

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: DOUGLAS STREET SUPERMARKET

LICENSEE: Ignatius Benedict Ryan

LICENCE NUMBER: 80901579

PROCEEDINGS: Hearing to Consider Penalty for Four (4) Breaches of Section 106C of the *Liquor Act* – Supply of Liquor to Minors and One (1) Breach of Section 102 of the *Liquor Act* - Sell Liquor to Intoxicated Person

HEARD BEFORE: Mrs J M Large (Presiding Member)

DATE OF HEARING: 23 October 2008

APPEARANCES: Mr B O'Loughlin for Licensee
Mr I B Ryan, Licensee
Ms J Truman for Director of Licensing
Mr A Borg, Licensing Inspector

BACKGROUND

- 1) On Friday 26 October 2007, at approximately 5.30 pm, a number of minors entered Douglas Street Supermarket ("the Supermarket"), and two of the minors purchased one (1) six (6) pack of UDL cans and two (2) cans of Bourbon and Cola. At approximately 5.34 pm a minor entered the Supermarket and purchased a six (6) pack of UDL cans. On Saturday, 27 October 2007, at approximately 5.29 pm, two female minors entered the Supermarket and purchased a six (6) pack of UDL cans, a six (6) pack of Smirnoff Black cans and a packet of Winfield Blue cigarettes. On Saturday, 17 November 2007, at approximately 6.00 pm, a male minor accompanied by a female minor entered the Supermarket and purchased a carton of Bundaberg Rum and Cola cans. A complaint, that the above purchases were in breach of Section 106C of the *Liquor Act* ("the Act") and that the Licensee had not complied with the condition of his licence, was lodged with the Director of Licensing.
- 2) On Friday, 23 November 2007, at approximately 6.00 pm, a male person who was intoxicated at the time entered the Supermarket and purchased a six (6) pack of Melbourne Bitter beer. A complaint, pursuant to Section 48 in allegation of a breach of Section 102 of the Act was lodged with the Director of Licensing.

The complaints were supported with sworn statements from the minors involved, a parent, a teacher and Licensing Inspectors.

SUBMISSIONS ON PENALTY

- 3) Mr O'Loughlin, representing the Licensee, pleaded guilty to the breaches of Sections 106C and 102 of the Act. He outlined Mr Ryan's personal circumstances stating that he was sixty-one (61) years of age and had owned the Douglas Street Supermarket for twenty-three (23) years in which time there had been no recorded breach of his licence or the Act. He worked seven (7) days a week every week and lives within the shop. The supermarket makes a very small profit, approximately \$300 per week, which Mr Ryan takes as salary. Half of the profits are estimated to relate to liquor sales and any loss of licence would end the business.
- 4) Further, Mr O' Loughlin said that Mr Ryan had never intentionally breached the Act and genuinely did not remember the transactions which resulted in the breaches and conceded that he was a poor judge of age. In relation to the serving of an intoxicated person Mr O'Loughlin stated that the customer, who was well known to the Licensee, had been involved in a motor vehicle accident in 1981 and suffered brain damage which resulted in bad balance at all times and epilepsy. These symptoms often mirrored the effects of intoxication. However, it was agreed that on the day in question the customer was intoxicated.
- 5) In regards to the level of penalty to be considered Mr O'Loughlin pointed out that Mr Ryan had fully cooperated with the Licensing Inspectors on these complaints and his early guilty plea had saved minors from having to give evidence before the Commission. Mr O'Loughlin referred to previous Commission decisions for similar breaches in 2006-2008; in particular, drawing attention to the decision on the *Berrimah Supermarket* dated 13 September 2007.
- 6) Mr O'Loughlin referred to *Ellis v The Queen {2005} NTCCA 1* and *Mill v The Queen (1988) 166 CLR 59* and asked the Commission to take into account the "totality principle" where, when deciding on penalty in respect of multiple offences regard has to be given to the total effect of the penalty on the offender. He also, pointed out the penalties included under Section 124AAA of the Act for consideration by the Commission.
- 7) In support of Mr Ryan's good standing in the community, references from Philip L Freier, Bishop of the Northern Territory, Val Haydock, President, Rotary Club of Darwin North Inc. and Georgina Barton, employee, were tendered. Also, tendered and returned to Mr Ryan were photos showing Mr Ryan's support and involvement in the Racing Industry, the Reel Woman's Fishing Competition and the Lions Club.

- 8) Ms Truman, representing the Director of Licensing, stated that there were aggravated circumstances attached to these breaches, namely, the young age of the minors (13 – 17 years of age), no attempt had been made to check the minors' IDs and the incidents happened on several occasions over a short period of time. Any mitigating circumstances offered by the Licensee could not deter from the very seriousness of the breaches.
- 9) Ms Truman made reference to various previous decisions by the Licensing Commission and drew attention to the Chairman's advice to the liquor industry that it regarded the sale of alcohol to a minor, particularly when relating to takeaway alcohol sales, as at the highest end of the scale of breaches of the Act.
- 10) Ms Truman submitted that the penalty should be a long period of licence suspension to show how serious the Commission considered such breaches and suggested consideration of a suspension of licence for two (2) months with some part thereof suspended for a period of time.

CONSIDERATION OF PENALTY

- 11) In respect of the sale of alcohol to minors, underage drinking problems are of concern both nationally and internationally. This was recognised by the Northern Territory Licensing Commission when the Chairman advised the liquor industry in 2006 that sale of alcohol to minors, especially relating to takeaway sales, would be regarded as at the highest end of the scale of breaches of the Act and that harsher penalties would be imposed on Licensees found in breach of Section 106C of the Act.
- 12) In the matter of the Douglas Street Supermarket the seriousness of the breaches is exacerbated by the fact that in a short space of time there were four (4) sales of alcohol to minors by the Licensee himself, one of the minors was only thirteen (13) years of age and could in no way be considered an adult, and there appeared to be no attempt to ascertain the age of the customers.
- 13) Having examined all the information in the Hearing Brief and listened to the Counsels' submissions, I do believe that, although there were two (2) sales of alcohol to a minor on the 26 October 2007, they were the result of a minor, who having obtained liquor successfully, immediately decided to try his luck again. In setting any penalty this will be treated as one (1) breach.
- 14) I have, also, reached the conclusion that Mr Ryan, the Licensee, did not deliberately set out to breach Section 106C of the Act but, for reasons unknown, had become careless and was taking a very casual and unconcerned attitude which bordered on reckless indifference towards his responsibilities under the Act. When given a verbal warning by the Licensing Inspectors early in 2007 he denied the allegations and suggested older people had supplied minors with liquor. This does not excuse the breach but is in contrast to his previous record in having no breaches of licence recorded and in taking the initiative in not selling casks of wine or longneck beers because of problems these caused in the neighbourhood.

- 15) Despite Mr O'Loughlin's submission I am not convinced that Section 124AAA can apply under these circumstances as the prescribed licence suspensions are additional to any penalty imposed under a prosecution for the same offence. I do, however, note that the penalties prescribed do increase substantially from first offence to second and third offences, namely, from twenty-four (24) hours to seven (7) days to twenty-eight (28) days.
- 16) It is always very difficult in reaching a decision on penalty to find a precedent in previous decisions as the circumstances in each matter differ. Of the cases brought to my attention by Counsel I find that the *Tiwi Supermarket* decision on 23 July 2007 and the *Berrimah Supermarket* decision on 27 September 2007 the most applicable to this matter. Other recorded decisions relate to licensed hotels and clubs which are a more controlled drinking environment and the Liquorland Casuarina case involved other circumstances which are not applicable to this matter.
- 17) There were two (2) separate breaches of the Section 106C of the Act by the Licensee of the Tiwi Supermarket and the penalty imposed was that the liquor licence was cancelled. There had been six (6) previous breaches by the Licensee (1 x sell liquor to an intoxicated person and 5 book-up breaches) and the employee selling the alcohol was fully aware the customer was a minor. In this case the Licensee has no previously recorded breaches and, I have reached the conclusion his actions were not deliberate, therefore, the cancellation of the licence would not be an appropriate penalty.
- 18) In the *Berrimah Supermarket* case there was one sale of alcohol to a minor by the Licensee and the Commission determined:
- "to impose a penalty of five (5) days but discounted due to the circumstances surrounding the breach and the long standing compliance with licence conditions of the Licensee. On this basis and with the discount, it determined a penalty of a two (2) day suspension for serving a minor."*
- 19) Whilst parallels can be drawn between the *Berrimah Supermarket* case and the current matter before the Commission there are differences. The Licensee of the Douglas Street Supermarket had received a verbal warning from Licensing Inspectors earlier in the year about allegations of serving alcohol to minors. Also, there are dissimilarities when considering any discount to be applied. Both the Licensees had a long, unblemished record, their actions were not found to be deliberate and they admitted the breaches early in the investigation but at the time of the incident the Licensee of the Berrimah Supermarket was understandably preoccupied and distracted with a requirement to attend at the morgue to organise his wife's funeral which was scheduled for the following day. When a request for cigarettes and alcohol was referred to the Licensee by the employee, who had requested identification from the minor and asked her age, the Licensee believed she was mature and of legal age and allowed her to purchase alcohol. No such excuse can be attributed to the Licensee of the Douglas Street Supermarket and no attempt was made to identify the age of the customer.

- 20) For the first breach under Section 106C of the Act, namely on 26 October 2007 I find that the appropriate penalty is a licence suspension of six (6) days which should be discounted to take into account Mr Ryan's unblemished record and his previous initiatives in reducing the sales of certain types of alcohol by two (2) days.
- 21) The second breach occurred the following day, 27 October 2007, and involved a different minor. I determine the penalty for this breach should be a licence suspension of eight (8) days and, whilst it cannot be considered a first offence or decided concurrently with the previous breach, the close proximity in dates and the fact that the minor purchasing the alcohol was seventeen (17) years and seven (7) months leads me to allowing a discount on the penalty of two (2) days.
- 22) The third breach, on 17 November 2007, indicates a regular pattern of selling alcohol to minors and this should be reflected in any penalty imposed. I determine a licence suspension of twenty-eight (28) days.
- 23) In relation to the breach under Section 102 of the Act, the Commission has clearly stated that sale of takeaway alcohol to an intoxicated person will be considered a very serious breach of the Act. In its decision of 24 April 2007 on a breach of Section 106 of the Act by the *Walkabout Tavern* the Commission stated:
- "The Commission takes very seriously a breach of the Liquor Act which involves serving take-away to an intoxicated person as the intoxicated person is being allowed to go into the community with more alcohol to consume with possible detriment to them selves or the community in general."*
- 24) When considering penalty for this breach by the Licensee of the Douglas Street Supermarket I have taken into consideration the penalties imposed in two similar matters, namely, the *Everley Parap Supermarket* on 22 September 2006 and in the above *Walkabout Tavern* on 15 May 2007.
- 25) In the *Everley Parap* matter the Commission considered that an appropriate penalty was a suspension of the liquor licence for the premises for ten (10) days. In the *Walkabout Tavern* decision the licence was, also, suspended for ten (10) days of which seven (7) days was a suspended suspension for a period of twelve (12) months. The deferment of part of the suspension was because it was a first offence by the Licensee, and as well as taking action to restrict the sales of particular drinks he had been extremely proactive in the community regarding the responsible drinking of alcohol.
- 26) This is a first offence, by the Licensee of the Douglas Street Supermarket, under Section 102 of the Act, the customer whilst intoxicated was not so severely intoxicated as in the two cases outlined above and some credit can be given for the Licensee's previous actions in restricting sales of certain types of alcohol. I consider the appropriate penalty to be a suspension of the liquor licence for a period of ten (10) days but discount the penalty by six (6) days.

27) The total penalty of forty two (42) days licence suspension is deemed appropriate for the four (4) breaches of the Act by the Licensee of the Douglas Street Supermarket. However, Counsel for the Licensee has requested that the total penalty be re considered under the “totality principle”.

28) This principle is clearly described in High Court case of *Mill v The Queen (1988) 166 CLR 59*:

“The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is “just and appropriate.”

29) This principle was reiterated, among many other similar decisions, by Gaudron and McHugh JJ in *Griffiths v The Queen (1989) 167 CLR 372 at 393*:

“It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effect of the sentence on the offender”

30) The cases mentioned above refer to the imposition of concurrent or consecutive prison sentences. However, the principle can equally apply in reaching a decision of whether a suspension of a liquor licence should be served or deferred for a period of time.

31) It is clear from the information provided to the Commission that the Douglas Street Supermarket is the sole interest of the Licensee. He lives on the premises and works there seven (7) days a week every week from 6.00 am to 8.00 pm. The supermarket had become his life as well as his livelihood. The profit from this livelihood, which forms the weekly salary for the Licensee, is some \$300 per week of which it is estimated that half relates to the sale of alcohol. The proposed forty two (42) days liquor licence suspension will have a major effect on the Licensee and his daily life and could lead to the permanent closure of his business.

32) Therefore, I have decided that half of the penalty, namely twenty-one (21) days will be a suspended suspension for a period of twelve (12) months from the date of this decision.

DECISION

33) The Commission has determined the following penalties in relation to the liquor licence of the Douglas Street Supermarket:

- a. For the breach of Section 106C of the Act, namely supply of liquor to a minor on two (2) occasions on 26 October 2007, to impose a penalty of a licence suspension of four (4) days.

- b. For the breach of Section 106C of the Act, namely supply of liquor to a minor on 27 October 2006, to impose a penalty of a licence suspension of six (6) days.
- c. For the breach of Section 106C of the Act, namely supply of liquor to a minor on 17 November 2007, to impose a penalty of a licence suspension of twenty-eight (28) days.
- d. For the breach of Section 102 of the Act, namely selling liquor to an intoxicated person on 23 November 2007 to impose a penalty of a licence suspension of four (4) days.
- e. Of the forty-two (42) total days when the licence is suspended twenty-one (21) days will be deferred for a period of twelve (12) months from the date of this decision. If the same, similar or a more serious breach of the licence condition occurs within a period of twelve (12) months from the date of this decision, the twenty-one (21) days deferred suspension of the liquor licence will apply consecutively at a date determined by the Commission and will be in addition to any other penalty imposed by the Commission for the further breach. If no further breaches of the Act occur in the twelve (12) months period this "deferred suspension" will cease.
- f. The twenty-one (21) days of licence suspension that are to be served shall commence on the next Monday following the publication of these written Reasons for Decision.

Mrs J M Large
PRESIDING MEMBER

11 November 2008