

HIGH COURT. Apia. 1959. 8, 9, 11, June. ROTHWELL J.

Liquor - possession of intoxicating liquor - whether such possession for purposes of sale - Samoa Act 1921, section 338.

The evidence having established that the defendants had purchased with their own money intoxicating liquor in considerable bulk which was subsequently delivered or transferred to individuals for cash and at a price higher than that paid to the Customs Department; and that there was no separation or appropriation of specific consignments of liquor owned by the various individuals for whom the purchases had been made -

Held: that this amounted to possession of intoxicating liquor by the defendants for purposes of sale, contrary to section 338 of the Samoa Act 1921.

Superintendent Phillip, for Police.
Metcalf, for defendants Walter, Ah Foon, Frost, Pelesa, and Stowers.
Phillips, for defendants Ripley and Ah Kiau
von Heiderbrandt, in person.

Cur. adv. vult.

ROTHWELL J.: These prosecutions are all instituted under section 338 of the Samoa Act 1921. The defendants are all charged with having in their possession for sale intoxicating liquor. In almost all cases the possession was admitted as also was to the intoxicating quality of the liquor in terms of the Samoa Act 1921. The sole matter therefore requiring decision was whether the possession was for the purposes of sale and in that respect the burden of proof is cast upon the defendants by section 14 of the Samoa Amendment Act 1923.

Intoxicating liquor may be imported into Samoa only by the Government and it may legally be sold only by the Government for medical purposes. Such sale is conducted by the Customs Department to persons who are the holders of permits to procure liquor (popularly referred to as "points") and any other sale is illegal. The permits have apparently always been treated as being assignable although how that can be so when their issue appears to depend on the state of health of the licensee, it is difficult to understand. The practice, however, has been recognised by the Customs Department, and indeed the Court was informed that most people procure their supplies by the activities of either agents or assignees.

The prosecutions nearly all contain one common factor, namely, that the defendant sets up as a defence that he was operating as agent of a number of people either as an informal group or as a club - in some cases a proprietary club and in other cases a members' club. The prosecution alleged substantial sales by the defendants outside the limits of these alleged clubs or groups. The evil appears to be the possibility of sales to non-permit holders who are not able to acquire liquor legally.

In general the defence was that the property in the liquor vested in individuals and not in the defendant, and that subsequently the individuals merely took delivery of the liquor purchased on their behalf. In general it was proved that the defendant was the one who supplied the cash for the purchase from the Customs Department; that purchases were made in considerable bulk; that the sale or subsequently delivery to individuals was at a price higher than the price paid at the Customs Department; that cash passed on the transfer or delivery from the defendant to his so-called principal; and that in no case was there a separation or appropriation of specific consignments of liquor owned by the various individuals for whom the purchases had been made. In some cases when individuals surrendered liquor permits they were given a number of coupons corresponding with the amount of liquor represented by the permit, but in my view this does not alter the position. The process outlined in this paragraph is clearly in my view a bulk purchase by the defendant followed ultimately by individual cash resales to the persons in whose names

he has bought the liquor concerned.

To perfect the defence which has been set up in these cases it would be necessary for the defendant in making purchases on behalf of X, Y, and Z to appropriate and segregate the liquor belonging to each by a properly conducted locker system or by marking or other similar identification. The liquor might then become the property of X, Y or Z as the case may be, notwithstanding that the funds of the defendant had been used in the purchase. Nothing short of such an individual appropriation in my view can so identify the liquor as to vest property in the purchaser in his own right. The payment of an additional charge for service is probably not objectionable but would be much more clearly marked as a service charge if it were separated completely from the price of the commodity. I now proceed to apply this principle and other factors involved to the various prosecutions seriatim:

1. Elsie Walter:

This defendant alleged that she was the owner of a proprietary club called the "Savalalo Club" having about 25 or more members. She deposed that the members hand her their liquor permits and that she then in person purchases the bulk supplies of liquor at the Customs Department, keeps it in the house in which the club is conducted, and ultimately transfers to each member on request and on payment of 3/6 per bottle the beer which she has purchased at 3/- per bottle. She said -

"I don't keep a record of members' use of points. I always know whether a member has points left."

After the conclusion of the case for both prosecution and defence, Mr Metcalfe sought leave to recall the defendant, and on her recall she deposed that one Hellesee who was not a member of the club gave her 24 points; that he bought and paid for three bottles of beer and that she got the beer afterwards from the Customs. In reply to a question from the Court she said that the unused 21 points would go into stock.

It is clear that in this case there was a bulk purchase without appropriation and that the subsequent transaction with the members were individual sales and that the liquor was in the possession of the defendant for that purpose. She must be convicted.

2. Fale Ah Foon:

The defendant in this case sets up an informal association of a number of people who were in the habit of handing their liquor permits to her, following which she would obtain bulk supplies from the Customs Department paying 3/- per bottle for beer and recovering 3/6 in due course. She also said that her husband, who is a tailor by trade, occasionally brought points given to him by customers but she could not say how many. There was no attempt at explanation of the destination of liquor purchased by means of the points procured by the husband, nor any suggestion of appropriation to individuals of the liquor purchased by means of their points. Evidence was given by three permit holders of purchases of liquor from the defendant at 4/- per bottle. I hold in this case that there was clear evidence of bulk purchases and individual resales. That this was standard practice and the liquor was in possession of the defendant for that purpose. She will be convicted.

3. James Ripley and Fa'amalepe Ripley:

The defence in this case was that the purchases were for a club of a much more formal type which has actually been incorporated since the date in respect of which the prosecution was brought. Defendant James Ripley was the President of the club but not very closely associated with its active operations. The information against him will be dismissed. His wife, however, was the paid manageress with "full control". The information against her will be amended by insertion of the words "as manageress of the Society of Friends Club". Incidentally to a search of the club's premises some whisky and gin was seized which clearly was the private property of

Mr Ripley and another individual. There will be an order for return of this liquor accordingly. No admission was made in this prosecution, but it was proved that the liquor was found in the possession of the defendant Fa'amalepe Ripley as manageress and that it was intoxicating and the only question for determination now is whether it was in such possession for the purposes of sale. The Treasurer of the club produced the club's financial records and these proved to consist of mainly records of expenditure for rent and wages, income from savings interest arising from another aspect of the club's activities and a recurring item relating to purchases of beer. A typical item would be one case of beer with a credit of £1.4.0. Now the net cost of one case of beer purchased from the Customs Department is £7.4.0 but individual sales of bottles at 3/6 (the admitted price to members) would produce £8.8.0 and so upon the purchase of every case a credit of £1.4.0 potential profit is shown in the books, and when the case has been completely sold the net cost of another case for replacement remains in the till. The President, James Ripley, said in reply to a question by the Court -

"The member does not hand over any money. The liquor is bought out of club funds."

Applying the general principle there is here also clearly a bulk purchase followed by individual resales. The defendant Fa'amalepe Ripley must be convicted.

4. Jonathan Vincent Ah Kiau and Isa Dora Vaotele Ah Kiau:

In this case the allegation of the defendants was a loose association with some relatives or personal friends, pooling of points and subsequent joint consumption. Evidence was given also of sales at 4/- per bottle to persons outside the club. A Samoan female named Taunese Mataia deposed that on the day before the offence charged she went to the defendant's premises with a number of other persons including sailors from a boat and that beer was bought at 4/- per bottle and consumed on the premises in part, and that some liquor was taken away. One of her companions Fieta also gave evidence of consuming beer but said she saw no money. In reply to the question as to whether moneys could have been paid without her seeing, she first said they could and upon the question been put to her again she appeared to hesitate and then answered "no". My note originally was -

"They could have paid without my seeing".

and the word "not" was interpolated as a result of her second answer. Fieta said that the beer they consumed was cold. This evidence was given on June 8th. The following morning another member of the party Faapusi was called in rebuttal by leave of the Court. She said that the beer consumed at the Ah Kiau place that day was taken there by the sailors, and was warm and was consumed in that condition. Faapusi appeared to be an unreliable witness but her evidence might have been acceptable if she had not been broken down rather badly in cross-examination by Superintendent Philipp. She said in evidence in chief that they arrived at the Ah Kiau place about 2 o'clock and left after 3 o'clock. She said Mrs Ah Kiau came home while they were there and "scolded us for being there". In cross-examination she said "Mrs Ah Kiau is a teacher at Malifa. She came home early - after 4". On this inconsistency being put to her, she changed her evidence and said that Mrs Ah Kiau came home first at about 2.20 p.m. with her husband and then changed her dress, went away, and came back after 4. I do not believe this witness but accept the evidence of Taunese. Another witness Faalavelave has been criticised as unreliable, and his evidence is not a factor in the decision which the Court has come to in this matter. Senior Sergeant Schuster gave evidence of an interview with both defendants on May 11th, when they said that the beer was purchased by means of joint liquor permits of married couples, by the name of Simpson, Krause and Warren in addition to the defendants and was so consumed. In answer to the Court he said that the price to members was stated to be 3/- per bottle. A cousin Lester Dean deposed to supplies of liquor to sailors from the "Matua" on which ship his brother is or was a butcher. He said "he gives me money for beer". Here again the finding of the Court is that bulk purchases are made, that there is no individual appropriation and that the subsequent

transactions are resales. The bottle of whisky found on the premises does not appear to be associated with these transactions and must be returned to the defendants. Both defendants will be convicted.

5. Fuala'au Frost:

This prosecution is in a different category. The defendant is an independent operator and appears to be in a very substantial way. On the date that her premises were raided, 16 bottles of beer were found but later she was interviewed at the Customs Department Bond where she has paid for and was about to uplift three cases of beer each containing 48 bottles. This was later seized by the Police but I have ruled that the seizure was illegal as the beer was not in her possession and it must be returned accordingly. The 16 bottles found on her premises were claimed by her to be the property of her brother who lives in another house in front of the defendant's house with their mother. She said she had got the beer two or three days before and was keeping it in her house for her brother. She had no explanation to offer for taking it past her brother's house to her own house for this purpose. She said that the three cases which she was about to collect at Customs were for permit holders who had given her authority. She admitted sales at 3/6 per bottle and in reply to the Court said that the three cases in question would be called for from time to time by permit holders who would generally pay for two bottles at a time at 3/6 per bottle. She said "I supplied all money to buy bulk, collected bottle by bottle". This is a clear commercial undertaking for bulk purchases and individual resales whether to permit holders or to others. There was evidence from three separate witnesses for the prosecution of purchases of beer at 4/- per bottle. These purchases were made by non permit holders. Defendant must be convicted.

6. Semoe Pelesa:

A plea of guilty was entered in this case but it is mentioned here for the record.

7. Fritz Peter von Heiderbrandt:

The defence here was an association of a small number of friends associated together to pool their liquor resources and enjoy consumption of the liquor jointly. This seems to be a curious and unnecessary arrangement between friends and there is no reason why each should not furnish his own liquor instead of having a joint arrangement for purchase. Here again there was no evidence of appropriation of special property to individuals but merely a statement that on the bulk purchase of liquor "about 6 of us put in about £2.0.0" and again "while drinking we put in 3/- per bottle". The defendant had previously said that the beer found on May 8th was the result of a collection which financed the purchase of 6 dozen and three bottles. There was no explanation as to why this collection was necessary whereas the usual procedure was to provide a fund for future purchases by contributions of 3/- per bottle during consumption of present supplies. Evidence was given by Corporal Tinotali that although not a permit holder he had bought beer from the defendant. The defendant gave evidence of an approach by Corporal Tinotali at the Customs Bond with a permit for 48 points of which the Corporal was going to draw 12 himself and the remainder was to be drawn by the defendant and held available for the corporal from time to time. It was alleged that this was a special permit in the name of To'omata which had been assigned to the corporal. Corporal Tinotali gave evidence for the prosecution and denied any such arrangement when cross-examined. He confirmed the purchase of two bottles but said that he had no permit of his own, nor had he given the defendant any points. Superintendent Philipp gave evidence as Chairman of the Liquor Board that he had never issued a special licence to Toomata. Three other Police witnesses gave evidence of purchases from the defendant without points. Sales are clearly established also in this case and the defendant must be convicted.

8. Patrick Stowers and Tony Stowers:

This prosecution was stopped before any evidence was tendered against Mrs Stowers but in any event one conviction only would be entered. The case

against her is dismissed. This also was a club case, the defendant Pat Stowers deposing to be the Manager of the "Country Club". The information will be amended by interpolating the words "As Manager of the Country Club at Lotopa". The club is unincorporated, has a membership of 81 and here again it is clear that there is no appropriation of purchases to individual members but that supplies are purchased in bulk with club funds and individuals are supplied in return for their liquor permits bottle by bottle at the usual rate of 3/6. The defendant said that overseas visitors were supplied at the club provided that they held a permit "so that we can replace". In reply to a question by the Court he said "overseas visitors with permits buy at 3/6 per bottle, the same as members" and again "we use the club beer and replace later". This defendant also must be convicted.