

[HIGH COURT OF AUSTRALIA.]

OTZEN APPELLANT ;
INFORMANT,
AND
BEABOUT RESPONDENT.
DEFENDANT,

H. C. OF A. *National Security—Prices control—Declared goods—Hotel and business carried on
1947. therein owned by company—Liquor—Sale by barmaid at price greater than fixed
maximum price—Offence—Liability of licensee—Barmaid and licensee employees
of company—National Security (Prices) Regulations (S.R. 1940 No. 176—
S.R. 1946 No. 93), reg. 29 (1) (a), (3)—Liquor Act 1912-1946 (N.S.W.) (No. 42
of 1912—No. 34 of 1946), ss. 15, 43.*

SYDNEY,
Dec. 4, 12.

Latham C.J.,
Starke, Dixon,
McTiernan and
Williams JJ.

A hotel was owned and the business therein was conducted by a company which employed a manager and a barmaid. The manager was the licensee of the hotel under the *Liquor Act 1912* (N.S.W.). On the barmaid selling some whisky at a price greater than the maximum price fixed under the *National Security (Prices) Regulations* an information was laid against the licensee for a contravention of the regulations. The information was dismissed on the ground that the sale made by the barmaid was a sale by the company and not by the licensee. Upon appeal,

Held, that although the barmaid was the servant of the company she was, by presumption under s. 43 of the *Liquor Act 1912* (N.S.W.), the agent of the licensee and, in the circumstances, it was on his behalf, within the meaning of reg. 29 (3) of the *National Security (Prices) Regulations*, that she sold the whisky, and that therefore the magistrate's decision was erroneous.

CASE STATED.

In an information laid by Ernest Otzen, an officer of the Department of Trade and Customs, it was alleged that on or about 4th October 1946, at Medlow Bath, New South Wales, William Keith Beabout, of the Hydro Majestic Hotel, Medlow Bath, did contravene a provision of the *National Security (Prices) Regulations* made in pursuance of the *National Security Act 1939-1946* and that contrary

to reg. 29 of those regulations he did sell in the lounge of the said hotel declared goods to wit spirituous and fermented liquors, being one nip of "Old Crony" Australian whisky and one 8 oz. glass of beer at a price, namely 2s., being a greater price than the maximum price, namely 1s. 11d. fixed in relation to those goods under the regulations for the sale of those goods.

Regulation 29 of the *National Security (Prices) Regulations* provides, so far as material, as follows:—“(1) A person shall not (a) sell or offer for sale any declared goods at a greater price than the maximum price fixed in relation thereto under these regulations for the sale of those goods; . . . (3) For the purposes of this regulation, any person on whose behalf or at whose place of business any declared goods are sold or offered for sale at a greater price than the maximum price fixed, in relation thereto, under these regulations, for the sale of those goods, whether the goods are sold or offered for sale contrary to the instructions of the person or not, shall be deemed to have contravened the provisions of this regulation, unless the court is satisfied that the sale or offering for sale took place without his knowledge and that he has systematically used all due diligence to secure observance of these regulations.”

The *Liquor Act* 1912 (N.S.W.), as amended, provides, by s. 15: “All publicans’ licenses . . . may be in the form prescribed, and every such license shall authorise the licensee therein named to sell and dispose of liquor but . . . only on the premises therein specified . . .”; and by s. 43: “(1) Every person who (not being the agent or servant of a person authorised to sell liquor under this Act) sells . . . any liquor shall, unless he is authorised under this Act to sell the same be guilty of an offence against this section.”

The magistrate held that the word “sell” in reg. 29 must be construed in the ordinary commercial sense of the word and that the defendant was not a person on whose behalf or at whose place of business the sale of the whisky in question took place. He therefore found the defendant not guilty of the offence and acquitted him.

In a case stated at the request of the informant for the opinion of the High Court there were set forth the following facts which were found by the magistrate to have been established to his satisfaction by the evidence given before him:—

- “(a) That the defendant was at the relevant date licensee of the Hydro Majestic Hotel, Medlow Bath.
- (b) That at about 5-45 p.m. on 14th October 1946 two “Prices” officers called at the Hydro Majestic Hotel at Medlow

H. C. OF A.

1947.

OTZEN

v.

BEABOUT.

H. C. OF A.

1947.

OTZEN

v.

BEABOUT.

Bath and were supplied with a nip of "Old Crony" whisky with water and an eight ounce glass of beer by a bar assistant, namely Mrs. Perkins, in the Pellevue lounge and that they paid her the sum of two shillings and received no change.

- (c) That the nip of "Old Crony" whisky with water and the eight ounce glass of beer were declared goods within the meaning of the *National Security (Prices) Regulations* and that under Prices Regulation Order 2210 as varied by notice in writing dated 10th October 1945 the maximum fixed price for the said declared goods was 1s. 11d. on the date in question.
- (d) That the defendant was engaged on 31st January 1946 as manager of the hotel and the business thereof under the supervision and direction of the Hydro (Medlow Bath) Ltd., that he was required to devote his whole time and attention to the conduct and management of the hotel and the business thereof, that he was required to keep proper and sufficient books of account which were supplied by the company and always remained its property, that he was required to make regular entries of all moneys, goods, liquor, stores and merchandise received and all moneys disbursed by him, that he was required once every day or oftener if required by the company and at a time to be appointed by the company to pay all moneys received by him to the accountant of the company or into the company's banking account, that he was required to hold the publican's licence for the hotel in trust for the company and to comply with the requirements of the *Liquor Act*.
- (e) That the company was to pay all fees and expenses including licence fees and contribution to the compensation fund under the *Liquor Act*.
- (f) That the defendant was employed at a weekly wage of £7 and was also entitled under certain circumstances to payment in addition of £1 per centum on takings derived from the hotel and the business carried on therein.
- (g) That the company had power to dismiss the defendant.
- (h) That the defendant was required to be responsible to the company for all cash paid to the hotel for liquor and to account for same daily, that the defendant could not without the consent of the company purchase or order any liquor &c. in his own name or on account of the company.

- (i) That the defendant had not systematically used all due diligence to secure observance of the *National Security (Prices) Regulations*."

The question for the determination of the High Court was whether the magistrate's decision acquitting the defendant was erroneous in point of law.

Louat, for the appellant. The facts show that the respondent carried on the business of buying and selling liquor on behalf of the company which owned the hotel, and for its benefit. The evidence does not establish that the respondent had knowledge of the challenged sale; his liability depends upon the reputed responsibility. This is a case of vicarious responsibility which comes within sub-reg. (3) of reg. 29 of the *National Security (Prices) Regulations*. The words "on whose behalf or at whose place of business" in sub-reg. (3) are directly relevant and both portions of that phrase are independently relevant. For there to be a sale, within the ordinary meaning of that term, it is not essential that the person selling should own or have the property in the liquor. For the purposes of reg. 29 it must be ascertained who is carrying on the business. Under the *Liquor Act* 1912 (N.S.W.) the licensee, and no one else, is the person licensed and authorized to carry on the business. It is necessary to distinguish between the respondent's position as a manager—in which respect he was purely an employee—and his position as a licensee, which is the relevant character for the purposes of this appeal, in which he was entirely independent of his employer and only bound by a trust and in pursuance of which he was carrying on the business. Under s. 43 of the *Liquor Act* 1912 every person not being the licensee, or agent or servant of the licensee, who sells liquor commits an offence. The barmaid was an agent of the licensee, the respondent, who was the person authorized to sell liquor, therefore the liquor sold by the barmaid was sold on his behalf. If that were not so the sale would be in breach of the *Liquor Act*. Section 15 of that Act authorizes the licensee to sell liquor. The operation of reg. 29 is attracted by the fact that the sale was made by the barmaid on behalf of the licensee—respondent. Although she was a servant of the company she was nevertheless an agent of the licensee. The fact that the respondent was employed to manage the hotel is an irrelevant circumstance. The respondent was licensed by the State law to carry on the business at the hotel; that business, it is true, was carried on for the benefit of the company, but it was none the less in law an independent business in liquor carried on by the respondent, as

H. C. OF A.
1947.

OTZEN
v.
BEABOUT.

H. C. OF A.
 1947.
 }
 OTZEN
 v.
 BEABOUT.

an approved person, at the hotel. For limited purposes the business is the respondent's business. The respondent's case before the magistrate was founded on *Mellor v. Lydiate* (1) and it was urged that certain observations in that case (2) were *obiter dicta*. It was further argued on behalf of the respondent that the word "sale" as used in reg. 29 of the *National Security (Prices) Regulations* means a sale in the ordinary commercial sense. The appellant does not support that view. Regulation 29 is intended to operate upon the sale of commodities in the States subject to whatever relevant State law applies to those commodities. If reg. 29 can be read consistently with State law it should be so read. There is no difficulty whatever in reading reg. 29 consistently with the *Liquor Act* 1912 which places the right to sell, and the exclusive right to sell, in the person to whom a licence is granted under that Act. Regulation 29, as a whole, is not concerned with where the property in the goods may be, it is concerned with acts and with who carries out the actual operations of selling. The barmaid was conducting the actual retail operations in place of and for the licensee. From the fact that she was a barmaid it is implicit that the barmaid was the servant of the licensee. There are special statutory circumstances in this case which modify the general law, and particularly s. 43 of the *Liquor Act* 1912, because the position is that unless a barmaid has the character of an agent or servant she herself commits an offence by selling without a licence. From the contractual basis with the company the licensee had the responsibility of selling.

There was no appearance by or on behalf of the respondent.

Cur. adv. vult.

Dec. 12

The following written judgments were delivered :—

LATHAM C.J., DIXON, McTIERNAN AND WILLIAMS JJ. This is an appeal from a decision of a court of petty sessions exercising Federal jurisdiction. The decision dismissed an information laid under the *National Security Act* 1939-1946 for a contravention of the *National Security (Prices) Regulations*. The contravention alleged consisted in selling in the lounge of the Hydro Majestic Hotel, Medlow Bath, declared goods, namely spirituous liquors (whisky) at a price greater than the maximum price fixed under the regulations in relation to such goods. It appeared from the evidence that the defendant was the licensee of the hotel. The sale was not

(1) (1914) 3 K.B. 1141.

(2) (1914) 3 K.B., at pp. 1153, 1155,
1157.

made by him, but by a barmaid. The owner of the hotel and the proprietor of the business was shown to be The Hydro (Medlow Bath) Ltd., an incorporated trading company. Whisky was in fact sold at a price 1d. above the maximum price fixed under the Prices Regulations. The defendant and the barmaid were both servants of the company. The magistrate was of opinion that the sale made by the barmaid was a sale by the company and not by the defendant, and on that ground he dismissed the information.

Regulation 29 (1) (a) of the Prices Regulations provides that a person shall not sell or offer for sale any declared goods at a greater price than the maximum price fixed in relation thereto under the regulations for the sale of those goods. Sub-regulation (3) of reg. 29 provides that for the purpose of the regulations any person on whose behalf or at whose place of business any declared goods are sold or offered for sale at a greater price than the maximum price fixed, whether the goods are sold or offered for sale contrary to the instructions of the person or not, shall be deemed to have contravened the provisions of this regulation unless the court is satisfied that the sale or offering for sale took place without his knowledge and that he had systematically used all due diligence to secure observance of these regulations.

The defendant gave evidence that he had instructed those employed in the hotel to sell liquors within the maximum prices, and that the sale made by the barmaid in question was made without his knowledge or prior information. The magistrate did not say whether he accepted this evidence or not, but he said that he was not satisfied that the defendant had systematically used all due diligence to secure observance of the Prices Regulations. If it had been shown that the defendant had procured or had in any way been directly or indirectly knowingly concerned in or party to the sale he would, under s. 5 of the *Crimes Act* 1914-1941, have been deemed to have committed the principal offence, and would have been punishable accordingly; but no reliance was placed upon that provision for lack, doubtless, of the necessary finding of fact.

We must, we think, assume that the defendant gave no express prior authority for a sale of spirits above the fixed price, and that the sale was in fact made without his actual complicity. His employment with the company was regulated by a contract of service under which he was employed at a weekly wage and at a percentage of takings. He was required to devote his whole time and attention to the conduct and management of the hotel, and to hold the publican's licence for the hotel in trust for the company. He contracted with the company to comply with the requirements of the *Liquor Act*.

H. C. OF A.
1947.

OTZEN

v.

BEABOUT.

Latham C.J.
Dixon J.
McTiernan J.
Williams J.

H. C. OF A.
1947.

OTZEN
v.

BEABOUT.

Latham C.J.
Dixon J.
McTiernan J.
Williams J.

It is, of course, State law, not Federal law, to which it is necessary to refer in order to determine whether a given transaction amounts to a sale or to establish the identity of the seller.

It is the law of sale which decides such questions. Under that law a man may occupy the position of seller in a contract of sale, although he is not the actual owner of the goods. The property will pass under the sale if the seller has the authority of the owner : see per *Hilbery J., Hotel Regina (Torquay) Ltd. v. Moon* (1).

It is, therefore, of no importance that the licensee is not himself the owner of the liquor he sells. It is sufficient that he is the real seller and has authority over the disposal of the liquor.

Under s. 43 of the *Liquor Act* 1912 (N.S.W.) it is an offence for a person to sell liquor without holding a licence authorizing the sale thereof unless he is the agent or servant of the holder of such licence. Section 15 provides that the publican's licence shall authorize the licensee therein named to dispose of liquor, but only on the premises therein specified. According to State law, therefore, the defendant himself as licensee might lawfully have sold liquor, and any of the persons employed in the business, provided they were his agents or servants, might have done so. This condition of State law gives rise to a prima-facie presumption which can be relied upon in the administration of the Federal law that the barmaid in selling the liquor acted either as the licensee's servant or as his agent. Upon the facts it seems clear that she was in fact the servant of the company, and not of the licensee. This circumstance, however, leaves open the inference that she acted as the defendant's agent. If she were not, her action would have been completely unlawful and for that reason alone it should be assumed that in selling the liquor she acted under his authority. It is, moreover, the natural inference from the circumstances that the servants of the company placed at the disposal of the manager were intended to act under his directions and, as it was necessary that he should take the responsibility under the law as licensee, that they should have his actual authority as licensee for what they did. This does not mean that it is to be presumed that she had his actual authority for infringing the Prices Regulations by selling above the fixed prices. But it does justify a conclusion that for the purposes of sub-reg. (3) of reg. 29 he was a person, to use the language of that regulation, on whose behalf declared goods are sold or offered for sale at a greater price than the maximum price.

The words "on whose behalf" do not necessarily imply that the transaction was with the actual authority of the person represented.

The exculpatory part of the sub-regulation shows that that is not intended. Notwithstanding that the defendant was the servant of the company, it may be taken to have been the common intention of the company and the defendant that in transactions with the public he should, as between the company and the public, occupy the position of principal. It may be true that as between himself and the company the defendant was their servant or agent, but that is quite consistent with the company's putting him forward as the licensee of the hotel as a party principal to the sale of food and liquor made in the course of the business. Nor would it matter that some or all of the members of the public who bought food or liquor in the hotel were aware that the company was the true proprietor of the business. The common intention between the defendant and the company that the ultimate control of the conduct of the business and the exclusive enjoyment of its proceeds, less his percentage deduction, should rest with the company is not incompatible with the common intention between them that he should be the party to the relations with others which arose out of the daily conduct of the business. Licensing laws make the existence of the latter common intention almost imperative. In New South Wales and in England it would appear to be the position that the sale of liquor on hotel premises by a person who is neither the authorized agent of the licensee nor a person selling through the licensee as the apparent principal is an offence. The licensee must be no mere dummy. He must be a responsible actor in the conduct of the business. But no offence is committed by a principal if the sales are made by a licensed person, notwithstanding that the liquor belongs to the principal: see *Mellor v. Lydiate* (1) and *Peckover v. Defries* (2).

These considerations give rise to a conclusion of fact, for such we think it is, that the sale of the liquor by the barmaid on the occasion in question was as between the customer and the licensee—a sale made on behalf of the licensee in purported execution of his authority. That brings the defendant within the application of sub-reg. (3). The operation of that sub-regulation is to place upon him vicarious responsibility for the sale made by the barmaid at a price above the maximum fixed.

For these reasons we are of opinion that the decision of the magistrate was erroneous, and his decision dismissing the information should be set aside. It was suggested that this Court might convict the defendant and impose a penalty, but in our opinion the proper course is to remit the information to the magistrate.

H. C. OF A.
1947.

OTZEN

v.

BEABOUT.

Latham C.J.
Dixon J.
McTiernan J.
Williams J.

(1) (1914) 3 K.B. 1141.

(2) (1906) 95 L.T. 883.

H. C. OF A.

1947.

OTZEN

v.

BEABOUT.

STARKE J. The Hydro (Medlow Bath) Ltd. is an incorporated company which owns the Hydro Majestic Hotel. It engaged the respondent as manager of the hotel and the business thereof under the supervision in all things of the company or its managing directors.

The publican's licence in respect of the hotel was granted to the respondent under the *Liquor Act* 1912 of New South Wales. The licence authorizes the licensee to sell and dispose of liquor in the hotel premises subject to the provisions of the Act (see Act, s. 15). And any person who sells liquor without holding a licence authorizing the sale, unless he is the agent or servant of the holder of such licence, is guilty of an offence (Act, s. 43). Further, the Act makes the licensee responsible for the conduct of the premises in respect of which he is licensed.

The respondent was charged under the *National Security (Prices) Regulations* that he sold in the hotel declared goods, to wit liquor, at a price greater than the maximum price fixed by the regulations (reg. 29). The evidence disclosed that a barmaid who was employed in the hotel sold liquor contrary to the regulations. She was under the direction of the respondent as manager of the hotel but could not lawfully sell liquor in the hotel unless she was his servant or agent. She did sell it however and under his direction and with his knowledge.

In general a person is responsible only for his own acts but there are cases in which the law imposes on him vicarious responsibility for the acts of others. And the present is a case in which such a responsibility is brought about by force of the provisions of the *Liquor Act* and also by force of his own direction as licensee of the hotel.

The stipendiary magistrate, nevertheless, acquitted the respondent but stated a case for the determination of this Court, the question being whether his determination was erroneous in point of law.

In my opinion it was and the question stated should be so answered and this appeal allowed.

Appeal allowed with costs. Order of the magistrate set aside. Matter remitted to the stipendiary magistrate to be dealt with according to law.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.