

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: MCP

Respondent: Commissioner of Police
(represented by Mr Daniel Harrop of State Solicitor's Office)

Commission: Mr Rudolf Alexander Zilkens (Presiding Member)

Date of lodgement of Application: 13 October 2017

Matter: Application for review of a barring notice under section 115AD of the *Liquor Control Act 1988*

Date of Determination: 5 December 2017

Determination The terms of the barring notice dated 13 September 2017 is varied as follows:

- 1 In the fourth paragraph of the barring notice, after the words:

"All restaurant licences issued under section 50"

add the words:

"operating with an extended trading permit (liquor without a meal) issued pursuant to section 60(4)(ca) of the Act"
- 2 The barring notice shall otherwise remain in its current terms.

Authorities referred to in Determination:

- *Batty v Commissioner of Police* (LC 33/2011)
- *K R B v Commissioner of Police* (LC22/2011)
- *Lewer v Commissioner of Police* (LC 58/2011)
- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241
- *Piscopo v Commissioner of Police* (LC 55/2011)
- *Quartermaine v Commissioner of Police* (LC 46/2011)
- *Sagnata Investments Ltd v Norwich Corporation* (1971) 2 All ER 1441
- *S V S v Commissioner of Police* (LC19/2011)

Introduction

- 1 On 13 September 2017, a Delegate of the Commissioner of Police issued a barring notice pursuant to s115AA(2) of the *Liquor Control Act 1988* (“the Act”) to prohibit MCP (“the applicant”) from entering specified licensed premises in Western Australia for a period of 6 months, namely:
 - a. All hotel licences, however referred to, issued under section 41;
 - b. All nightclub licences issued under section 42;
 - c. Casino licence issued under section 44;
 - d. All club licences issued to under section 48;
 - e. All restaurant licences issued under section 50;
 - f. All occasional licences issued under section 59; and
 - g. All special facility licences issued under section 46 and regulation 9A of the Liquor Control Regulations 1989.
- 2 The barring notice was served on the applicant on 13 September 2017 and on 13 October 2017, the applicant lodged an Application for Review in respect of the barring notice pursuant to s 115AD(3) of the Act. The Commissioner of Police has opposed the application.
- 3 For the reasons set out below, I have decided to vary the terms of the barring notice issued by the Delegate of the Commissioner of Police to MCP.

Background

- 4 The applicant has been charged with the following offences contrary to the *Criminal Code 1913*:
 - a. assault occasioning bodily harm;
 - b. assault of a public officer; and
 - c. obstruction of a police officer.

The incident giving rise to the barring notice is the alleged assault occasioning bodily harm, which occurred on licensed premises (“the incident”), and the assault of a public officer and obstruction of a police officer occurred after the incident outside the licensed premises (“the secondary incident”).

- 5 The Commissioner of Police (“the respondent”), has provided the Commission with a copy of the Statement of Material Facts relating to the incident, which states as follows:

“At about 10:05PM on Friday the 18th of August 2017, the accused was inside [REDACTED], on the dance floor in company with the co-accused in this matter.

Also present was the victim in this matter, [REDACTED]. The accused and co-accused do not know the victim.

The victim threw the contents of her drink at the accused and co-accused.

The co-accused has turned to the victim and kicked her in the legs once with right foot and slapped her in the head once with her left open palm. (This incident is not subject to this charge and determined as possibly circumstances of provocation).

(ALLEGATION OF FACT-AOBH);

The victim can be seen protecting herself from further assault and is not seen to be threatening harm against the accused.

The accused and co-accused have then used the victim's hair to drag her down to the ground whilst the co-accused punched the victim in a hammer fisting action with her right clenched fist.

The victim was curled in a ball on the floor attempting to protect her head with her arms. The accused lay on top of the victim, still holding onto her hair and scratched and slapped her to the face. The co-accused released the victim's hair before standing up and kicking the victim once to the head with her right foot.

The venues security has arrived and had to physically drag the accused off the victim who walked off into the corner of the room.

The accused and co-accused were evicted from the venue by security shortly after. At about 11:30PM Police attended the venue and spoke with the victim, who pointed out the accused and co-accused who were in the lane way next to the venue.

Police spoke with the accused who was arrested shortly after for another matter [the secondary incident].

On Tuesday the 29th of August 2017, the accused attended Perth Police Station where she refused to participate in an electronic record of interview."

- 6 In relation to the incident, the respondent has provided the Commission with copies of:
- a. a witness statement of the victim;
 - b. photographs of the victim's injuries evidencing the injuries set out in the Statement of Material Facts;
 - c. an Incident Report from [REDACTED];
 - d. an Incident Report from WA Police;
 - e. CCTV footage from inside [REDACTED];
 - f. CCTV Surveillance time log; and
 - g. Still images of CCTV taken inside [REDACTED].

- 7 The incident reports from [REDACTED] and the WA Police and the CCTV material is consistent with the Statement of Material Facts. As stated in paragraph 53 of the respondent's

submissions, the CCTV footage shows the applicant striking the victim in the face and grappling on the floor whilst the victim is curled in a ball to protect herself.

- 8 The witness statement of the victim is inconsistent with the Statement of Material Facts only so far as she states that she did not throw her drink at the applicant and the co-accused, but spilt it over them by accident. The CCTV footage clearly shows the victim throwing her drink in the face of the applicant.
- 9 The applicant has not indicated how she intends to plead in relation to the charge and has not put forward any material to refute any of the allegations made against her. I find, on the balance of probabilities, that the applicant engaged in the alleged conduct set out in the Statement of Material Facts.
- 10 In relation to the secondary incident, the respondent has provided the Commission with copies of an incident report from WA Police and CCTV footage from outside [REDACTED].
- 11 The incident report from the WA Police and the CCTV footage is consistent with paragraphs 8 and 9 of the respondent's submissions, which states that the applicant became abusive and obstructive towards police before spitting in a police officer's face.
- 12 The applicant has not indicated how she intends to plead in relation to the charges against her in relation to this secondary offence and has not put forward any material to refute any of the allegations made against her. I find, on the balance of probabilities, that the applicant engaged in the alleged conduct set out in the incident report from the WA Police.
- 13 The respondent has also provided the Commission with copies of the criminal and traffic history for the applicant, which relevantly shows that the applicant was convicted of common assault on 8 September 2017 in relation to an incident at the [REDACTED] on 17 June 2017.
- 14 The respondent also submits that the applicant is also currently subject to two violence restraining orders to protect two different individuals, one of whom is the victim.
- 15 Accordingly, it appears that the respondent had reasonable grounds for imposing the barring notice. I must now determine whether to exercise my discretion to quash, vary or affirm the barring notice.

Applicant's submissions

- 16 The applicant has applied for a review of the barring notice on the grounds that:
 - a. her mental health illness and the victim's deliberate provocation of her were mitigating factors in the incident; and
 - b. the barring notice is negatively affecting her mental health, because it has the effect of isolating her from attending social events with her family and friends.

- 17 In her “Grounds for application” letter submitted to the Commission, the applicant relevantly wrote:

“I have recently been diagnosed with a mental health illness in July this year (emotionally unstable personality disorder, formerly known as borderline personality disorder) and I feel that this was a major factor in my out of character behaviour on this night...

I presented to Joondalup Health Campus Emergency Department to seek a Psychiatric review and help... I was referred to Youth Axis, a Government Youth Mental Health Program. This program provides specialist mental health treatment, consultation and community building for people with emerging health issues...

I also presented to my GP and was recommenced on my antidepressants which help to regulate my mood and decrease my anxiety levels. Due to the incident also occurring when I had been drinking I was concerned about my alcohol intake, so I have also attended Cyrennian house for alcohol counselling, this is also still ongoing...

As I am ... banned from all licensed premises I can no longer enjoy an active social life with my friend (sic) or family, this is impacting on my mental health as I feel isolated and cut off from my social circle. My brother is the manager at [REDACTED], we often go there for a family meal, now I am unable to attend due to this order. I have tickets for concerts in December and January that I was to attend with my sister, as they are on licences (sic) premises I can no longer go.”

- 18 The applicant has submitted the following evidence in relation to her mental health:
- a. a letter dated 25 August 2017 from [REDACTED], general practitioner, to [REDACTED], psychiatrist, stating that the applicant has been diagnosed with emotionally unstable personality disorder and referring the applicant to [REDACTED] for opinion and management of anxiety and irritability;
 - b. a letter dated 25 August 2017 from [REDACTED] to the applicant stating that the applicant has an appointment with her on 10 October 2017;
 - c. an Emergency Department Triage Assessment form dated 28 August 2017 stating that the applicant presented to the Joondalup Health Campus requesting psychiatric review; and
 - d. a letter dated 3 October 2017 from [REDACTED] at Youth Axis to the applicant stating that the applicant has an appointment with her on 24 October 2017.

- 19 The applicant goes on to state that she is “not a violent person, and [has] no previous criminal history or history of violence” and that her actions were in response to derogatory remarks made by the victim and the victim throwing a full drink over the applicant and her co-accused.

- 20 The applicant further submits that the barring notice was issued as the result of a direct request of the victim as part of a personal vendetta against her, but provides no evidence to support this contention.

Respondent's submissions

21 At paragraph 56 of the respondent's submissions, the respondent states that "*the Commission ought not depart from the decision of the respondent lightly*". The respondent refers to the judgments of Edmund Davies LJ and Phillimore LJ in *Sagnata Investments Ltd v Norwich Corporation* (1971) 2 All ER 1441 at 1457 and 1460 respectively.

22 At paragraph 70 of the respondent's submissions, the respondent goes on to state that: "*If the Commission is satisfied that the Respondent had the requisite basis for his belief that the Applicant behaved violently whilst on licensed premises, the order should only be varied where the terms of the Barring Notice do not give effect to the objects and purposes of the Act*".

23 At paragraph 74 of the respondent's submissions, the respondent states that:

"a. The Barring Notice was issued by the Respondent upon the request of the WAPOL Liquor Enforcement Unit following a routine interrogation of WAPOL incident reports relating to incidents on licensed premises. [REDACTED] did not request that a Barring Notice be issued to the Applicant.

b. The Applicant's statement that she is "not a violent person, and [has] no previous criminal history or history of violence" is inconsistent with the available evidence. The Applicant was convicted of common assault contrary to section 313(1)(b) Criminal Code on 8 September 2017 in relation to an incident at the [REDACTED] on 17 June 2017. The Applicant participated in a voluntary record of interview in relation to the incident and admitted the assault. It is disingenuous for the accused to submit to the Commission that she has no previous criminal history or history of violence.

c. Whilst it is admirable that the Applicant is seeking help in relation to a mental health illness, it does not diminish the fact that the Applicant acted violently on a licensed premises."

24 At paragraph 67 of the respondent's submissions, the respondent states that there are also "*two active violence retraining orders in place in relation to the Applicant to protect two different individuals, one of whom is [the victim]*". Although no evidence has been provided to support this contention, the applicant herself refers to a restraining order made against her by the victim, [REDACTED].

Determination

25 Section 33(1) gives the licensing authority absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest.

26 Section 33(2) provides that an application:

a. may be refused, even if the applicant meets all the requirements of this Act; or

b. may be granted, even if a valid ground of objection is made out,

but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit.

- 27 The discretion is confined to the scope and subject of the Act and is not arbitrary or unlimited: *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241.
- 28 In determining whether to quash or vary the barring notice it is relevant to take into account the nature and circumstances of the incidents giving rise to the barring notice, the risk of the applicant behaving in a similar manner and the need to protect the general public, the licensee and the applicant herself: *Batty v Commissioner of Police* (LC 33/2011) at [34]; *Quartermaine v Commissioner of Police* (LC 46/2011) at [34]; *Piscopo v Commissioner of Police* (LC 55/2011) at [21]; *Lewer v Commissioner of Police* (LC 58/2011) at [19].
- 29 The matters I have taken into consideration in reaching my determination are as follows:
- c. The conduct giving rise to the barring notice was the very type of conduct which the amendments to the Act were designed to overcome, that being anti-social and violent behaviour on licensed premises.
 - d. The applicant was aggressive and threatening towards other patrons of the venue before the incident and her response to the victim throwing the contents of her drink at her and her co-accused, being both disproportionate and violent, was reprehensible and worthy of a barring notice prohibiting the applicant from entering licensed premises generally.
 - e. After the incident inside the licensed premises, the applicant became aggressive outside the venue towards attending police officers and spat in a police officer's face, culminating in further charges being laid against her.
 - f. The applicant has not expressed any remorse for any of her actions surrounding either incident, though it must be borne in mind that the applicant has not advised whether she intends to plead not guilty to the charges and both matters are still ongoing.
 - g. The applicant was convicted of common assault on 8 September 2017 in relation to an incident occurring at a nightclub. Further, there are currently two active violence restraining orders in place in relation to the applicant to protect two different individuals, one of whom is the victim.
 - h. The purpose of a barring notice is to protect the general public, a licensee or indeed the applicant from her own actions, and is not intended as a punishment: *S V S v Commissioner of Police* (LC19/2011); *K R B v Commissioner of Police* (LC22/2011).
 - i. However, if the risk that the applicant could behave in a similar manner is low, that risk can be further minimised by the terms of the barring notice: *Batty v Commissioner of Police* (LC 33/2011) at [40].
 - j. The applicant appears to have taken a number of steps to prevent any further inexcusable behaviour by ensuring that that she is appropriately dealing with her mental health issues, including by meeting with a psychologist, attending alcohol

counselling and taking medication. Despite this, it appears to me likely that there is a risk the applicant might behave in the same or similar manner in the future if faced with similar circumstances, and that this risk is especially heightened in certain licensed premises.

- k. In her submissions, the applicant states that she believes that the barring notice is having a negative effect on her mental health by preventing her from socialising with her friends and attending family meals at restaurants. It appears to me unlikely that the applicant will, while present at a restaurant that is only authorised to sell liquor for consumption on the premises and ancillary to a meal, engage in the kind of conduct listed at section 115AA(2) of the Act.

30 In balancing the above considerations, I have concluded that:

- a. it is appropriate to vary the barring notice to allow the applicant to enter all restaurant licences except those restaurants with an extended trading permit (liquor without a meal), enabling the applicant to socialise with her family and friends in a restaurant setting, whilst satisfying the objects of the Act to protect the public and the applicant herself from her own actions; and
- b. it is not appropriate to otherwise vary the barring notice, such as by removing references to specified classes of venue.

31 Accordingly, the terms of the barring notice dated 13 September 2017 is varied as follows:
In the fourth paragraph, after the words:

"All restaurant licences issued under section 50"

add the words:

"operating with an extended trading permit (liquor without a meal) issued pursuant to section 60(4)(ca) of the Act".

32 The barring notice shall otherwise remain in its current terms.



Rudolf Alexander Zilkens
Presiding Member