Supreme Court of Western Australia - Court of Appeal Decisions

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⇦ Mackiewicz ⇨ v ⇦ Kal Holdings Pty Ltd ⇨ & Anor [1999] WASCA 84 (2 July 1999)

Last Updated: 12 November 1999

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : ⇦ **MACKIEWICZ** ⇨ -v- ⇦ **KAL HOLDINGS PTY LTD** ⇨ & ANOR [1999] WASCA 84

CORAM : MILLER J

HEARD : 22 JUNE 1999

DELIVERED : 2 JULY 1999

FILE NO/S : SJA 1026 of 1999

SJA 1027 of 1999

BETWEEN : RICHARD JOHN ⇦ **MACKIEWICZ** ⇨

Applicant

AND

⇦ **KAL HOLDINGS PTY LTD** ⇨

JAY NAREE KEMP

Respondents

Catchwords:

Liquor licensing - Restaurant licence - Sale of liquor ancillary to a meal - What is a genuine meal - Basket of wedges served in early hours of morning

Legislation:

Liquor Licensing Act 1988

Result:

Appeal dismissed

Representation:

Counsel:

Applicant : Mr B P King

Respondents : Mr D J Williams

Solicitors:

Applicant : State Crown Solicitor

Respondents : Talbot & Oliver

Case(s) referred to in judgment(s):

Case(s) also cited:

R v Adams [1935] HCA 62; (1935) 53 CLR 563

MILLER J:

Appeal

1 This is an appeal from a decision of Mr W Tarr SM given in the Court of Petty Sessions at Kalgoorlie on 12 February 1999 when the learned Magistrate dismissed complaints against each of the respondents that on 29 October 1998 at Kalgoorlie they and each of them were in breach of the provisions of s 110(1)(a) of the *Liquor Licensing Act 1988* by selling beer on the premises of *Monty's Restaurant* otherwise than as authorised by the provisions of the Act. The complaint against the first respondent was that it as licensee of the licensed premises subject to a restaurant licence had sold liquor (beer) on the premises to one Gary McCavanagh otherwise than as authorised by the provisions of the Act and the complaint against the second respondent was that she as the approved manager of licensed premises known as *Monty's Restaurant* subject to a restaurant licence had sold liquor (beer) on the premises to McCavanagh otherwise than as authorised by the Act.

2 On 12 March 1999 McKechnie J granted to the applicant leave to appeal the decisions of the learned Magistrate on the following grounds:

(a) The learned Magistrate erred in fact and in law in finding that a plate of potato wedges was a meal as defined in section 3 of the Liquor Licensing Act 1988 for the purposes of the authorisation under section 50 of that Act for the holder of a restaurant licence to sell liquor ancillary to a meal.

(b) The learned Magistrate erred in fact in not finding that the respondent sold liquor that was not ancillary to a meal.

(c) The learned Magistrate erred in law in not finding the charges proved.

The facts

3 There is no dispute in relation to the facts of the case. At about 2 am on the morning of 29 October

allege that liquor purporting to be sold for consumption or consumed ancillary to a meal was not so sold or consumed. The complaints alleged that liquor (beer) was sold on the premises otherwise than was authorised by the Act within the meaning of s 110(1a) of the Act. That section must be read with s 50(1), providing that the licensee of a restaurant licence is during permitted hours authorised to sell to any person liquor on the licensed premises for consumption on the premises ancillary to a meal supplied by the licensee. There was no allegation contained within either complaint that liquor purporting to be sold for consumption or consumed ancillary to a meal was not so sold or consumed within the meaning of s 50(2) of the Act. The particularisation of the complaint (by evidence) clearly formulated the primary allegation against the respondents as being a failure to provide "a meal" within the meaning of the definition of "meal" contained within the Act. There was a secondary allegation, namely, that the liquor was not consumed ancillary to a meal, although much less emphasis was placed on this allegation. No onus was therefore cast upon the respondents to prove beyond reasonable doubt the matters set out in s 52(2)(a-d) of the Act.

The Magistrate's decision

8 The learned Magistrate expressed the view that it was to be expected that the menu of the restaurant might change after 11 pm with what he described as "lesser types of meal" in the early hours of the morning. He pointed out that Parliament has not been specific in the definition of a *genuine meal* and that it must have been in the contemplation of the Licensing Court when issuing a 24-hour licence to a restaurant that the same type of meals would not be served throughout those 24 hours. He added:

"It seems to me that it's a reasonable expectation that there be lighter meals at lunch time, perhaps a different meal for the evening meal, and then later on, particularly in the early hours of the next day, a different type of meal would be served, more of a snack-type of meal, and I would have thought the authorities who issued the licence would have considered that to be the case...

Now, meals are going to vary, as I said, not only from time to time of the day, but also in relation to each customer. For example, I suppose in relation to the breakfast menu, someone might want breakfast with a glass of champagne and one egg on toast, and would be considered a meal for the purpose of the legislation at that time of morning. Culinary tastes have changed over the years. The traditional middle class meal of meal and three vegetables is no longer necessarily the norm, and people eat a variety of foods for a variety of reasons...

When I consider the type of meal or the type of presentation of the wedges, although there is only one type of food in the basket, it was clearly substantial. It was served in a way different, I would have thought, than it would have been served if someone had ordered another type of meal with a side serve of wedges. I wouldn't have thought that was the type of serve which would be served as a side serve of wedges.

When I consider the time of day and the fact that at that time of day people generally are not looking for the type of meal or dinner they would have at 8 o'clock, but looking more for a supper-type meal, I can't, I believe, conclude that the basket of wedges could not be held to be a meal within the meaning of section 3 of the Liquor Licensing Act."

Submissions on Appeal

9 In relation to Ground 1 of the appeal, the appellant submits that the Act has as its primary objects the regulation of the sale, supply and consumption of liquor and the minimisation of harm or ill-health caused to people or any group of people due to the use of liquor. The term "meal" should therefore be given an effective and purposive meaning and should be interpreted so as to preclude the potential for a sham. Whilst I accept this, there is in my view no evidence that the basket of potato wedges served in this instance constituted a sham.

10 The respondent points out that the definition in s 3 of the Act specifically excludes something "in

1998 two police officers (in plain clothes) arrived at *Monty's Restaurant* at the corner of Hannan and Porter Streets Kalgoorlie where Sergeant McCavanagh went to the bar area and ordered two drinks from a person behind the bar. He thereupon received advice that he could not have those drinks unless he purchased a meal with the drinks. He was given a menu and when he asked what he had to order he was told that he could order "anything on the menu". He returned to his table where he spoke with his partner, Constable Bell, and between them they agreed to order a basket of wedges, which was an item listed on the menu. McCavanagh returned to the bar and placed the order which was taken. He thereupon ordered two drinks, namely a Swan Gold beer and a white wine. These were provided to him and he returned to the table where, about 20 minutes later, he and his partner were served with the wedges. These were eaten, and the two officers remained at their table for another hour and a half, during which time they ordered another three stubbies of beer and three wines. They left at approximately 3.45 am. It emerged in evidence before the learned Magistrate that the basket of wedges was served on a plate, with a bowl of sour cream. No knives or forks appeared to have accompanied the dish.

4 At the hearing the defence called the second respondent who elaborated upon what a basket of wedges was. She pointed out that the restaurant had two menus, the menu changing at 11 pm each night. Wedges were available all day at the restaurant, being served before 11 pm in a china bowl but after 11 pm in a basket. Wedges were said to be "more substantial than chips" and "more filling as a meal". The second respondent stressed that in terms of quantity the basket of wedges was "enough to eat to fill you up" and would generally be a full serving for two people. Its cost was $5.50 and it comprised at least four to five potatoes which were served with a side serve of either sour cream, chilli sauce or tomato sauce at the customer's choice. The second respondent stressed that in her view a basket of wedges was "a genuine meal" ... "a big meal" and in the design of the menu she had put on it things which were "substantial enough to drink alcohol". When cross-examined and faced with the suggestion that potato wedges were "more a snack than an actual meal" the second respondent was adamant that a basket of wedges was a meal, expressing the view that "potatoes are a substantial meal".

The issues at trial

5 The learned Magistrate correctly appreciated that the question in issue was whether under the provisions of s 50(1) of the Act the respondents had sold liquor on unlicensed premises for consumption on those premises "ancillary to a meal supplied ... and eaten". The complaints were in each case preferred under the provisions of s 110(1) of the Act, alleging that the licensee and a person engaged to perform a particular function in the business had sold liquor on the premises otherwise than as authorised under the Act. The learned Magistrate's view was that the central question in issue was whether wedges were for the purposes of s 50(1) a "meal", the definition of "meal" being that contained in s 3 of the Act and defined to mean "a genuine meal, not supplied in sandwich form, eaten or to be eaten by a person while seated at a dining table or counter".

6 Although the complaints were in very general terms, and failed to particularise what it was that was alleged to constitute a failure to comply with the provisions of the Act, it was accepted on the hearing of the appeal that there were in fact two questions before the learned Magistrate:

(1) whether the potato wedges constituted a genuine meal; and

(2) whether the liquor was consumed ancillary to a meal supplied.

7 Much time was devoted at the hearing to the provisions of s 52 of the Act which the learned Magistrate correctly identified as dealing with evidentiary matters. Section 52(2) provides that for the purposes of any proceedings under the Act, an allegation in the complaint that liquor purporting to be sold for consumption or consumed ancillary to a meal was not so sold or consumed shall be accepted as proved unless the licensee or person by whom the liquor was consumed as the case may be, establishes certain matters beyond reasonable doubt. However, in this case the complaints did not

sandwich form" from being a meal but does not otherwise particularise any items of food which are or are not to be considered a meal. It is submitted that a liberal interpretation of what constitutes a meal should be given and that Parliament so intended. Reference was made to dictionary definitions of "genuine" as meaning "real" and "authentic" (*Macquarie Dictionary* 3rd ed at 886) and a meal being "the food eaten or served for a repast" (*Macquarie Dictionary* (*supra*) at 1334).

11 In relation to Ground 2 of the appeal the appellant contends that the learned Magistrate erred in not finding that the respondents sold liquor that was "not ancillary to a meal". The appellant contends that the meaning of ancillary is "subservient or subordinate" relying on ***Koala Motels Pty Ltd v Chief Licensing Inspector*** (1978) 18 ALR 12 at 14; ***Minagall v Ingram*** [1968] SASR 236 at 240; and ***Brown v Bade*** [1985] VR 182 at 184. It is contended that the only inference open on the evidence was that the food was ancillary to the liquor and that the learned Magistrate failed to consider whether drinks supplied and consumed during one and a half hours after the wedges were served were "ancillary to a meal".

12 The respondents' contention is that ancillary means "accessory" and "auxillary" as well as subservient or subordinate and that in this instance the refusal to serve alcohol until a food order was taken demonstrated that the alcohol was clearly ancillary. It was submitted that persons are entitled to continue to be supplied with liquor after consumption of the meal, reliance being placed on ***Koala Motel Pty Ltd*** (*supra*) at 14. The proper test for determining whether liquor was supplied for consumption ancillary to a meal was said to be whether "the liquor was intended for consumption with a *bona fide* meal": ***Sharp v Hotel International Ltd*** [1969] VR 103 at 107.

13 Further, the respondent points to the provisions of s 50(1a) of the Act which provide for an extended trading permit in certain cases of restaurant licences. In such a case the licensee is authorised to sell liquor to a person, whether or not ancillary to a meal eaten by the person, if that liquor is consumed at a dining table and not more than 20 percent of the seating capacity for customers on the premises is available or being used at any one time for persons to consume liquor other than ancillary to a meal. Counsel for the respondents relies upon this provision as an indication of legislative intent that under the Act a broad interpretation should be given to the requirements that liquor consumed on restaurant licensed premises should be ancillary to a meal. There is some substance in the submission.

Conclusion

14 In the Second Reading of the *Liquor Licensing Bill* on 13 September 1988 the Minister for Gaming, Mrs Beggs, announced that the *Bill* repealed the *Liquor Act 1970* and replaced it with a new *Liquor Licensing Act* which reflected "the changing demands of the industry and the public, especially those relating to tourism" (*Hansard* 13 September 1988 at 2651). The only reference made by the Minister to matters pertinent to this appeal was in the following terms:

"Enforcement of provisions relating to liquor consumption ancillary to meals is significantly enhanced. There is no longer any obligation for licensees to provide food or meals, except for hotels and restricted hotels which must supply breakfast and dinner to lodgers ..." (*Hansard* 13 September 1988 at 2652)

15 As a general statement on the purpose for which the new Act was to be introduced, the Minister said:

"The Government recognises the important role played by the liquor industry in the economic and social life of the State. Within the industry itself, there are several competing interest groups. With social legislation such as this there are also the legitimate expectations and interests of the general community to be considered. While maintaining regulation of the industry and a balancing of industry interests through different licence categories and criteria, the Bill takes greater account of general

community considerations by placing emphasis on the public interest and the requirements of the public in specific localities." (Hansard 13 September 1988 at 2653)

16 I take the reference by the Minister to the enforcement of provisions relating to liquor consumption ancillary to meals to be a reference to the provisions of s 52 of the Act the side note to which is "**liquor sold or consumed ancillary to a meal, evidentiary matters**". I conclude from the Minister's general statement that it was the intention of the Act to liberalise in many respects earlier restrictions which existed in relation to the sale of liquor under the *Liquor Act 1970*.

17 In ***Mills v O'Donohue*** (1908) 10 WAR 81 the Full Court held that the supply of biscuits and cheese with a drink could properly be described as a "sham and a device for evading the law" in the sense that a person supplied with the same could not be said to be "taking a meal" at a hotel. Burnside J (at 83) made reference to the policy of the *Wines, Beer & Spirit Sale Amendment Act 1884* in these terms:

"The general object of the Statute is to restrict, or at any rate to regulate, the sale of spirituous and fermented liquors. By The Act which provides for the licensing of hotels, the privilege of selling liquor is extended to persons licensed as hotel keepers, and the purpose is to enable those persons who avail themselves of the ordinary conveniences which hotels afford, to obtain liquor at any time they consume their food. The word "meal" in the Statute does not appear to me to be one to which any precise or definite meaning can be attributed. It may be extended to include what might be described as the repast of an alderman, or it may be limited to the fare of a beggar. But in the section in which it occurs, its signification is, to my mind, controlled by the context. Neither the quantity nor the quality of the good are of importance, nor is it necessary that it should be served at any particular time in any particular place. Its meaning is gathered entirely and solely from the context, and it is from the surrounding circumstances that the Magistrate must draw what, I think, is an inference of fact as to the nature of the act complained of."

In my opinion, these observations are equally applicable to the objects of the *Liquor Licensing Act 1988*, and I adopt them.

18 In my view the learned Magistrate was correct in the decision he reached. As to the first ground of appeal, there was evidence to support the conclusion that a basket of wedges, served in the circumstances in which these were, constituted a meal within the meaning of that term as defined in the Act. That is, a "genuine meal not supplied in sandwich form eaten ... by a person while seated at a dining table". The second respondent made it clear that a basket of wedges was a substantial serving of food comprising as it did four or five potatoes served with an accompaniment. It was clearly otherwise than in sandwich form. It was served at a table and was sufficiently filling for two people to eat.

19 In my view the learned Magistrate was correct in his assessment of the reasonableness of varying menus in 24-hour restaurants for the consumption of food in the early hours of the morning. What might be an appropriate meal between the hours 11 am and 11 pm might not between the hours of 11 pm and 11 am. Further, the learned Magistrate was, in my view, correct in his conclusion that culinary tastes have changed over the years, with the result that traditional "middle-class meals" of "meat and three vegetables" are no longer necessarily the norm, with people eating a wide variety of foods for a variety of reasons. It is certainly the case that there have been dramatic changes in the presentation of food at restaurants in recent years. As was pointed out during argument in the Court below, many order at restaurants modest meals which would not in times gone by have been classified as a "substantial meal". But that is not the question. The question is whether a serving of potato wedges in the early hours of the morning, chosen from a menu, and constituting a substantial quantity of food, constituted a "genuine meal" within the meaning of the definition of the Act. In my opinion it did.

20 As to the second ground of appeal, it is my view that there is ample evidence that the alcohol

served to McCavanagh was served ancillary to the meal within the meaning of s 50(1) of the Act. I accept the submission of the respondent that the refusal to serve alcohol until a food order was taken is demonstrative of the fact that the alcohol was indeed ancillary. Nor was the fact that several drinks were ordered, and consumed after consumption of the meal evidence that the drinks were otherwise than ancillary: ***Koala Motels Pty Ltd*** (*supra*).

21 In ***Koala Motels Pty Ltd*** Muirhead J (at 14) was dealing with the provisions of the *Licensing Ordinance 1939 (NT)*, s 15(1)(b) of which required persons taking a meal on the premises to take it in the dining room and in circumstances where the supply of liquor was ancillary to the meal. His Honour gave the following definition of the word "ancillary":

"It is important to note that the word "ancillary" has a special meaning. It means less than supplementary or supplemental to - it means "subservient" or "subordinate" the derivation being from the Latin "ancillaris" - "ancilla" being a handmaid - a person who in the good old days was regarded as subservient to her mistress and perhaps even to her master. So the meal is clearly the principal thing that inspired the legislature to extend the time during which the patrons enjoyment of the meal - and no doubt of the company - could be enhanced by the supply of liquor.

The dictates of the section, in so far as the 'taking" of the meal is concerned, must be sensibly interpreted.

Those who sit patiently waiting for the first sign of interest from the waiter - that is to say on the culinary side - are entitled to sip a drink although they may be "waiting" rather than "taking". They have a bona fide intention - in fact often a desperate longing - to eat, and when all is over, when the last morsel of cheese or chocolate mint has been consumed and the coffee drained - they are entitled to be supplied with liquor as they linger and plan the night - or perhaps I should say the morning - which yet remains."

This passage is relied upon by counsel for the respondents as an indication that the consumption of alcohol may be ancillary to a meal in circumstances where it is continued (as was the case at *Monty's Restaurant* on the night in question) after the actual consumption of the meal. That I accept.

22 In ***Brown v Bade*** (*supra*) Murphy J (at 184) was dealing with the provisions of s 26(1)(d) of the *Liquor Control Act 1968 (VIC)* which authorised the sale or disposition of liquor for consumption ancillary to substantial refreshment. His Honour said (at 184-185):

"Therefore, it permits sale for consumption prior to but as a subservient or subordinate adjunct of substantial refreshment. Ancillary is a word taken from the Latin "ancilla", meaning a handmaiden, and means subservient or subordinate. Consumption of the liquor is not to be the dominant feature taken, say, with a salted peanut or a salt biscuit to whet the appetite for more liquor. But if the liquor is sold for consumption as a subordinate or, as it were, an aperitif leadup to or even a follow-up to the substantial refreshment, then its sale is permitted under s. 26(1)(*d*).

Whether in any particular case the sale is for consumption ancillary to substantial refreshment will involve considerations of matters of degree, fact and finally law."

In my view this passage correctly sets out the proper meaning of the word "ancillary".

23 In ***Sharp v Hotel International Ltd*** (*supra*) Newton J was dealing with the provisions of s 43(1) of the *Licensing Act 1928 (VIC)* which empowered the Licensing Court in certain circumstances to grant a permit to a licensee "for the sale, disposal or supply of liquor for consumption with bona fide meals". The proper test to be applied in determining whether liquor had been sold for consumption with a *bona fide* meal was set out as follows (at 107):

"In *Esler v. Nelson*, [1937] V.L.R. 309, at p. 313; [1937] A.L.R. 494, Gavan Duffy, J., said, that the proper test to apply in deciding whether liquor had been sold "for consumption with a bona fide meal" was: "Was the liquor intended for consumption with a bona fide meal?" This test was referred to which approval by Martin, J., in *Olive ,v Carroll*, [1941] V.L.R. 37, at p. 39; [1941] A.L.R. 28. In my opinion , the intention referred to is that of the licensee or his servant who sells the liquor."

I respectfully adopt what His Honour said in relation to the question of intention, and accept that it is the intention of the licensee or a person engaged to perform a function in the business conducted under the licence in relation to whom the relevant question of intention or purpose is to be asked. If the provisions of s 52 of the Act are considered relevant to the determination of this matter (as to which I have reservations) it seems to me that it is the licensee or person otherwise engaged in the functions of the licence who must make the determination whether the primary and predominant purpose of persons entering licensed premises is to obtain a genuine meal, as distinct from obtaining liquor.

24 I am of the view that the decision of the learned Magistrate was entirely correct and I dismiss the appeals.
