[1980–87 Gib LR 53]

ATTORNEY-GENERAL v. BAGLIETTO

COURT OF APPEAL (Forbes, P., Hogan and Unsworth, JJ.A.):
October 22nd, 1981

Liquor—licensing—licensed premises—both grant and issue of licence obligatory for applicant to be licensed to sell alcohol on premises under Licensing and Fees Ordinance (cap. 90), s.7

The respondent was charged in the magistrates' court with selling intoxicating liquor without a licence contrary to the Licensing and Fees Ordinance (*cap*. 90), ss. 7(1) and 44(1).

The respondent had been granted a licence to serve alcohol in his tavern during the year 1980. He paid for the issue of a licence covering the first quarter of the year but failed to pay for the second quarter, with the result that he was not issued with a licence for this period. He nevertheless served alcohol and was found guilty in the magistrates' court of selling liquor without a licence contrary to the Licensing and Fees Ordinance. On appeal, the Supreme Court (Davis, C.J.) held that the respondent had in fact been licensed to serve alcohol on the date in question. He had been granted a licence for the whole of 1980, and the fact that the licence had not been issued was immaterial.

On further appeal by the Crown, the Attorney-General submitted that the decision of the Supreme Court was incorrect; in order to be properly licensed for the purposes of the Ordinance, the respondent had to be both *granted* a licence and *issued* with one, which had not happened here since no licence had been issued to the respondent.

The respondent submitted in reply that (a) he had, in fact, been licensed to sell alcohol on the date in question as he had been granted a licence for the whole of 1980 and could have been issued with the licence document by the Financial & Development Secretary at any time had he paid the necessary fee; and (b) the grant and the issue of a licence did not refer to different stages of the licensing process and it was not necessary for a licence to be issued for an applicant to be licensed. Once he had been granted a licence he could sell alcohol without contravening the Licensing and Fees Ordinance.

Held, setting aside the decision of the Supreme Court and restoring the decision of the magistrates' court:

The respondent had committed the offence charged contrary to the Licensing and Fees Ordinance. Considering the Ordinance as a whole, the

words "licensed under the provisions of this Ordinance" in s.7 meant that for the respondent to be licensed, the whole process of licensing contemplated by the Ordinance, including both the granting and issuing of a licence, had to have been completed. As the respondent had not had a licence issued to him covering the relevant time, he had committed the offence of selling intoxicating liquor "without a licence for that purpose" (paras. 13–21).

Cases cited:
(1) *Thompson* v. *Harvey* (1859), 4 H. & N. 254; 157 E.R. 836, considered.
(2) *Whitefield Billiard Hall Co. Ltd.* v. *Pickering*, [1920] 1 K.B. 604, considered.

Legislation construed:
Licensing and Fees Ordinance (Laws of Gibraltar, *cap.* 90), s.5: The relevant terms of this section are set out at para. 4.
s.7: The relevant terms of this section are set out at para. 4.
s.33: The relevant terms of this section are set out at para. 4.
s.44(1): "A person who acts in contravention of any of the provisions of this Ordinance or any of the terms or conditions of any licence issued under the authority of this Ordinance is guilty of an offence against this Ordinance."
First Schedule, item 10: The relevant terms of this item are set out at para. 5.

E. Thistlethwaite, *Crown Counsel*, for the Crown;
D. Faria for the respondent.

1 **FORBES, P.,** delivering the judgment of the court: This is an appeal from a decision of the learned Chief Justice on an appeal to him by way of case stated from the magistrates' court.

2 The case stated was as follows:

> "1. On July 2nd, 1980, the appellant (John Baglietto) and the respondent in the appeal to this court pleaded not guilty to the following information:
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> 'That on the April 18th, 1980, then being the owner of certain premises known as the Bull & Bush bar situated at 30 Parliament Lane did sell intoxicating liquor without a licence for the purpose issued by the licensing authority, contrary to ss. 7(1) and 44(1) of the Licensing and Fees Ordinance, Chapter 90.'
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> 2. That the appellant was represented by Mr. David Faria.
>
> 3. That the prosecution was undertaken by Chief Insp. Emilio Borastero.

4. I found the following facts:

The appellant was the owner and the licensee of a tavern called the Bull & Bush.

The appellant had renewed the tavern licence for the year 1980 at the Brewster Sessions.

The appellant had paid the licence for the first quarter of 1980 and had been issued with a licence for that period.

The appellant had forgotten to pay for the licence for the second quarter, April 1st, 1980, to June 30th, 1980, and was not in possession of a licence issued in accordance with r.5 of the Licensing Rules.

The appellant had on April 18th, 1980, exercised his calling as a licensee and members of the public were being served with intoxicating liquor at the aforesaid premises.

5. The appellant contended that the defendant did have a licence to sell intoxicating liquor on April 18th, as a licence for the whole year 1980 had been granted at the Brewster Sessions and referred me to *Whitefield Billiard Hall* v. *Pickering*.

6. I was of the opinion that the appellant was not licensed until such time as a licence had been actually issued by the Financial & Development Secretary as set out in s.7(2) of the Licensing and Fees Ordinance.

The question for the opinion of the Supreme Court is whether I came to a correct determination in law."

3 In answering the question, the Chief Justice found that the decision of the magistrates' court, that the appellant was not licensed until such time as a licence had been actually issued by the Financial & Development Secretary as required by s.7(2) of the Ordinance, to be an incorrect determination of the law and it is against this finding of the Chief Justice that the Attorney-General now appeals.

4 The law as to licensing, including licensing for the sale of intoxicating liquor, is now set out in the Licensing and Fees Ordinance (*cap*. 90) and the Licensing Rules (*cap.* 90 subsidiary legislation). Section 3, as read with r.3, establishes the magistrates' court as the licensing authority for the grant of certain intoxicating liquor licences including tavern licences. Sections 5 and 7 provide for the grant and issue of licences and s.33 and the First Schedule deal with the period for which a licence may be issued: These provisions are as follows:

"5.(1) The licensing authority, except where otherwise expressly provided, is hereby authorized and empowered to grant and issue, or

in his discretion to refuse to grant and issue, to person applying for the same, all licences required to be taken out by this Ordinance.

(2) Such licences shall be in such form and shall contain such particulars as may be required by this Ordinance and as the licensing authority may require."

"7.(1) Unless licensed under the provisions of this Ordinance, no person shall manufacture, sell, barter, exchange or otherwise dispose of for money or reward any intoxicating liquor without a licence for that purpose issued by the licensing authority.

. . .

(2) Licences for the manufacture and sale of intoxicating liquor shall be issued by the Financial and Development Secretary, on the requisition of the licensing authority, in the following forms—

. . .

(d) Tavern Licences;

. . .

(3) Every licence shall be subject to the provisions of this Ordinance and of any subsidiary legislation made thereunder, whether such provisions relate to licences generally or to specific licences."

"33. The period for which a licence may be issued shall be specified in relation thereto in the First Schedule."

5 Item 10 in the First Schedule, which relates to a Tavern Licence, provides in the column headed *Terms and Conditions of Licence and how payable*—

"Per annum; issuable for one year;

Fee payable quarterly in advance."

6 It is apparent from an examination of the above provisions of the licensing law that a difference is contemplated between the grant and issue of a Tavern Licence. The licence is granted by the magistrates' court as the licensing authority but the licence is actually issued by the Financial & Development Secretary on the requisition of the licensing authority. The substantial issue raised before the Chief Justice and in this court is whether a person who has been granted an annual licence by the magistrates' court is licensed within the meaning of s.7 even though he is not in possession of the actual quarterly licence issued by the Financial & Development Secretary.

7 In finding that the respondent was in fact so licensed, the Chief Justice put the matter in this way:

> "In the present case it appears therefore that the licensing authority (the magistrates' court) in granting the application for a renewal of the Tavern Licence for the Bull & Bush for the whole of the year 1980 *granted* him a Tavern Licence for that period. It did not, however issue . . . a Tavern Licence as the issuing of a Tavern Licence, by virtue of s.7(2), is the function of the Financial and Development Secretary.
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> Section 7(1) of the Ordinance read with s.44 gives rise to a penal offence. It is well established that such provision must be construed strictly (see *Maxwell on Interpretation of Statutes*, 12th ed., at 240 *et seq*. (1969)) and while s.7(1) appears to me to be clearly tautologous it also appears to me that I must construe it as it is worded.
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> The provisions of s.7(1) are governed by the words 'unless licensed under the provisions of this Ordinance.' The subsection provides (in so far as relevant to this case) that 'no person shall . . . sell . . . any intoxicating liquor without a licence for that purpose issued by the licensing authority,' but one must then turn back to the introductory words to which the rest of the subsection is subordinate 'unless licensed under the provisions of this Ordinance.'
>
> What then does 'licensed' mean? The Ordinance contains no definition of the verb 'license.' I turn therefore to the ordinary every-day meaning of the word given in the *Shorter Oxford Dictionary* (the 1933 edition, being the only one available to me). There the relevant meanings are given as—'to give (a person) permission to (do something); to grant (a person) a licence to do something e.g. to practise a trade, hold a curacy, keep a dog, carry a gun, *etc*.'
>
> Reading the word 'licensed' in s.7(1) in this sense, I find that the appellant was 'licensed' to sell intoxicating liquor at the Bull & Bush Bar for the whole year 1980 in that the licensing authority had granted him a licence to do so. The fact that he had not been issued with a Tavern Licence for the second quarter of 1980 by the Financial & Development Secretary under s.7(2) is therefore immaterial in so far as the offence created by s.7(1), as read with s.44(1), is concerned.
>
> Accordingly, I find the learned Stipendiary Magistrate's opinion that the appellant was not licensed until such time as a licence had been actually issued by the Financial and Development Secretary as required by s.7(2) of the Ordinance to be an incorrect determination of the law."

8 Mr. Thistlethwaite, on behalf of the Attorney-General, submitted that the learned Chief Justice was wrong in construing the word "licensed" in s.7(1) as referring to the grant of the licence by the magistrates' court. It was, in his submission, apparent from the context of the section and the Ordinance as a whole that what a person selling intoxicating liquor required was the licence issued by the Financial and Development Secretary. In support of this argument he referred to a number of sections of the Ordinance which, he submitted, clearly envisage that the licence is the formal document issued by the Financial and Development Secretary. Section 5 requires that the licence shall be in "such form and contain such particulars as may be required by this Ordinance and as the licensing authority may require"; s.7(1) refers to the licence issued by the licensing authority and this must be a reference to the document issued by the Financial and Development Secretary as sub-s. (2) of the same section provides that "licences for the manufacture and sale of intoxicating liquor shall be issued by the Financial and Development Secretary, on the requisition of the licensing authority"; s.24 requires that the "holder of a licence for the sale of intoxicating liquor by retail shall expose such licence in a prominent place approved by the Financial and Development Secretary"; and finally s.49 is in the following terms:

> "49. In any prosecution under this or any other Ordinance charging any person with doing, without a valid licence therefor, anything for the doing of which a licence is required under this or any other Ordinance, the charge shall be held proved if it is shown to the satisfaction of the court that the accused did the said thing unless the accused produce a valid licence in court or show to the satisfaction of the court that such licence was duly taken out."

9 In the circumstances mentioned above, Mr. Thistlethwaite originally submitted that s.7(1) must be construed in a manner which is consistent with the intention of the Ordinance even if it meant disregarding altogether the opening passage, and referred to the principles set out in *Maxwell on the Interpretation of Statutes*, 12th ed., at 228 (1969).

10 Mr. Faria on behalf of the respondent (Mr. Baglietto) contended that there was no clear distinction between the grant and the issue of a licence and submitted that the respondent was licensed within the meaning of s.7(1) of the Ordinance at the time of the alleged offence for the reasons given by the Chief Justice in his judgment. He referred to the cases of *Whitefield Billiard Hall Co. Ltd.* v. *Pickering* (2) and *Thompson* v. *Harvey* (1) and to the strict construction of words setting out the elements of an offence mentioned in *Maxwell on the Interpretation of Statutes* (*ibid.*, at 240).

11 In the case of *Whitefield Billiard Co. Ltd.* v. *Pickering*, the appellants, on March 13th, 1919, applied for and obtained from the licensing justices

a renewal of their billiard licence. The licence was prepared and signed by the justice's clerk and was duly sealed, but the appellant, although notified that it was ready, did not apply for it or pay the fee to which the clerk was entitled. In consequence of this the clerk, on April 6th, treated the licence as lapsed, and so endorsed it in his minute book. The appellants being charged, under s.11 of the Gaming Act, 1845, with unlawfully keeping on their premises a public billiard table without being duly licensed and not holding a victualler's licence, the justices convicted them, being of the opinion that the licence had lapsed and that the appellants were in the position of having no licence. The conviction was quashed on appeal on the ground that the payment of the clerk's fee was not a condition precedent to the grant of the licence and that the appellants were duly licensed although they had not taken up and paid the fee for the licence.

12 In referring to *Thompson* v. *Harvey*, counsel drew attention to the remarks of Martin, B., where he said (4 H. & N. at 262; 157 E.R. at 839): "It is a rule of construction that matters shall not be deemed to be conditions precedent unless they are declared to be so."

13 We think that the case of the *Whitefield Billiard Hall Co. Ltd.* v. *Pickering* (2) differs from the present case in that, in the *Whitefield* case, the formal licence had been prepared and signed whereas in the present case there was no formal licence and the issue which has to be decided is whether the respondent could be licensed unless there was a formal document issued by the Financial & Development Secretary.

14 We would accept the submission of Mr. Thistlewaite that the licence envisaged under the Ordinance is the formal licence issued by the Financial & Development Secretary and that the intention of the legislature as it appears from the Ordinance as a whole is that a person should be guilty of an offence if he sells intoxicating liquor without such a licence. This intention emerges from the sections referred to by Mr. Thistlewaite and other provisions such as s.6 and s.23(2) of the Ordinance.

15 The question remains, however, whether the intention of the legislature is carried out in the section creating an offence, and, after careful consideration of the original submissions made to us by counsel, we sought further assistance in the examination of the circumstances at the time of the amendment in 1948. This has led to additional submissions which are reflected in the remaining passages of this judgment. We should mention that this aspect was not argued or considered in the Supreme Court.

16 The issue of intoxicating liquor licences was formerly governed by the Revenue Ordinance (Laws of Gibraltar 1933, *cap*. 93). Section 33 originally provided:

"Form of Licences.

33. Licences for the sale of intoxicating liquor shall be issued by the licensing authority in the following forms:

. . .

(c) Tavern Licence

. . .

and shall be subject to any restrictions . . ."

Section 35 provided:

"Restrictions on Sale of Intoxicating Liquor.

35. No person shall sell, exchange or otherwise dispose of for money or reward any intoxicating liquor without a licence for that purpose issued by the licensing authority . . ."

17 Sections 33 and 35 were repealed and replaced by ss. 5 and 6 of Ordinance No. 12 of 1948. The new s.35 related to a manufacturer's licence and is not relevant to the question before us. The new s.33, however, was in the terms which are now contained in s.7 (*cap.* 90). Sub-section (1) of the new s.33 is clearly the old s.35 with the addition of the words "Unless licensed under the provisions of this Ordinance," and the insertion of the word "manufacture," in the earlier part of the section, while sub-s. (2) now provides for licences to be "issued by the Financial Secretary on the requisition of the licensing authority" instead of being "issued by the licensing authority."

18 The section in its new form is somewhat puzzling until one looks at the situation facing the draftsman and the legislature in 1948, which was more fully outlined to us by Mr. Thistlewaite at the resumed hearing.

19 The amendments introduced a new procedure for the issue of licences, which had previously been authorized and issued by the Financial Secretary as licensing authority. Now a new licensing authority was to authorize the issue of certain licences, whilst the actual issuing of these licences was still to be the function of the Financial Secretary. Consequently, the older form of prohibition in s.35 was no longer appropriate for the new licensees and the opening words in the new s.33 were introduced to cover them. There would still have been a number of the old licensees about, although they were a vanishing entity. Probably the newly-introduced words would have been sufficiently general to cover them but it may well have been thought *ex abundante cautela*, that the words at the end should remain so as to leave no room for argument on the point. Whether there was any need to retain these words when the enactment became *cap.* 90 of the latest revision, at a time when the

category in question may well have ceased to exist, does not affect our conclusions.

20 Approached in the manner just discussed, we see no ambiguity in the section. Looking at the Ordinance as a whole we think the words "licensed under the provisions of this Ordinance" mean that the whole process of licensing contemplated by the Ordinance, including, where appropriate, both the granting and the issuing of the licences, has been completed. This construction removes the difficulty of reconciliation with other sections which has already been mentioned and avoids the somewhat arbitrary interchange of the expressions "grant" and "issue" advanced by Mr. Faria, in his interesting address, as a means of minimizing it.

21 Whether it would be desirable to reconsider the language used in framing charges under the section is not a matter for us to determine on the case stated.

22 The appeal is allowed, the decision in the Supreme Court is set aside and the decision of the magistrates' court is restored.

Appeal allowed.
