H. C. OF A. 1905.

REID v. SMITH.

Appeal allowed. Judgment directed for the plaintiff for a perpetual injunction and costs of action. Defendant to pay costs of appeal.

Solicitors, for appellant, *Flower & Hart*, by their agents *Unmack & Connolly.*

Solicitors, for respondent, *Roberts, Leu & Barnett.*

Cons *Elhusseini & Elsahili* 33 ACrimR 155 | Foll *R v House* (1991) 28 FCR 194 | Cons *R v Enslow* (1992) 62 ACrimR 119 | Cons *Renwick v Bell* [2002] 2 QdR 326

H. E. M.

[HIGH COURT OF AUSTRALIA.]

CONNOLLY . . . . . COMPLAINANT;

AND

MEAGHER . . . . . DEFENDANT.

EX PARTE CONNOLLY.

SPECIAL LEAVE TO APPEAL.

H. C. OF A. 1906.

BRISBANE, *April* 19.

Griffith C.J., Barton and O'Connor JJ.

Special leave refused—"Autrefois convict"—Queensland Criminal Code, sec. 16; *sec.* 19 (8)—*Nominal penalty.*

Special leave to appeal will be granted in criminal cases only where questions of great public importance are involved, and such leave will not be granted where it appears to the Court that the accused, who had been acquitted in the Court below, was, at most, only technically guilty of the offence charged and a merely nominal penalty might lawfully have been imposed.

The provision of the Queensland *Criminal Code*, sec. 16, that a person shall not be twice punished for the same act or omission, does not impose the same test as the Common Law defence of *autrefois convict.*

MOTION for special leave to appeal from the Supreme Court of Queensland.

The defendant, an innkeeper, was proceeded against by summons for keeping his licensed house open on Sunday, an offence against the *Licensing Act* 1885 (49 Vict. No. 18, sec. 75 (2).) He had been already convicted of supplying liquor to a boy under the age of 14, an offence against sec. 67 (*b*) of the *Licensing Act*. It was proved that the two acts, charged as separate offences, took place on the same occasion, and were constituted by the same circumstances. The case was heard by three benches of magistrates; twice the bench disagreed; finally, in a bench of five justices, four decided to dismiss the charge. They found that the hotel was kept strictly closed on that Sunday against the sale of liquor, except that a bottle of liquor was sold to the boy, upon the representation that it was for his sick mother, and they, therefore, decided to follow sec. 16 of the *Criminal Code*, which provides that a person should not be twice punished under the Code or any other law for the same act or omission.

A special case was stated, under sec. 226 of the *Justices Act* 1886 (50 Vict. No. 17), for the opinion of the Full Court, who held that the magistrates were right.

Blair State A.G. (with him *Henchman*) for the complainant applicant moved for special leave to appeal from the decision of the Supreme Court. In *Sherwood* v. *Spencer* (1) the High Court laid down the test to be applied to these circumstances. The question is—Would the evidence necessary to support the second indictment be sufficient to support a legal conviction upon the first?

[GRIFFITH C.J.—The Code lays down a new test—sec. 16—"A person cannot be twice punished, either under . . this Code or . . any other law, for the same act or omission." The law of *autrefois convict* is laid down in another part of the Code—secs 17 and 598.]

That test is the same as the test at common law.

There are two distinct offences here; the Supreme Court has failed to distinguish the acts which are the essential elements of the offence from the particular evidence which was adduced to prove the facts: *R.* v. *Hull* (2).

(1) 2 C.L.R., 250.

(2) (1902) St.R.Q., 53.

H. C. OF A. 1906.

CONNOLLY v. MEAGHER.

[BARTON J.—We must follow the facts of the special case—"the house was kept strictly closed except for the sale to the boy." Sec. 16 of the Code cuts away the common law technicalities of *autrefois convict.*]

The sale to the boy was merely evidentiary of the keeping open on Sunday; it was not the "same act," but only *evidence of* the act. This is a question of high importance to the public, involving the administration of the *Licensing Act.* It is important to obtain a ruling that the facts establish distinct offences, and that the finding by the magistrates, that the two offences were constituted by one act, was immaterial.

Under sec. 19 (8) of the Code a person convicted of any offence on summary conviction may, at the discretion of the magistrates, instead of being sentenced to the punishment to which he is liable, be discharged upon his own recognizances.

The judgment of the Court was delivered by

GRIFFITH C.J. The point sought to be raised is, no doubt, in one sense an important one. It is provided by sec. 16 of the *Criminal Code* that no person shall be twice punished for the same act or omission. That is not quite the same as the law which allows the defence of "*autrefois convict*," which is dealt with in secs. 17 and 598 of the Code. The rule in sec. 16 may or may not be identical with the common law, but it is the law of Queensland. In the present case the defendant had sold a bottle of porter on a Sunday to a boy under 14 years of age. It is an offence under the *Licensing Act* to sell liquor to a boy under 14 at any time, and he had been convicted of that offence. He was then charged, under another section of the *Licensing Act*, with the offence of keeping open his licensed premises for the sale of liquor on a Sunday. The only evidence of his keeping his house open on that day was the sale of that bottle of porter. The justices found as a fact that he did not keep his house open on the Sunday except for the purpose of selling that bottle of porter, and this under circumstances which made his act a not very heinous offence although it was a technical breach of the law, and they refused to convict. The point taken by the Attorney-General is that the keeping of the house open, and the sale of the liquor to the boy, were not the same act. The

learned Judges of the Full Court based their decision principally on the finding of fact by the justices that the whole matter was substantially one act. We have not had the advantage of argument in support of that view, beyond the brief reason given by the learned Judges themselves; but at present it seems to us that there is a distinction between the keeping open of the house and the sale of the liquor. The keeping open of the house must be momentarily precedent to the sale. In the present case the interval of time was inappreciable, and in reality all that the defendant did was to open the door and give the boy a bottle of porter.

Technically, perhaps, the defence set up was not established; but it is clearly a case in which the justices, if they had thought themselves bound to convict, would most properly have exercised their jurisdiction, under sec. 19 (8) of the Code, to refrain from inflicting any penalty. This Court very rarely gives leave to appeal in a criminal case; and only then when questions of great public importance are involved. We are unable to see that any question of public importance is involved in an unsuccessful prosecution brought for the purpose of inflicting upon a man two punishments for what in substance, though perhaps not in technical form, consists of only one act. We think, therefore, that this is a case in which we ought not to give special leave.

Special leave refused.

Solicitor, for complainant, *Crown Solicitor.*

N. G. P.