

Northern Territory Licensing Commission

Reasons for Decision

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| Premises: | Walkabout Tavern |
| Licensee: | Gove and Beyond Pty Ltd |
| Licence Number: | 80313140 |
| Nominee: | Mr Peter Vearncombe |
| Proceeding: | Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> - Breach of Section 102-Serve Intoxicated Person |
| Heard Before: | Mrs J M Large Mrs V McClintic Mr J Brears |
| Date of Hearing: | 28 November 2006 29 November 2006 |
| Date of Decision: | 1 February 2007 |
| Appearances: | Mr D McConnel for Licensee Mr G Lye for Director of Licensing |

Background

1. On 27 June 2006 Sergeant Martin McCallum, Acting Officer in Charge of Nhulunbuy Police, lodged a complaint with the Director of Licensing pursuant to section 48(2) of the *Liquor Act* (the Act) against the Walkabout Tavern, Westral Street, Nhulunbuy. The complaint alleged a breach of section 102 of the Act in that on the 10 May 2006 a staff member at the Walkabout Tavern sold alcohol to an intoxicated person. On 11 October 2006 the Licensing Commission determined pursuant to Section 49(1) of the Act to conduct a hearing at a date to be fixed. A hearing was held at Nhulunbuy on 29 November 2006.
2. Prior to the commencement of the formal hearing, evidence was given by Constable Daniel Kowalewycz that the complainant's main witness, Mr David Dhamarrandji, had been located in an intoxicated condition earlier in the morning and was currently in protective custody. Consequently, he would be unable to give evidence until sometime after 3.00pm. The Commission determined that other witnesses would be heard prior to Mr Dhamarrandji being available.

The Hearing

3. Evidence was given by Police Officers Breed and Kowalewycz that at approximately 5.05pm on Wednesday 10 May 2006 they had sighted Mr Dhamarrandji, who was well known to them, walking from under the cover way of the Walkabout Tavern bottle shop, carrying a cask of wine in a plastic bag. There was nobody with him or in the nearby vicinity. When they stopped and questioned Mr Dhamarrandji they assessed that he was seriously affected by alcohol. A breath analysis reading taken at 5.13pm on the same day returned a reading of 0.311% blood alcohol concentration. When answering questions from the Police, Mr Dhamarrandji claimed:
 - a) ownership of the cask of wine with the words "its mine",

- b) that he had been sold the cask by “that girl” “blonde little one” ; and
- c) that he had paid for the wine by producing a bank keycard in his name from his pocket saying “with this”.
4. The Police witnesses further stated that they then drove to the Walkabout Bottle Shop and asked the service attendant, identified as Samantha Adam, if she had recently served a full blood male Aboriginal in a red flannel shirt. Her reply was that she “may have” but he was “sober when she did so”. No request was made by the Police to view the relevant camera surveillance tapes.
 5. In a statement taken from Mr Dhamarrandji on 11 May 2006 he admitted that he went to the Bottle Shop “got a cask of moselle out of the fridge, put it on the counter and paid for it with my key card”.
 6. Mr Dhamarrandji, an indigenous man of average height and with curly hair was released from protective custody to give evidence at the hearing. He gave two sets of conflicting evidence. Firstly, he admitted purchasing the cask of wine from the young lady at the Bottle Shop using cash and not the key card and secondly that someone else had purchased the cask for him. He appeared to the Commission to still be suffering from the effects of alcohol. The Commission determined that Mr Dhamarrandji’s level of intoxication at the time of giving evidence was such that he had no clear memory of what had happened over six (6) months earlier on 10 May and his evidence at the hearing was discounted.
 7. Crucial documents produced at the hearing were the tax invoices for the Bottle Shop showing the list of transactions that took place on 10 May in the late afternoon. The transactions were as follows:
 - Tax Invoice No 15021, 4.28pm, Jim Beam White LBL 700 \$31.00
 - Tax Invoice No 15022, 4.36pm, \$0
 - Tax Invoice No 15023, 4.37pm, Bundy Rum 700 ml \$33.00, Winfield Blue 20s, \$10.00
 - Tax Invoice No 15024, 4.49pm, \$0
 - Tax Invoice No 15025, 5.01pm, Smirnoff Ice, \$8.00, Berri Fresh Dry Wine, \$20.00
 - Tax Invoice No 15026, 5.04pm, J. Walker Black Label, \$40.99
 - Tax Invoice No 15027, 5.05pm, Ctn Victoria Bitter, \$41.99
 - Tax Invoice No 15028, 5.05pm, Flavour milk, \$2.80
 - Tax Invoice No 15029, 5.05pm, Ctn Carlton Mid Bitter, \$32.00, Winfield Blue 25s, \$11.80
 - Tax Invoice No 15030, 5.07pm, 6 PK Coopers Pale Ale, \$15.00

The crucial sale for our purposes appears to be the sale of a cask of wine at 5.01 pm.

8. The Licensee in his written statement to the Director of Licensing asserted that the transaction for a five (5) litre cask of wine and two (2) RTDs (cans of Smirnoff Ice) which took place at 5:01 pm was to David Yunupingu. There appears to be no evidence to support this statement. The main witnesses for the Licensee were Ms Samantha Adams and Mr Peter Vearncombe (Tavern Manager). Ms Adams was the service attendant at the Bottle Shop on the day and time in question. She admitted that she had only worked in the Bottle Shop on a couple of occasions prior to 10 May 2006 and did not know a David Dhamarrandji or a David Yunupingu. She stated that on the afternoon of 10 May

2006 at about 4.45pm a gentleman in a taxi requested but was refused service as he declined to step out of the taxi to make the purchase. About ten (10) minutes later another gentleman purchased a cask of wine and two (2) cans of Smirnoff Ice. This man was described as a taller (than the man in the taxi), he was of average height and curly hair and he paid for the purchase with an EFPOS card. The gentleman from the taxi was in the Bottle Shop at the time and was again refused service. The two customers left together. Ms Adams stated that she had not seen either gentlemen again. Minutes later she served two to three (2 - 3) other customers and the Tavern Manager, Mr Peter Vearncombe, who bought a soft drink.

9. Mr Peter Vearncombe confirmed that he was in the Bottle Shop at about 5.05 pm on 10 May 2006. At that time there were about three (3) customers being served and he saw Mr Dhamarrandji near the drink cabinets in the Bottle Shop. He knew Mr Dhamarrandji and assessed him as being intoxicated. He stated that when Mr Dhamarrandji attempted to buy alcohol he was refused by the attendant. Mr Vearncombe purchased a non alcoholic drink and walked out of the Bottle Shop behind Mr Dhamarrandji. He did not see anyone else or any taxi outside the Bottle Shop and did not see Mr Dhamarrandji carrying any product from the Bottle Shop. Mr Vearncombe admitted that he did not know a David Yunupingu.
10. Mr Bellinger, in charge of Electrical Maintenance at the Walkabout Hotel gave evidence that when asked by the Duty Manager about camera surveillance tapes for 10 May 2006 he explained there were no cameras inside the Bottle Shop and the external footage was corrupted and the BMR was found to be defective.
11. Mr Tourish, proprietor of the Walkabout Hotel, gave evidence that when he heard about the incident he spoke to Ms Adams and Mr Vearncombe and his notes at the time indicated that a different person (David) purchased a cask. The name David Yunupingu was also written in the notes. He had asked Mr Bellinger to review the camera surveillance footage but it was defective and producing frames so fast that nothing could be effectively seen.

Consideration of the Issues

12. The Commission has before it two (2) conflicting stories as to the sale and purchase of a cask of wine from the Bottle Shop at the Walkabout Hotel at approximately 5.00pm on 10 May 2006. There are, however, certain facts which are accepted by all parties. These are:
 - a) The name David Yunupingu is, as described by Mr McConnel in his summing up, "a red herring" which somehow appeared when Mr Tourish was running around trying to get the facts. The name appears in the notes made by Mr Tourish following discussions with Ms Adams and Mr Vearncombe in relation to the incident. It then evolved, for some unknown reason, into the written defence to the sale of alcohol to an intoxicated person. Both Ms Adams and Mr Vearncombe denied on oath any knowledge of a David Yunupingu.
 - b) Mr Dhamarradji was in and around the Bottle Shop of the Walkabout Hotel about 5.00pm on 10 May 2006 as testified by the Police, Ms Adams and Mr Vearncombe. At that time he was heavily intoxicated as shown by the Alcotest taken at 5.13pm, namely .311% blood alcohol content, and the evidence of the Police and Mr Vearncombe.
 - c) At 5.01pm on 10 May 2006 a purchase was made at the Bottle Shop of two(2) cans of Smirnoff Ice and one (1) cask of Berri Fresh Dry White wine. It was agreed that the Tax Invoices of the till sales and the bank statements showed that this purchase was made by EFTPOS using a Westpac key card in the name of David Dhamarrandji.
 - d) At about 5.05pm on 10 May 2006 Mr Dhamarrandji was seen walking away from the Bottle Shop carrying a cask of wine. This cask was found to be Berry Fresh Dry White wine.

13. The conflict arises as to whether the cask of wine was sold to Mr Dhamarrandji or, as the Licensee contends, to some other person who used Mr Dhamarrandji's key card and who then presumably passed the cask to Mr Dhamarrandji.
14. In examining the evidence given on behalf of the Licensee the Commission noted that Mr Vearncombe stated that he entered the Bottle Shop about 5.05 pm to purchase a non alcoholic drink and he saw two to three (2 – 3) other people in the Bottle Shop being served. The Tax Invoices for the Bottle Shop substantiate this evidence as they show that the only soft drink purchased between 5.00pm and 5.08pm was at 5.05pm and there were three (3) other purchases of alcohol, namely whisky and beer, made at 5.04pm and 5.05 pm. As Mr Vearncombe's evidence was that he entered the Bottle Shop at about 5.05pm it would appear that Mr Vearncombe was not in the Bottle Shop and did not observe the circumstances of the crucial sale of the cask of wine and cans of Smirnoff at 5.01pm.
15. Mr Vearncombe did give evidence that Mr Dhamarrandji was in the shop at 5.05 pm and tried to buy alcohol but was refused service and that he followed Mr Dhamarrandji out of the shop.
16. Ms Adams' evidence then becomes the only testimony made on behalf of the Licensee of the transaction in question and she stated that there were two men and that she sold the cask of wine and two cans of Smirnoff to the first gentleman who was sober. She refused to serve the second man who she had previously refused when he arrived in a taxi and the two men left together. She further ascertained that she never saw them again.
17. The Commission is not assisted by the Police who under section 19 (10) of the *Liquor Act* (the Act) are deemed to be Inspectors, in that they failed to request or to view the camera surveillance footage and did not obtain a positive identification of Mr Dhamarrandji by Ms Adams even though he was in the Police vehicle outside the Bottle Shop when they interviewed her. Similarly, the written response provided by the Licensee, who asserted several times, that Mr David Yunupingu purchased the cask of wine at 5.01pm on 10 May 2006 and that Mr Vearncombe escorted Mr Dhamarrandji off the premises at 4.50pm have proved to be inconsistent. The former was acknowledged as a "red herring" and the latter was not backed up by Mr Vearncombe's evidence at the hearing.
18. Section 102 of the *Liquor Act* states:
- "A Licensee or a person employed by a Licensee shall not sell or supply liquor to a person unless the person in whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant)"*
- Mr McConnel in summing up, submitted that the correct interpretation of Section 102 differed from the interpretation espoused by the Commission in previous cases such as *Scotty's Place* (delivered 18 February 2000) in that case, the Presiding Member stated:
- "Once there is a case to answer in relation to a breach of Section 102 which is to say, once a sale or supply is demonstrated together with any reasonable ground to suspect that the recipient may have been other than not intoxicated an onus of proof shifts to the Licensee who must prove that the patron was not intoxicated or alternatively must sufficiently undermine the evidence of the sale or supply having occurred."*
19. Mr McConnel took issue with the final underlined portion of the above decision and submitted that the reverse onus in Section 102 required the Licensee to prove on the balance of probabilities that the customer was not intoxicated but did not require the Licensee to disprove that the sale or supply to that person occurred. The Commission notes that in previous cases dealing with Section 102, the matter in dispute has been the intoxication of the customer and not the circumstances of the sale and therefore the question of the extent of the reverse onus has not previously been considered. Further, in the second reading speech on the amendment to the *Liquor Act* which introduced the reverse onus provision for Section 102 it is apparent that the whole thrust of the amendment relates to the level of intoxication and places "the onus of proving that the

person served as not intoxicated on the defendant". The Commission found Mr McConnell's reasoning persuasive and for the purposes of this decision, it intends to require that the complainant prove on the balance of probabilities that the sale was made to Mr Dhamarrandji with the reverse onus only applying to the question of intoxication.

20. In this case intoxication is not the issue and therefore the onus rests with the complainant to prove the sale to Mr Dhamarrandji and we accord with the description of this onus made by Mr John Withnall in Scotty's Place Decision on 18 February 2000.

"The onus in this regard remains with the complainant, who needs to positively persuade us (along Briginshaw –v- Briginshaw lines), that a breach of that section has occurred. The task for the Licensee therefore in making answer is to make such inroads into, or explanation of, the case of the complainant such that the Commission does not feel positively persuaded of the breach having occurred."

21. We have considered carefully whether or not we are satisfied on the balance of probabilities that a sale of liquor to Mr Dhamarrandji took place on 10 May 2006 at a time when he was intoxicated. Some of the evidence is confusing so we have needed to take some care to satisfy ourselves that the burden of proof has been met. We have placed some weight on the comments made by Mr Dhamarrandji to Police when they spoke to him directly outside the Bottle Shop on 10 May including his admission that he purchased the wine with his credit card from a woman matching the description of Ms Adams. We are well aware that Mr Dhamarrandji was intoxicated at the time but his statements to Police are sufficiently corroborated by other evidence to satisfy us of their accuracy. He said he made the purchase of the cask of wine by debit card and the tax invoices appear to confirm this. He also accurately described the appearance of the Bottle Shop attendant.
22. Despite the lack of confirmation by way of camera surveillance footage of the sale we are of the opinion that the complainant has provided sufficient evidence on the facts, (agreed by all parties and set out in Paragraph 12), above, together with, and the responses by Mr Dhamarrandji and Ms Adams on the 10 May 2006 and the statement on 11 May 2006. We are positively persuaded that a case has been made out for a breach of Section 102 of the *Liquor Act* in that a sale of liquor to an intoxicated person was made at the Bottle Shop of the Walkabout Hotel to an intoxicated person on 10 May 2006.
23. In reaching this conclusion, we make the following comments:

- a) The Licensee's response is limited to the testimony of the service attendant Ms Adams. The Commission, in assessing the weight that should be placed on Ms Adams' evidence, has taken into account that at the time she had only served in the Bottle Shop on a couple of occasions. Her main evidence was that she refused service to the man in the taxi and when he later appeared in the Bottle Shop she again refused him service. She stated that she did not know David Dhamarrandji and it is doubtful if she could have clearly identified him as the man in the taxi, actually a mini bus, as he refused to leave the bus. The Commission has to consider the possibility that if there were two (2) persons in the Bottle Shop when the purchase was made (and we are not sufficiently satisfied that there were), then the first could have been Mr Dhamarrandji who was served and the second unidentified man who was not served.
- b) Mr Tourish's notes, made on the 10 May 2006, after interviewing Ms Adams about the incident, show "Different person (David) purchased cask". Since David Yunupingu has been discounted it could possible refer to David Dhamarrandji. In the witness box Ms Adams' description of this person could easily have been of Mr Dhamarrandji. We also note with interest that at no time during the short interview with the Police on the 10 May did Ms Adams mention two men and it was only after the event that she stated another person made the purchase. No further evidence was provided to support the existence of another person making the purchase using Mr Dhamarrandji's key card.

- c) Whether or not Mr Dhamarrandji was the man who arrived at the Bottle Shop in a taxi at an earlier time or was in the Bottle Shop at a later time is considered irrelevant to the case as on both occasions there was no sale of alcohol.
 - d) In regards to the mystery of the two (2) cans of Smirnoff Ice it was ascertained during the hearing that when the attendant made a sale at the Bottle Shop the product was not scanned but manually punched into the system which can give rise to errors being made. It was also noted that twice during the preceding half an hour the Tax Invoices show that the till had been opened but no sale made. This information, together with the inexperience of the service attendant (Ms Adams had only worked in the Bottle Shop a couple of times), and the fact that no cans of Smirnoff were located leads to a possibility that an error was made and the cans were not part of the sale.
24. Taking all of the above into consideration we find that the Licensee has made no inroads into the case by the complainant and we believe that on the balance of probabilities the breach occurred.
25. In regards to the requirements under *Briginshaw –v- Briginshaw* (1938) the degree of probability on which the Commission must reach a conclusion as to whether or not a Licensee has failed to comply with the provisions of the *Act* will depend on the nature and gravity of the issue to be determined. The supply of alcohol to an intoxicated person is considered a serious breach of the *Liquor Act*. We have determined that after an assessment of the facts provided by the complainant, the initial statements made by Mr Dhamarrandji and the lack of supportive evidence from the Licensee the degree of probability that a breach occurred is very high.

Decision

26. The Commission determines that the Walkabout Tavern, Westal Street Nhulunbuy, committed a breach of Section 102 of the Liquor Act in that on 10 May 2006 alcohol was sold in the Walkabout Bottle Shop to an intoxicated person, namely Mr Dhamarrandji.
27. Submissions on penalty will be considered by the Licensing Commission in Darwin and can be presented orally at a Commission hearing, date to be decided, or by written submissions to the Commission.

Mrs Jane M Large
Presiding Member