

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: **FERNANDA'S**

LICENSEE: MRS FERNANDA DE SOUSA

PROCEEDING: SEC. 48 COMPLAINT
 by MS JUDY MURRAY

HEARD BEFORE: Mr John Withnall (Presiding)
 Mrs Mary Ridsdale
 Mr Brian Rees

DATE OF HEARING: 01 November 2000

DATE OF DECISION: 16 November 2000

APPEARANCES: MS JUDY MURRAY, in person
 MRS FERNANDA DE SOUSA, in person
 MR JOHN STIRK, Counsel Assisting the Commission

At about 11 a.m. on Thursday 31 August 2000 the complainant Judy Murray and colleague Michael Dougall met at Fernanda's Cafe & Restaurant in Tennant Creek. They are both members of the "beat the Grog" committee in Tennant Creek, the complainant being the Chairperson. The purpose of the meeting was said to be for the complainant to bring Mr Dougall up to date in relation to an earlier meeting of the Committee which Mr Dougall had not attended. Ms Murray is Manager of Alcohol Aftercare with the Anyinginyi Congress Aboriginal Corporation.

Ms Murray's surprise at the scene she encountered at Fernanda's is detailed at folio 1 of the hearing brief, Exhibit 1. The allegation of intoxicated Aboriginal persons on the premises was accepted by the Commission as a complaint under section 48(1) of the Liquor Act. It is to be recorded that the hearing proceeded unscheduled on 1st November 2000 in Tennant Creek at the request of the licensee on the day and with the consent of the complainant.

It is also to be noted that the matters complained of occurred on a "Thirsty Thursday", when so-called front bars in Tennant Creek are closed and lounge or "back" bars in the hotels do not open until 12 noon. It is obvious from Ms Murray's written complaint and her evidence during the hearing that she was surprised to encounter a noisy public bar environment instead of the quiet restaurant she was accustomed to and was expecting. As Ms Murray became aware, however, Mrs De Sousa's licence permitted a public bar type of operation at this time, albeit to Mrs De Sousa's own surprise at discovering this to be the situation **after** she had bought the business and took a transfer of the licence in October 1999.

The premises had previously been known as the Dolly Pot, and operated on a liquor licence apparently tailored to the rather unusual conjunction of award-winning restaurant and public squash courts. The licence does not require the service of liquor to be in conjunction with a meal, nor the premises to trade predominantly as a restaurant; it is an unconditional "on-licence". It is merely a house rule of Mrs De Sousa that persons sitting in the restaurant area within the premises need to order food to be able to be served liquor in that area.

Complainant and licensee agree that Ms Murray complained almost immediately about the noise, given the purpose of her visit. Mrs De Sousa promptly offered the use of her small conference room, an offer declined by the complainant not only because she knew the room to be somewhat claustrophobic but also, she told us, because of her fascination with the scene in which she found herself. During a view of the premises, Commission members inspected the conference room. It seemed to us to be pleasantly functional, with several windows to the outside of the building, but of course claustrophobic indicators for different persons are not susceptible to any helpful objective assessment.

Mrs De Sousa and her daughter Elizabeth, who was attending bar at the time, concede a noise level consistent with a public bar operation, and point out that if Ms Murray was to attend the premises during squash competitions she would be even more incommoded by the noise factor if she was seeking a venue for a quiet discussion.

It is to be noted that the noise aspect of Ms Murray's unhappiness was contained within the premises; this is not the usual complaint of *leakage* of disturbing levels of noise to the detriment of persons other than patrons of the premises. The remedy of a *patron* who finds the inside environment too noisy is obvious. This seems to have been acknowledged by Ms Murray and Mr Dougall by way of a conversation with Mrs De Sousa as to what sort of patronage she wanted to encourage.

It seems to the Commission that given the operating parameters of the licence, the internal noise level is not a matter for any determination on our part in the absence of any complaint or evidence of noise pollution or disturbance beyond the premises. Mr Dougall conceded in evidence that the real issue was intoxication, and the Commission is in accord with that view.

Ms Murray testified that she personally knew from her work about 25 to 30% of the persons present, and that two who came up and spoke to her she knew to be intoxicated. Several of those whom she knew purchased beer at the bar while in her view intoxicated. Mr Dougall testified that in his estimate some half dozen persons were intoxicated, walking in a swaying manner and unable to stand up straight, but added that most people whom he saw in that condition went straight to the outside area upon entry to the premises without going to the bar (thereby raising the issue of a breach of section 121(1) of the Liquor Act rather than the breaches of section 102 raised by Ms Murray's evidence).

What is significant, in the Commission's determination of this matter, is that neither Ms Murray nor Mr Dougall pointed out any specific persons to Mrs De Sousa as being intoxicated at the time, so that at this remove in time Mrs De Sousa was necessarily limited in her evidence at the hearing to a general denial.

Mrs De Sousa has been a resident of Tennant Creek for almost twenty years. She testified that she does not permit intoxicated people on the premises, and refuses to sell to them. She says that the Aboriginal persons who come in at 10 a.m. know they have to wear shoes, "dress up" and be of good behaviour. She plays country music, people get happy but not intoxicated. Many walk in a swaying fashion after only a drink or two, but it normally does not indicate intoxication. There is no swearing or fighting. She maintains a safe environment for kids. The Aboriginal patrons are normally gone by twelve noon, as she insists that they either eat there at that time or make way for people seeking to patronise a lunchtime environment.

Elizabeth De Sousa is eighteen years old, and is a full time employee of her mother. She was born in Tennant Creek, and testified that she has grown up with Aboriginal people and knows when they are drunk.

The Aboriginal people who come in of a morning she describes as "nice", happy and noisy but polite. When someone occasionally swears, he will immediately apologise. If someone starts to get out of hand, such person will be put out. Elizabeth tells us that she does not serve anybody who is intoxicated.

Constable Brian Bryce gave evidence of having attended Fernanda's on routine patrol on 31 August: Ms Murray remembers his attendance early in the hour or so that she was there. Constable Bryce testified that there were about sixty persons in

the premises, that he removed one person at the request of that person's relatives ("take him out because he is drunk and causing humbug") but that the other patrons could not be said to be "seriously affected by alcohol" although "on the way". He had not returned later to check on the situation.

The Commission's preferred definition of intoxication was put to Constable Bryce, namely that of showing observable physical indication of faculties being affected by alcohol, but his response was that he had not observed the patrons long enough to be able to conclude that any were intoxicated.

The evidence of Ms Murray is such as to cast an onus on Mrs De Sousa to disprove the intoxication of the relevant customers; there is a reverse onus in relation to complaints of breaches of section 102 of the Liquor Act. That issue was recently addressed by the Commission in a decision in relation to Scotty's Place in Alice Springs in February of this year. Such decision read in part as follows:

The making out of a case to answer has different consequences for the licensee as regards the different sections of the Liquor Act which, on the case of the complainant, appear to have been breached. No reverse onus attaches to Section 121(1) (failure to exclude), as it does attach to Section 102 (serve intoxicated persons effectively becomes failure to serve only non-intoxicated persons).

We deal first with Section 121(1). The onus in this regard remains with the complainant, who needs to positively persuade us (along *Briginshaw -v- Briginshaw* lines), that a breach of that section has occurred. The task for the licensee therefore in making answer is to make such inroads into, or explanation of, the case of the complainant such that the Commission does not feel positively persuaded of the breach having occurred.

Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together (we would add) with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that (*the patron*) was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred.

The nature of the reverse onus in section 102 in proceedings such as the present was raised in an earlier matter in April/May 1997, also involving Scotty's Place at which time the Commission had this to say on the issue of the reverse onus:

(*The*) second submission was that the reversal of the normal onus of proof now included in Section 102 since the amendment in 1996 is applicable only where the proceeding is such as can have a "defendant". That is, (*it is argued*) the provision for reverse onus cannot apply to the present proceeding in that this proceeding is not a prosecution.

There is no definition of defendant in the Liquor Act. Nor could the Commission (*be directed*) to any relevant definition or provision in any other Act in support of his submission. That being so, the Commission does not see the word "defendant" as being restricted to or signposting any particular jurisdiction or type of

proceedings, but as referable to any “licensee or a person employed by a licensee” who contests an allegation of breach of Section 102 in any empowered forum.

If the licensee chooses to contest (that is, to defend) the allegation of a breach of Section 102 having occurred as alleged, then the burden of proof as to the non-intoxication of the person supplied with liquor lies on that licensee.

In arriving at this determination, the Commission concedes, however, that as a matter of law the reverse onus is able to be discharged on the balance of probabilities.

Mrs De Sousa’s legal position following Ms Murray’s evidence was therefore that the evidentiary onus on Ms Murray in relation to the complaint shifted to Mrs De Sousa, who had to prove to us, on the balance of probabilities, that the patrons whom Ms Murray alleges were served beer while intoxicated were in fact not intoxicated. This is a difficult enough task for a licensee in any complaint situation, but well nigh impossible where the persons alleged to have been intoxicated were not pointed out or identified to the licensee at the time, such that the licensee has been unable to make or pass on to us any observations as to any specific persons on the day but is reduced to testifying as to the trading environment in general.

This is no criticism of either Ms Murray or Mr Dougall, who are not professional complainants, and who at the time would not have been thinking ahead in terms of making out an evidentiary case before the Licensing Commission, and who in all likelihood have never heard of the legal authority of *Briginshaw-v- Briginshaw* referred to above. That case however allows for the burden of proof in matters involving an assessment of the balance of probabilities to vary according to the nature, importance or context of a particular issue. Given Mrs De Sousa’s evidentiary handicap in not having had the opportunity to herself assess the condition of those persons noted by Ms Murray and Mr Dougall but not drawn to her attention, the Commission is of the view that the licensee’s evidence in general denial has been all it could reasonably have been expected to be, and as persuasive as it needed to be in order for the complaints not to be upheld.

This is no reflection whatsoever on the credibility of either Ms Murray or Mr Dougall. The Commission accepts that they both gave truthful evidence as to genuine impressions, and it was Ms Murray herself who remarked on the problems inherent in different perceptions by different people. What has happened is that as a matter of law we have allowed two different standards of proof in relation to the respective positions of complainant and licensee. The Commission’s usual standard of proof in relation to complaints is that of positive persuasion, and because we have allowed Mrs De Sousa a lower standard of proof in relation to her reverse onus the Commission is unable to be positively persuaded that any patrons in the premises that morning were intoxicated to the point of the licensee being in breach of the Liquor Act.

One of Ms Murray’s submissions can be seen to have been outside our foregoing deliberations; she made the point that regardless of differences in perceptions of intoxication between herself and the licensee, the removal of the person by Constable Bryce should be seen to be confirmation that there was at least that one

intoxicated person on the premises. On reviewing the Constable's evidence, however, we find that he did not actually offer any opinion on the condition of the person he removed. He said that he removed such person because the person's relatives considered him to be drunk and causing trouble by humbugging. Mrs De Sousa confirmed that it was the man's sister who asked the Constable to remove him, and added her opinion that the man was walking properly when he left.

Further though, there was no evidence that such person had been served any liquor on the premises, and no evidence as to what indicators of intoxication should have been observed by Mrs De Sousa such that she herself should have excluded him prior to the Constable's arrival. To uphold the complaint on the basis of that one patron would be unsafe on the evidence.

The dismissal of the complaints, however, does not conclude the matter. The Commission is empowered under section 49(4)(a) of the Liquor Act to vary the conditions of a licence after a hearing, regardless of the outcome of the hearing. The members of the hearing panel admit to being as surprised as Mrs De Sousa tells us she was herself to discover that her licence permitted her to commence selling liquor at 10 a.m., even on Thursdays. This does stand out as an anomaly in the face of the intended effect of what is referred to as the Tennant Creek restrictions. We agree with Ms Murray that it is differences such as this in the application of the restrictions that can be expected to lead to problem areas.

In terms of Mrs De Sousa's legitimate expectations in relation to trading hours, she quite obviously did not expect to receive a licence with those trading hours when she bought the business after the Tennant Creek restrictions had been left in place on review by the Commission at the end of 1998. She was surprised, and we are surprised. Admittedly her premises are neither a hotel nor a bottleshop, but nor are they a club or a restaurant. Mrs De Sousa is in a unique situation in the town, especially on Thursdays. Such is her awareness of her licensed situation being "different", to use her own description, that at one stage she asked Inspector Chris McIntyre to remove the trading time of 10 to 12 on Thursdays from her licence.

It was obvious on the evidence that Mrs De Sousa has been apprehensive about **electing** not to open between 10 and 12 on Thursdays without the authority or imprimatur of the Commission, and although she would now like those hours left as they are to be more attractive a proposition to a prospective purchaser of the business, it is clear that she is expecting the Commission to address the issue of her Thursday opening time. Also, it can properly be remarked that any prudent prospective purchaser of this or any other licence in Tennant Creek should expect to have to negotiate trading times with the Commission at the transfer stage in any event.

The view of the premises conducted by the Commission revealed an obviously well-run business having the look and feel predominantly of a restaurant operating within the "liquor without a meal" provisions, albeit with the squash courts attached. Mrs De Sousa in evidence constantly referred to the premises as a restaurant, even while emphasising that she has a "tavern" licence. The business name is that of a "cafe and restaurant".

Opening time for restaurants generally throughout the Territory is 11.30 a.m. The Commission is of the view that in the current climate of liquor availability in Tennant Creek, Mrs De Sousa should refrain from liquor sales before 11.30 a.m. at least on Thursdays, and her licence will be varied accordingly. No other changes are made; she still retains a "tavern" type licence, and her trading hours other than on Thursday mornings remain unaffected.

The variation will take effect upon Mrs De Sousa's receipt of a new copy of the licence as now varied.

John Withnall
(Presiding Member)
16 November 2000