[HIGH COURT OF AUSTRALIA.]

DAVIES . . . . . APPELLANT;
INFORMANT,

AND

RYAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE COURT OF PETTY SESSIONS OF THE TERRITORY FOR THE SEAT OF GOVERNMENT.

H. C. OF A. 1933.

SYDNEY, *Dec.* 4.

Evatt J.

High Court—Jurisdiction—Appeal—Competency—Court of Petty Sessions—Dismissal of information—"Order"—"Ruling"—"Determination"—Judiciary Act 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *sec.* 34A—*Court of Petty Sessions Ordinance* (*No.* 2) 1930 (*F.C.T.*) (*No.* 21 *of* 1930), *secs.* 143 (1)*, 207*, 208*.

Court of Petty Sessions—Information—Disclosure of offence—Sufficiency of particulars—Words of ordinance followed—"Sufficient in law"—Liquor Ordinance 1929-1932 (*F.C.T.*) (*No.* 15 *of* 1929—*No.* 15 *of* 1932), *ss.* 19 (2)*, 43 (1) (*d*)*—*Court of Petty Sessions Ordinance* (*No.* 2) 1930 (*F.C.T.*) (*No.* 21 *of* 1930), *secs.* 27,* 28*.

An order of dismissal made under sec. 143 (1) of the *Court of Petty Sessions Ordinance* (*No.* 2) 1930 (F.C.T.), is either an "order" of the Court of Petty Sessions within the meaning of sec. 208 of the ordinance, or a "ruling" or a "determination" of such Court within the meaning of sec. 207: therefore the High Court has jurisdiction to hear and determine an appeal therefrom.

*The *Liquor Ordinance* 1929-1932 (F.C.T.) provides:—By sec. 19 (2): "Subject to the provisions of this ordinance a residential hotel licence shall authorize the licensee to sell, supply and dispose of liquor on the licensed premises—(*a*) during trading hours; (*b*) between the hours of six and eight o'clock in the evening of any day, as part of a meal, to persons having on the premises a meal for which a price (excluding the price of any liquor) of not less than two shillings and sixpence is paid; (*c*) at any time to bona fide lodgers or travellers for consumption on the premises by those lodgers or travellers and their guests; and (*d*) to boarders, within the hours prescribed for boarders, as part of meals supplied to those boarders and their guests for consumption on the premises." By sec. 43 (1): "Every holder of a licence shall be guilty of an offence if he . . . (*d*) during prohibited hours, keeps his licensed premises open for the sale of liquor, or sells or supplies any liquor, or permits any

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The respondent was charged by information that, being the holder of a residential hotel licence under the *Liquor Ordinance* 1929-1932 (F.C.T.), she, upon a day named, supplied liquor during prohibited hours on her licensed premises except as provided in the ordinance, in that she supplied liquor at such licensed premises during hours other than trading hours contrary to the ordinance in such case made and provided. The information was dismissed on the ground that it did not disclose an offence.

Held, that, as the information disclosed one offence only and followed the exact words of the ordinance creating the offence, it was "sufficient in law" within the meaning of sec. 27 of the *Court of Petty Sessions Ordinance* (*No.* 2) 1930 (F.C.T.).

APPEAL from the Court of Petty Sessions of the Territory for the Seat of Government.

On an information laid by Alfred David Davies, a police officer stationed at Canberra in the Territory for the Seat of Government, Mary Ryan was charged that on 29th July 1933, at Canberra, she, "being the holder of a licence granted under the *Liquor Ordinance* 1929-1932, did supply liquor during prohibited hours on her licensed premises except as provided in the said ordinance in that she being the holder of a residential hotel licence in respect of Hotel Wellington did supply liquor at the said hotel during hours other than trading hours contrary to the ordinance in such case made and provided."

At the hearing it was submitted on behalf of the defendant that the information did not disclose any offence, as under the *Liquor Ordinance* it was not an offence for a licensee holding a residential hotel licence thereunder to supply liquor during prohibited hours on the licensed premises or to supply liquor during hours other than trading hours; also that the information did not allege supply

liquor to be consumed on his licensed premises except as provided in this ordinance. Penalty: Twenty pounds."

The *Court of Petty Sessions Ordinance* (*No.* 2) 1930, provides:—By sec. 27:—"(1) Such description of persons or things as would be sufficient in an indictment shall be sufficient in informations. (2) The description of any offence in the words of the ordinance . . . or other instrument creating the offence, or in similar words, shall be sufficient in law." By sec. 28: "If at the hearing of any information . . . any objection is taken to an alleged defect therein in substance or form . . . the Court may make such amendment in the information . . . as appears to it to be desirable or to be necessary to enable the real question in dispute to be determined." By sec. 143 (1): "If the Court dismisses the information . . . the Court shall make an order of dismissal." By sec. 207: "The High Court shall have jurisdiction to hear and determine appeals from all rulings, orders, convictions or determinations of the Court." By sec. 208: "Any party to any proceedings in the Court who is aggrieved by or dissatisfied with an order or conviction of the Court may . . . apply to the High Court for leave to appeal to the High Court against such order or conviction."

to any specific person, by reason of which omission the defendant did not know and had no means of knowing who was alleged to have been supplied with liquor. The name of the person referred to was furnished in Court and the matter was adjourned. At the further hearing, after further submissions had been made on behalf of the parties, the magistrate dismissed the information on the ground that it did not disclose an offence, and made an order of dismissal accordingly. The defendant did not attend in person at either of the two hearings, and no evidence was given.

From this decision the informant now, by leave, appealed to the High Court.

Hill, for the respondent. There is a preliminary objection that in this matter there is no right of appeal to this Court. The decision by the magistrate was not an " order or conviction " within the meaning of secs. 207 and 208 of the *Court of Petty Sessions Ordinance (No.* 2) 1930 (F.C.T.). The " order of dismissal " made under sec. 143 (1) of the ordinance is not an order as contemplated by secs. 207 and 208 (*Boulter* v. *Justices of Kent* (1)). An " order of dismissal " under sec. 143 (1) does not refer to an order dismissing a matter in which evidence has not been given (*Ex parte Kirkpatrick* (2) ; *King* v. *Kirkpatrick* (3)), but operates as a bar to subsequent proceedings and can be made only after a hearing on the merits.

Spender, for the appellant. The statutory provisions under consideration in *Boulter* v. *Justices of Kent* (4) referred to indictable offences only, whereas sec. 143 (1) of the *Court of Petty Sessions Ordinance* is not so limited. The matter was dealt with by the magistrate " on the merits " as appearing to him. The order of dismissal is sufficient, under secs. 207 and 208, on which to found the appeal.

EVATT J. Mr. *Hill* for the respondent has raised a preliminary objection to the hearing of this appeal. He points out that, under sec. 208 of the *Court of Petty Sessions Ordinance* (*No.* 2) 1930, the

(1) (1897) A.C. 556, at pp. 567 *et seqq.*
(2) (1916) 16 S.R. (N.S.W.) 541, at p. 553.
(3) (1916) 22 C.L.R. 552.
(4) (1897) A.C. 556.

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party who is dissatisfied with the decision of the Court of Petty Sessions is entitled to appeal to the High Court only in respect of what is described in the section as "an order or conviction of the Court." He then says that what was done by the magistrate in dismissing the present information was not an "order" within the meaning of sec. 208, and that, as, obviously, it is not a "conviction," this Court has no jurisdiction to hear the appeal.

Whether the jurisdiction of this Court is ultimately referable to sec. 73 of the Constitution or to sec. 52 (1) is immaterial. For, though sec. 73 confers jurisdiction upon the High Court to hear appeals from all judgments of Courts exercising Federal jurisdiction, that grant is expressly made subject to such exceptions and regulations as the Parliament prescribes. It is therefore necessary to turn to the statute passed by the Commonwealth Parliament. That statute is the *Judiciary Act*, which, in sec. 34A, provides that the High Court shall have such jurisdiction to hear appeals from all judgments of any Court of the Territory for the Seat of Government as is vested in it (that is, the High Court) by ordinance made by the Governor-General.

It is necessary to ascertain what is the meaning of the provisions in Part XI. of the *Court of Petty Sessions Ordinance* which govern appeals from the Court of Petty Sessions. First of all, the heading of Part XI. indicates that the appeals dealt with are appeals from what are called "decisions" of the Court of Petty Sessions. "Decision" is a term of wide import. Then, sec. 207, in express terms, confers jurisdiction upon the High Court in respect of "all rulings, orders, convictions or determinations," of the Court of Petty Sessions. In the present case, moreover, the magistrate, acting under sec. 143 (1) of the ordinance, after dismissing the information, made an "order of dismissal."

Without attempting any further analysis of the provisions of Part XI., I am quite satisfied that the "order of dismissal," dated 26th day of September, from which leave to appeal has already been granted by this Court, is either an "order" within the meaning of sec. 208 or it is a "ruling" or "determination" of the Court of Petty Sessions within the meaning of sec. 207.

No doubt there is much to be said for the contention, based upon Lord *Herschell's* speech in *Boulter* v. *Justices of Kent* (1), that the word " order " used in conjunction with the word " conviction " does, as a rule, in relation to matters of summary jurisdiction, refer to an " order " which follows upon a " complaint." In that case, Lord *Herschell* said (at p. 567) : " What is meant by the summary jurisdiction of magistrates is, of course, perfectly well understood by every lawyer, and in relation to that jurisdiction the words ' conviction ' and ' order ' have a well defined meaning."

But, in the present ordinance, the meaning is not only not " well defined," it is not defined at all. The Court has to ascertain it from the context of the ordinance, the heading of the Part, and the general nature of the jurisdiction conferred upon the High Court by secs. 207 and 208.

I therefore hold that the Court has jurisdiction, and I overrule the preliminary objection.

Spender, for the appellant, was not called upon.

Hill, for the respondent. The information does not disclose an offence. To sell liquor during the ordinary prohibited hours, or during hours other than trading hours, is not necessarily an offence. The information does not allege that the liquor was supplied " unlawfully," unless the words " except as provided in the ordinance " are sufficient for that purpose. Those words are too general to create an offence, or for the description of an offence. An accused person is entitled to know with what offence he is charged (*R.* v. *Partridge* (2)). As, by sec. 63 of the ordinance, every separate sale or supply of liquor contrary to the ordinance is to be deemed a separate offence, a licensee is entitled to an opportunity of making inquiries and formulating his defence (*Ex parte Duncan* (3)). The effect of sec. 27 (2) of the *Court of Petty Sessions Ordinance* (*No.* 2) 1930, is limited to a description of the offence ; it does not provide that a mere description of an offence in the words of the ordinance is a sufficient charge. A person charged with an offence is in law

(1) (1897) A.C., at pp. 567, 568.
(2) (1930) 30 S.R. (N.S.W.) 410.
(3) (1924) 41 N.S.W.W.N. 128, at p. 134.

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entitled to know the offence with which he is charged, and the words of sec. 27 (2) are not clear enough to deprive him of that right (*Maxwell* on *The Interpretation of Statutes*, 7th ed. (1929), p. 245). The information did not sufficiently disclose an offence, nor furnish the particulars required by law (*Smith* v. *Moody* (1); *Ex parte Duncan* (2)). The want of particularity was not, in the circumstances, covered by sec. 28 of the *Court of Petty Sessions Ordinance*. The provisions of that section, which are similar to those of sec. 65 of the *Justices Act* 1902 (N.S.W.), can be availed of only at the hearing, and have no operation where the information does not disclose an offence and the defendant is not present to be re-charged (*Ex parte Bartlett* (3); *Ex parte Marks* (4)). *R.* v. *Duff* (5), *Preston* v. *Donohoe* (6), *Ex parte Heffernan* (7), *Ex parte Parkinson* (8), and *Ex parte Young* (9), do not apply, as in those cases evidence was given; therefore secs. 65 and 115 of the *Justices Act* 1902 applied: amendment was made and conviction entered, but here there is not any evidence on which the Court can amend or enter a conviction.

EVATT J. The Court is obliged to Mr. *Hill* for his argument, but the appeal must be upheld.

Under secs. 27 and 28 of the *Court of Petty Sessions Ordinance* (*No.* 2) of 1930 it is expressly provided that, in respect of, *inter alia*, " informations " to be dealt with summarily, the description of any offence in the words of the ordinance creating the offence or in similar words " shall be sufficient in law." In sec. 28 it is provided that, if, at the hearing of any information, any objection is taken to an alleged defect therein in substance or form, the Court of Petty Sessions may amend the information as appears to it to be desirable or to be necessary to enable the real question in dispute to be determined. It is also provided that the Court shall not make any such amendment where it considers it cannot be made without any injustice to the defendant.

In this case, the summary offence with which the present respondent was charged was created by the *Liquor Ordinance* 1929-1932. Sec.

(1) (1903) 1 K.B. 56.
(2) (1924) 41 N.S.W.W.N., at p. 134.
(3) (1896) 17 N.S.W.L.R. 108 (L.), at p. 109.
(4) (1906) 6 S.R. (N.S.W.) 428.
(5) (1924) 41 N.S.W.W.N. 23.
(6) (1906) 3 C.L.R. 1089.
(7) (1907) 24 N.S.W.W.N. 179.
(8) (1909) 26 N.S.W.W.N. 7.
(9) (1910) 27 N.S.W.W.N. 14.

43 (1) of that ordinance provided that "every holder of a licence shall be guilty of an offence if he . . . (*d*) during prohibited hours . . . supplies any liquor . . . except as provided in this ordinance."

The information in this case asserted that the present respondent, being the holder of a licence granted in accordance with the *Liquor Ordinance*, did, upon a day named, supply liquor during prohibited hours on her licensed premises except as provided in the said ordinance in that she, being the holder of a residential hotel licence in respect of the Hotel Wellington, did supply liquor at the said hotel during hours other than trading hours contrary to the ordinance in such case made and provided.

Without referring to the authorities, the terms of sec. 27 of the *Court of Petty Sessions Ordinance* justified the form of the present information. The information disclosed one offence only, and it followed the very words of the ordinance creating the offence. It was, therefore, "sufficient in law."

It is quite true, as Mr. *Hill* points out, that his client might not, by the information itself, be furnished with sufficient knowledge of the case that would be made against her at the hearing, but, in my opinion, the magistrate should have come to the conclusion that the information was "sufficient in law."

Perhaps I should mention some of the cases to which Mr. *Hill* referred me. In *Ex parte Duncan* (1), *James* J. of the Supreme Court of New South Wales stated that he was "inclined to think" that both the information and the conviction should "set out the names of the persons by whom the liquor is consumed; so that the licensee might have the opportunity of making inquiries and formulating his defence, particularly as each particular sale or consumption is a separate offence."

I do not read this statement as a decision of *James* J. as to the legal requirements of an information which alleges a "supply" of liquor, but merely as an expression of opinion that, in the interests of justice, a person charged by information with such an offence should be furnished with a reasonable opportunity of preparing against the case to be made against him. I am strengthened in that view of

(1) (1924) 41 N.S.W.W.N., at p. 134.

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Duncan's Case (1) because of the earlier decision of the Full Court of the Supreme Court in the case of *R.* v. *Duff* (2).

Mr. *Hill* also referred to *Smith* v. *Moody* (3), where it was held by the Divisional Court that the conviction insufficiently described the offence because it failed to specify what property of the respondent had been injured. It merely stated that the defendant " did injure the property of the said Thomas William Moody."

I must say that I share to some extent the scepticism of *Channell* J., evidenced by his statement at page 63 of the report, as to the mischief apprehended by *Wills* J. in breaking down a rule said to be " at least two hundred years " old. It is quite clear that case is quite distinct from the present.

The necessary result of my opinion is that the appeal should be allowed, the order of dismissal set aside, and the matter remitted to the Court of Petty Sessions to hear and determine the information.

I think that I should add that I entirely agree with Mr. *Hill's* observations so far as they point out that the present information may fail to furnish the respondent with sufficient particulars to prepare her defence. My view is best expressed by stating that, although the legal sufficiency of the information cannot be questioned, it is highly desirable that a person charged with such an offence as the " supplying " of liquor, should have furnished to him particulars, if they are available, (1) as to the person to whom liquor was supplied during the prohibited hours, and (2) as to the approximate time when the liquor was supplied. If the name of the person is available, no harm can be done by including it in the information. But, if it is not contained in the information, and I have held that it need not be so contained, the Court of Petty Sessions should insist that, at a reasonable time prior to the hearing of the case, the particulars I have mentioned be furnished to a defendant by an informant. Such a course of procedure will avoid injustice, and I entirely agree with what *James* J. said (*Ex parte Duncan* (4)) as to the importance of avoiding unfairness in cases of this kind.

I make the following order :—Appeal allowed. Order of dismissal set aside. Matter remitted to the Court of Petty Sessions to hear

(1) (1924) 41 N.S.W.W.N. 128.
(2) (1924) 41 N.S.W.W.N. 23.
(3) (1903) 1 K.B. 56.
(4) (1924) 41 N.S.W.W.N., at p. 134.

and determine the information. In accordance with the previous order of the Court, the appellant will pay the respondent's costs of this appeal.

Order accordingly.

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Solicitor for the appellant, *W. H. Sharwood*, Commonwealth Crown Solicitor.

Solicitor for the respondent, *Felix F. Mitchell*, Cooma, by *Colquhoun & King*.

J. B.

Rev *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49

[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN KNITTING MILLS LIMITED AND ANOTHER . . . . . DEFENDANTS, } APPELLANTS;

AND

GRANT . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933.

MELBOURNE, *June* 13-16, 19, 20.

SYDNEY, *Aug.* 18.

Starke, Dixon, Evatt and McTiernan JJ.

Tort—Manufacturer of goods—Liability for damage caused by goods purchased through retailer.

Sale of Goods—Reliance on seller's skill or judgment—Merchantable quality of goods—Sale of underwear by retailer—Sale of Goods Act 1895 (*No.* 630) (*S.A.*), *sec.* 14*.

The plaintiff purchased woollen underwear from a retail merchant whose business it was to supply goods of that description. The manufacturer, after completing his preparation of the underwear, folded each garment, wrapped them in paper parcels and then tied them in quantities of one half dozen per

*The *Sale of Goods Act* 1895 (South Australia), sec. 14, provides:—"14. Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether