

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	KINGS CANYON RESORT
LICENSEE:	Kings Canyon Nominees Pty Ltd
LICENCE NUMBER:	80204644
NOMINEE:	Mark Edward Thomas
PROCEEDING:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i>
HEARD BEFORE:	Mr John Flynn (Chairman) Ms Brenda Monaghan Mrs Jane Large
DATE OF HEARING:	4 September 2006
DATE OF DECISION:	3 October 2006
APPEARANCES:	Mr Roger Bennett, for Director of Licensing Mr Rob Perry, for the Licensee Mr Mark Thomas, Nominee Mr Dave Woodbury, Employee

1. On 11 November 2005 a complaint was lodged by Mr Warren Hollier with the Director of Licensing claiming that he had been hit by the Bar Manager whilst he was drinking at the Kings Canyon Voyagers Resort. After investigations of this complaint, the Director of Licensing advised the Nominee of the Resort on 13 February 2006 of three (3) complaints to be laid against the Licensee as follows:
 - A breach of Section 102 of the *Liquor Act* (the *Act*) in that the patron, Mr Hollier was sold alcohol whilst in an intoxicated state on Friday 11 November 2005 in the George Gills Bar of the Resort;
 - A breach of Section 121 of the *Act* in that the Licensee allowed Mr Hollier to remain on premises whilst he was in an intoxicated state; and
 - A breach of Section 121 of the *Act* in that a staff member of the Licensee used excessive force when attempting to remove Mr Hollier from the licensed premises.

2. The matter proceeded to hearing on 4 September 2006 in Alice Springs. Mr Roger Bennett appeared as Counsel for the Director and Mr Rob Perry appeared as Counsel for the Licensee.
3. At the hearing, evidence was provided from various sources including:
 - Evidence in person from the complainant Warren Hollier (Hollier) and the bar staff member, David Woodbury (Woodbury).
 - Evidence from Maxine Viska (Max), a work mate of Hollier's, by telephone.
 - A signed Statutory Declaration from Alan Henderson (Junior), another work mate of Hollier's.
 - An Incident Report dated 11 November 2005 from an independent witness, Steve Nicholls but he was unavailable to give evidence. The Bar Manager, Amy and another workmate of Hollier's nicknamed Chance who were both present on the evening were also unavailable to give evidence.

The Facts

4. On 11 November 2005, Hollier and Max arrived at the Resort at around 9.00pm. Prior to their arrival, Hollier had drunk the best part of a 700ml bottle of Jim Beam with coke at the work camp. About half hour or so after their arrival, they were joined by Chance and Junior, two other workmates.
5. Hollier was served at the bar at least two (2) times. The others were served also served as they were in a "shout". The group spent some time playing pool at which stage Max and Junior both noticed that Hollier was visibly drunk. At around 10pm, the barstaff Woodbury and Amy elected to close the bar early and called last drinks. Around 10.30pm there was an altercation between Woodbury and Hollier resulting in Hollier sustaining significant injuries.

Alleged Breach of Section 102

The Law

6. When looking at previous decisions of the Commission on the proper interpretation of Section 102, it is clear that a complainant must prove on the balance of probability that the Licensee served the patron liquor at a time when he was likely to be intoxicated. If this threshold is met, then the onus shifts to the Licensee who must prove that he was not intoxicated when served.
7. Historically, the indicators of intoxication considered by the Commission equate to the outward signs of public drunkenness. Thus, if a patron is visibly intoxicated, then he should not be served. The Commission was

also provided with the definition of “public drunkenness” from the Freedictionary.com which states *“in public drunkenness the standard is subjective, meaning the person must be unable to care for himself, be dangerous to himself or others, be causing a disturbance, or refuse to leave or move along when requested”*.

8. Whilst the Commission accepts that on occasion a person served whilst intoxicated might also fit within this category of “public drunkenness”, we do not accept that this is always the case. It appears to us an appropriate test to apply in this case, however, as the patron had already consumed a large amount of spirits before entering the licensed premises. In these circumstances, the barman was unable to gauge the patron’s level of intoxication by the number of drinks he had served him and could only gauge intoxication on the appearance and demeanour of the patron.

The Evidence

9. At the hearing, there was clear evidence of both service and signs of intoxication. In these circumstances the threshold test is met and the onus is on the Licensee to prove either that the patron was not intoxicated at the time of sale or alternatively to disprove service.
10. We accept the evidence of Woodbury and Max that when Hollier first arrived at the bar, he was “holding himself together” okay. Neither Woodbury nor Max had been drinking and they seemed to recall the events of the evening clearly. At some stage during the next hour, it appears that Hollier’s demeanour deteriorated sharply. He admitted that he could not properly see the billiard balls, was slurring his words and having to prop himself up against furniture.
11. It is not completely clear however, quite when Hollier purchased drinks from the bar. He and Max arrived at the bar at around 9.00pm and were joined by Chancy and Junior sometime later. Junior’s statement gives the time of his arrival at around 9.30pm but we are reluctant to simply accept this evidence without corroboration as there was no opportunity to examine or cross examine him at the hearing.
12. Max said she saw Hollier purchase at least two (2) rounds of drinks for the group. She is not sure quite when those drinks were purchased or from whom. It appears that Hollier, being foreman for the work gang, normally took it upon himself to buy the first round of drinks. It is highly likely (but not completely clear) that Hollier purchased a drink for himself and Max when they first arrived. There is also evidence that he purchased a round for the whole group when Junior and Chancy arrived some time later.
13. There were two bar staff on that evening - Woodbury and Amy. Woodbury says he only served Hollier once and that Hollier did not show signs of intoxication at that time. Woodbury was adamant that he was customarily very careful about serving intoxicated people and as a result he has earned himself the tag “Bar Nazi” by other staff members.

14. Hollier disputes Woodbury's evidence and stated in the witness box that Woodbury served him twice. It is noted, however that there are conflicts in Hollier's evidence as in his earlier statement to Police, he advised that Woodbury had served him only once and that Amy served him twice. Noting both the large amount of alcohol Hollier had consumed earlier in the evening and the conflicts in his evidence, we prefer the evidence of the sober Woodbury and accept on the balance of probabilities that he only served Hollier once. We can only assume therefore that on the other occasions of service, Amy served Hollier.
15. In evidence, Woodbury stated that he had served Hollier on several earlier occasions in the past when Hollier and the Orr Gang attended at the premises. It was his view from previous occasions of service that Hollier could hold his liquor pretty well but then would fall off sharply. He seemed quite clear that when he observed Hollier arrive with Max, Hollier seemed fine. He stated that he only became aware of Hollier's level of intoxication later and is adamant that he did not serve Hollier further once he saw those signs of intoxication. Woodbury advised that he was unaware as to whether or not Amy served Hollier and that he did not see any such occasions of service. He acknowledged, however that he may have been busy with other duties such as clearing glasses and tables and may not have seen such service.
16. Whilst it is of concern that Hollier was served two or maybe three times by bar staff when he had already drunk the best part of a bottle of Jim Beam before entering the bar, the evidence of his demeanour at the time of service is unclear. If he was served early in the evening (eg when he and Max first arrived and then when the others joined them) then it may well have been that he was still able to appear sober. If he was served closer to 10.00pm, then he would have been showing clear signs of intoxication.
17. Junior's statement mentioned 9.30pm as the time when Hollier purchased a round of drinks but this evidence is untested and uncorroborated and we are reluctant to rely on it in these circumstances. We have no first hand evidence of any occasions of service of alcohol by the other bar person. In these circumstances, we have no details to support a finding that Hollier was served by either bar persons whilst intoxicated. There is simply not enough evidence on this issue.
18. The complaint of a breach of Section 102 of the *Liquor Act* is dismissed.

Breach of Section 121 (in that a staff member of the Licensee used excessive force when attempting to remove Mr Hollier from the licensed premises.)

19. This breach relates to the circumstances surrounding significant injuries received by Hollier after an altercation with Woodbury. It appears clear that after last drinks were called, Hollier and others in his group still had one or more drinks to finish. By 10.30pm, Woodbury went to close the bar and was frustrated by Hollier's attempt to prolong leaving the bar.

20. There is conflicting evidence as to who struck the first blow. Hollier says that Woodbury punched him in the face without warning after Woodbury gave verbal abuse. Woodbury emphatically denies this and is adamant that Hollier was the instigator of the altercation and the aggressor. He states that he only responded in self defence. His evidence is supported by an Incident Report dated 11 November 2005 from a witness, Steve Nicholls.

21. We have considered the evidence and prefer that provided by Woodbury. He was sober on the evening in question, he gave a clear, account of the circumstances surrounding the altercation and his evidence was corroborated by an independent witness. Hollier's evidence was not as convincing and his recall may well have been affected by his intoxicated state on the night in question. The complaint is dismissed.

Breach of Section 121 (in that the Licensee allowed Mr Hollier to remain on premises whilst he was in an intoxicated state)

22. Last drinks were called at 10.00pm despite the fact that the bar had a late licence on Friday nights until 1.00am. Management had earlier advised barstaff that they should close the bar for economic reasons on a quiet night. The bar staff had also encountered problems on earlier occasions with workers from the Orr Camp (and in particular Hollier) and had closed the bar early before because of unruly behaviour by that group. Further, Woodbury was aware of Hollier's drinking habits and had refused him service before. Woodbury gave evidence that once he and Amy realised that Hollier was intoxicated, they elected to close the bar. He said that on the night in question, economic reasons were not his main motivation for closing the bar but the presence of Hollier in a drunken state was.

23. In these circumstances, it is difficult to argue on the evidence before us that the Licensee allowed Mr Hollier to remain on premises in an intoxicated state and the complaint is dismissed.

John Flynn
PRESIDING MEMBER

3 October 2006