any prosecution for offering for sale or for having in possession for sale any intoxicating liquor in breach of section three hundred and thirty-eight of the principal Act the burden of proving that any liquor found in the possession of the accused was not in fact offered for sale or in his possession for sale shall be on the accused.

Mr. Braisby for the Police called evidence of a raiding party of Police which on the first of April in pursuance of a search warrant visited the premises of the two defendants at Vaimea. The evidence of the Police shows that certain liquor was found on the premises at different points amounting in total to 142 bottles of ale, 2.5 bottles of spirits, and 15.75 bottles of wine.

On behalf of the defendants it was admitted that the liquor was intoxicating liquor within the meaning of the Samoa Act, 1921. The evidence of the Police further shows that the premises were furnished

as a public room with tables, chairs, and sofas, and at one end was a counter which was described by the Police as a bar. On the premises when the Police entered were the two defendants, a number of marines and one or two local residents. Some of the liquor was found under the counter and some in the kitchen. Some of that found under the counter was kept in a safe which at the time of the raid was unlocked but with the door closed. This safe also contained a cash box with some money in it. Three of the marines were drinking with the defendant Alfred Betham at the counter. Two others were with a local resident seated at the table drinking beer.

There was some conflict of evidence as to what the three marines at the counter were drinking, but one of the marines and the defendant Alfred Betham in evidence asserted that it was whiskey given to them out of the bottle owned by the defendant Alfred Betham, and this evidence was not seriously disputed and I think may be taken as correct.

Under the counter also was found one case containing 48 bottles of beer, which is included in the total of 142.

The persons present were questioned by the Police and according to Police evidence, the defendants stated the premises were run as a club, the members of which owned their own liquor and left it on the club premises for consumption by themselves without any further payment other than a subscription of 2/- per month to the club funds. The marines who were not members of the club were drinking they said, three at the invitation of Mr. Alfred Betham and two at the invitation of Mr. Mitchell, their host's liquor without payment.

Posted up on the wall were the rules of the club and a list of former members. These were given to the Police and produced by them in evidence. Also produced was the liquor taken from the premises and an ordinary exercise book containing on the first page certain writing which appears to be a list of names against which were set quantities of liquor. On the back page was a list of five names which were in evidence shown to be the names of sergeants of the U.S. Marines who were present. Against these names appear the words: "Pd. 10/-". This exercise book was handed to the Police by the defendant Mrs. Betham. Mrs. Betham said at the time that the wine which came from under the bar was hers.

For the defence Mr. Jackson admitted that the onus of giving an explanation for the liquor found and the persons present rested upon the defendant and adduced evidence to explain both. One of the sergeants of marines who was found drinking with Alfred Betham stated that he had been asked by a friend of his in Pago Pago to look Alfred Betham up and brought with him two of his sergeant friends. They have been offered a drink by Alfred Betham and accepted and were drinking with him from his spirits when the Police came. He also stated, and his evidence was not seriously questioned that no money passed between him and the defendants except in payment for tickets for an entertainment to be given in Apia subsequently. They were asked by Mrs. Betham's niece if they would care to buy the tickets. The tickets were not handed over but the sergeant wrote down the names of the five sergeants of marines present, including the other two who were drinking with Mr. Mitchell. Evidence was further given that these tickets were ultimately used when some of the marines went with the Bethams to the entertainment.

One of the bottles of whiskey was said to have been given by Mr. Miedecke to Mrs. Betham. This statement was not challenged.

Evidence was called to support the statement of Alfred Betham that the club known as the "Apia Social Union" was run upon the premises, the President being Mr. Mitchell and the Secretary being Mr. Fred Betham, brother of the defendant. Mr. Mitchell, the President, deposed that meetings of the club were held fairly recently, that the club was still in existence and functioning. Other evidence was given by local residents that they were members of the club and had deposited the liquor they obtained under medical permit with Mrs. Betham taking in exchange the tokens issued in books of three and each representing one bottle of beer. They also paid into the club 2/- per month which entitled them to come to the premises to drink their own liquor and generally to have the privilege of club membership. They all deposed

that they had never obtained on the premises any liquor beyond the liquor deposited by them and had on no occasion paid cash for any liquor. The amount of liquor said to be deposited by the witnesses together with that of the accused would more than account for the number of bottles of beer found. Their evidence was not challenged and I think must be accepted. Certain evidence was also given to the effect that the defendants had moved other valuables besides their liquor into the club premises, the explanation given being that there was always someone looking after the premises and so the valuables would not be likely to be stolen from there as had occurred from the defendant's residence situated some distance down the road.

Mr. Jackson quotes the case of Bunker v. Mahoney [1914] V.L.R. 63 in support of his contention that a statutory prima facie presumption, such as is created by section 14 of the Samoa Amendment Act, 1923 merely means that if no evidence is adduced on behalf of the defendant he may be convicted, but not that the defendant must prove his innocence, and further that if evidence is adduced which shakes the presumption, the Magistrate is not entitled to say that the defendant has not satisfied him and therefore a conviction must be entered. He must weigh the whole evidence and be satisfied beyond reasonable doubt that the offence has been committed.

I think on the whole the explanation given must be taken to amount generally to a reasonable explanation if it is conceded that the running of such a club is legal.

There would be no doubt in my mind that such a club, apart from the sale of liquor, would be legal, and the only question which remains is the question whether the practice of the club management in storing liquor for its members and handing it out to them bottle by bottle upon return of tokens given when the liquor was first deposited, amounts to a "sale" within the meaning of that term as used in the Samoa Act, 1921.

The New Zealand Licensing Act provides for certain offences against the liquor laws including the offence of selling or exposing for sale without being duly licensed. There are certain decided cases on the point of what constitutes a sale: see Erickson v. Cattanach 30 N.Z.L.R. 492 and Bryant v. Eales [1916] N.Z.L.R. 1065; but in these cases there is a clear consideration given or to be given from the consumer or purchaser of the liquor to the owner. There does not appear to be a case directly deciding that the circumstances which appear in this case under review amount to a sale. The foregoing cases do, however, require as an essential for sale the passing of the property or ownership of the liquor from one party to another for some consideration, and I think in this present case both those requirements must be present in order to constitute a sale.

Where a person drinks or gives away his own liquor without quid pro quo either the property in the liquor does not pass, or there is no consideration, and therefore no offence. In this case, the rules and practice of the club, if strictly adhered to, provide for each man drinking his own store of liquor and there is therefore no passing of the property in the liquor except by way of gift by a member to a friend. The arrangement is such that each member buys his own liquor from the Treasury and deposits it at the club premises receiving as evidence of deposit certain tokens upon production of which he may have his liquor returned to him either all at once or bottle by bottle, or in the case of whiskey, the practice is for each member's bottle to be available to him when he asks for it.

If there had been evidence of any practice involving the passing of some money or moneys' worth to the defendants for liquor at any time my decision would have been different, but there is before the Court no such evidence and the information is therefore dismissed.