

Neutral Citation No. [2011] NIMag 2

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **11/04/11**

DIRECTOR OF PUBLIC PROSECUTIONS

Complainant

And

MARK DRUMM

Defendant

District Judge (MC) McNally

MARK DRUMM has been charged with permitting the consumption of intoxicating liquor on licensed premises other than during the permitted hours contrary to Article 41(1)(a)(ii) and (2) of the Licensing (N.I.) Order 1996 (hereafter called "the Order").

The facts are not in dispute and are as follows:-

1. The Defendant is the licensee of a public house in Enniskillen known as Magees Spirit Store.
2. On 1st September 1997 the County Court in Enniskillen granted an application under Article 44 of the Order extending the "permitted" hours until 1.00 a.m. The terms of the order on the license are as follows:-

“The Court of Summary Jurisdiction on the 1st day of September 1997 by order made under Article 44 of the 1996 Order directed that on the following specified days namely Monday to Sunday other than on Christmas Day, Easter Day or Good Friday in the licensing period commencing on the 1st day of October 1997 in the part(s) of the premises specified in the order on weekdays, the hours from 11 in the evening to 1 in the morning of the day next following (on Sunday not being 31st December from 10 in the evening to 1 in the evening (on Sunday being 31st December from 10 in the evening to 1 in the morning of the day next following shall in addition to the hours mentioned in Article 42 of the said order be included in the permitted hours for the premises. The part(s) specified in the order (is)(are) as follows:-

And which (is)(are) particularly delineated on the plan lodged in court.

Dated this 1st day of September 1997.

N.B. This order remains in force until revoked or rescinded by the court”

3. On 16th June 2010 at 00.40 a.m. the police noted thirteen people on the premises consuming alcohol.
4. No live entertainment or substantial refreshment was being provided.

SUBMISSION

5. Mrs. Taggart, for the Prosecution, submits that the consumption of alcohol at 00.40 hours is outside the permitted hours as no live entertainment has been provided in accordance with Articles 44(2) and 44(8).

6. Mr. Fahy B.L. on behalf of the Defendant states that there was no breach of the permitted hours as the extension under Article 44 had been validly obtained, that the Defendant was in possession of an entertainment license from Fermanagh District Council dated March 3rd 2010, and that the Defendant habitually provided entertainment in the form of live music and quizzes, his premises having designated areas for bands and dance floors.

THE LAW - THE LICENSING (NORTHERN IRELAND) ORDER 1996

7. Article 41

“41. – (1) Except as permitted by or under this Order, a person shall not –

- (a) himself or by his servant or agent –*
 - (i) sell intoxicating liquor in licensed premises, or*
 - (ii) permit the consumption of intoxicating liquor in licensed premises, or*
- (b) purchase intoxicating liquor in licensed premises, or*
- (c) consume intoxicating liquor in licensed premises, or*
- (d) take intoxicating liquor from licensed premises, except during the permitted hours.*

(2) Any person who contravenes this Article shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) This Article shall not apply to licensed premises such as are mentioned in Article 53(1) at an international airport."

Article 42

"42. – (1) Subject to the succeeding provisions of this Part, the permitted hours for premises of a kind mentioned in Article 5(1), except premises of a kind mentioned in Article 5(1)(b) or a place of public entertainment, are the hours –

- (a) on week-days, other than Good Friday or Christmas Day, from half past 11 in the morning to 11 in the evening; and*
- (b) on Good Friday from 5 in the afternoon to 11 in the evening; and*
- (c) except in the case of premises of a kind mentioned in Article 5(1)(a) with respect to which a direction under Article 7(10) or 15(5)(a) is in force, on Sunday or Christmas Day from half past 12 in the afternoon to 10 in the evening.*

(2) The permitted hours for premises of a kind mentioned in Article 5(1)(b) are the hours –

- (a) on week-days, other than Christmas Day, from 8 in the morning to 11 in the evening; and*
- (b) on Sunday, not being Christmas Day or Easter Day, from 10 in the morning to 10 in the evening.*

(3) The permitted hours for a place of public entertainment are that part of the hours mentioned in paragraph (1)(a) and (b) and, in the case of a theatre, paragraph (1)(c) which comprises –

- (a) the period of an entertainment; and*
- (b) periods, not exceeding 30 minutes in each case, which immediately precede the commencement and immediately succeed the termination of an entertainment."*

Article 44

“44. – (1) Subject to Article 17(3), where part or parts of premises, which are or include premises to which this Article applies, are structurally adapted and used, or intended to be used, for the purpose of habitually providing, for the accommodation of persons frequenting it, such entertainment or refreshment as is mentioned in paragraph (2)(i), (ii) or (iii) and the sale of intoxicating liquor is ancillary to that entertainment or refreshment –

- (a) a county court which grants a licence or declares a licence provisionally granted to be final, on the application of the person applying for the grant or declaration, or*
- (b) a court of summary jurisdiction, at any time, upon the application of the holder of the licence for those premises made in compliance with the procedure set out in Schedule 9,*

may make an order under this paragraph.

(2) An order under paragraph (1) may direct that, on such days as may be specified in the order, the hours –

- (a) on week-days from 11 in the evening to 1 in the morning of the day next following, and*
- (b) on Sunday, not being 31st December, from 10 in the evening to 12 in the evening, and*
- (c) on Sunday, being 31st December, from 10 in the evening to 1 in the morning of the day next following,*

shall, in addition to the hours mentioned in Article 42(1), be included in the permitted hours for any such part or parts of the premises specified in the order for the purposes of the sale, before the provision of –

- (i) musical or other entertainment; or*
- (ii) substantial refreshment; or*
- (iii) both such entertainment and refreshment;*

has ended, of intoxicating liquor for consumption on any such part or parts of the premises, and the consumption of such liquor.

(3) A court shall not make an order under paragraph (1) unless it is satisfied that –

- (a) *the business will be conducted during the hours mentioned in paragraph (2) and any period immediately following their termination in such a manner as not to cause undue inconvenience to persons residing in the vicinity of the premises; and*
- (b) *the hours mentioned in paragraph (2) will not cause undue inconvenience to persons residing in the vicinity of the premises.*

(4) *An order under paragraph (1) may be revoked by a court of summary jurisdiction on the application of the holder of the licence.*

(5) *Where, upon complaint made under Part VIII of the [1981 NI 26.] Magistrates' Courts (Northern Ireland) Order 1981, a court of summary jurisdiction is satisfied –*

- (a) *that the business carried on in premises to which an order under paragraph (1) applies is being conducted during the hours mentioned in paragraph (2) or any period immediately following their termination in such a manner as to cause undue inconvenience to persons residing in the vicinity of the premises; or*
- (b) *that such hours are causing undue inconvenience to persons residing in the vicinity of the premises; or*
- (c) *in the case of a complaint made by the sub-divisional commander of the police sub-division in which the premises are situated, that the specified part or parts of the premises are not being used for the purpose of habitually providing entertainment or substantial refreshment or both entertainment and substantial refreshment, as the case may require,*

the court may –

- (i) *revoke the order; or*
- (ii) *modify the order or, in relation to the order, the hours mentioned in paragraph (2); or*
- (iii) *make the continuance of the order subject to such terms and conditions as the court thinks fit.*

(6) *Nothing in this Article shall permit an order under paragraph (1) to authorise the sale of intoxicating liquor –*

- (a) *on Christmas Day, Easter Day or Good Friday, or*
- (b) *to a person admitted to the premises –*
 - (i) *less than 30 minutes before the end of the hours mentioned in paragraph (2), or*
 - (ii) *where the provision of entertainment or substantial refreshment or both entertainment and substantial refreshment is due to cease before the end of those hours, less than 30 minutes before that cessation.*

(7) *Nothing in paragraph (2) shall require the provision of substantial refreshment during the 30 minutes before the end of the hours mentioned in that paragraph.*

(8) *In this Article “entertainment” does not include any form of entertainment given otherwise than by persons actually present and performing.*

(9) *No part of any premises shall be treated for the purposes of this Article as used, or intended to be used, for the purpose of habitually providing entertainment or substantial refreshment or both entertainment and substantial refreshment unless it is used, or intended to be used, for the purpose of providing such entertainment or refreshment during the hours mentioned in paragraph (2) and for a substantial period preceding the end of the general permitted hours mentioned in Article 42(1) on every day or on particular days in every week, any break for a period or periods not exceeding 2 weeks in any 3 successive months, or on any special occasion, or by reason of any emergency being disregarded.*

(10) *The premises to which this Article applies are –*

- (a) *an hotel;*
- (b) *a restaurant;*
- (c) *a conference centre;*
- (d) *a higher education institution;*
- (dd) *an indoor arena;*
- (e) *any part of premises of a kind mentioned in Article 5(1)(a) which, in the case of a part specified in an order under paragraph (1) where substantial refreshment is to be habitually provided, are structurally adapted and used, or intended to be*

used, for the purpose of providing persons frequenting the premises with a main table meal at midday or in the evening, or both."

DECISION

8. There is no doubt that in this case the Defendant, by his servant or agent, permitted the consumption of intoxicating liquor in licensed premises. The sole issue is whether he did so outside the permitted hours.

9. At first sight the endorsement on the licence of the order granted by the County Court on 1st September 1997 under Article 44 may lend some support to the Defendant's submissions.

The endorsement simply states that the hours from 11 in the evening to 1 in the morning of the day next following shall be included in the permitted hours for the premises and does not make any reference to the provision of entertainment or refreshment.

Additionally, Article 44(5)(c) permits the police, in circumstances where the premises are not being used for the purpose of habitually providing entertainment or refreshment, to apply to the Court to revoke or modify the order.

The inference from the above, which the Defendant would urge me to take, is that this Court should not look behind the permitted hours as set out in the licence and that any breach, as in the circumstances

which pertain here, can be remedied solely by the police making an application under Article 44(5)(c).

10. As can be seen from paragraph 7, the general permitted hours, with the exceptions as mentioned in Article 42, are from 11.30 a.m. to 11.00 p.m. Under Article 44(1) a licensee may apply to a County Court or Magistrates Court to extend the permitted hours to 1.00 a.m. where part or parts of the premises are structurally adapted and used, or intended to be used, for the purpose of habitually providing, for the accommodation of persons frequenting it, entertainment or refreshment and the sale of intoxicating liquor is ancillary to that entertainment or refreshment.

11. It is important, in this context, to consider closely the terms of Article 44 to see what it actually permits. Firstly, Article 44(2) makes clear that the extension to the permitted hours is for the purposes of the sale BEFORE THE PROVISION OF -

- (i) musical or other entertainment; or
- (ii) substantial refreshment; or
- (iii) both such entertainment and refreshment

HAS ENDED, of intoxicating liquor for consumption on any such part or parts of the premises, and the consumption of such liquor.

Secondly, it is clear from Article 44(1) that the sale of intoxicating liquor is ANCILLARY to the entertainment or refreshment.

The Oxford Dictionary definition of “ancillary” is “subservient” or “subordinate to”.

Under the permitted hours in Article 42 the sale and consumption of alcohol are the primary purposes for which the premises are used but after 11.00 p.m. are secondary to the provision of entertainment or refreshment.

12. It appears to me, therefore, that the sale or consumption of alcohol after 11.00 p.m. is dependent upon the provision of entertainment or refreshment. If Article 44(2) makes it clear that the purpose of the order for additional permitted hours is for sale and consumption of alcohol before the entertainment has ended, how can it authorise the sale or consumption of alcohol if such entertainment has not even commenced? If the sale and consumption of alcohol after 11.00 p.m. is to be ancillary to the provision of entertainment how can it be anything other than the main purpose or objective if no entertainment is being provided?
13. It is clear from the terms of Article 44(8) that music from a juke box does not constitute “entertainment”.

14. I conclude, therefore, that in the absence of the provision of musical entertainment or substantial refreshment that there has been a breach of Article 42.

If intoxicating liquor is being sold and consumed after 11.00 p.m. outside of the purposes of Article 44 an offence has been committed and I convict the Defendant of the charge.

15. At this point, I think it is proper to highlight that, in my experience, the extension to the permitted hours under Article 44 is commonly abused throughout the jurisdiction and applicants frequently apply for an Article 44 extension for Monday to Sunday inclusive even though they do not intend to regularly utilise same by the provision of live entertainment on each of these nights. Indeed, in this particular case, the Defendant's evidence was that the entertainment he provided was a live band three nights per month with a table quiz 'now and again'. The Oxford English Dictionary definition of 'habitual' is 'done constantly or as a habit; doing something constantly or regularly; regular or usual'. I have absolutely no doubt that the level of entertainment which the Defendant purported to provide falls far short of 'habitual' provision of entertainment. Article 44(9) makes it clear that premises are not to be treated as being used for the purpose of habitually providing entertainment or substantial refreshment if they are not, in fact, being used for such purposes. Article 44(9) allows for a

break for a period not exceeding two weeks in any three successive months or an emergency arising e.g. a band not turning up. On the basis of the evidence in this case, the police could, in addition to this prosecution, make an application under Article 44(5)(c) to revoke or modify the order made under Article 44.

16. At this stage it may be helpful to set out some guidelines as to the practical effect of Article 44, in regard to the provision of musical or other entertainment, for the assistance of licensees in keeping within the law and for police in the exercise of their duty to ensure the law is complied with:-

- (a) When making an application under Article 44 a licensee should only include such days for which he intends to habitually provide live entertainment.
- (b) If live entertainment is provided, intoxicating liquor may be sold up to 1.00 a.m. and consumed up to 1.30 a.m. as ancillary to the provision of the live entertainment.
- (c) If no live entertainment is provided, intoxicating liquor may only be sold up to 11.00 p.m. and consumption is permitted only up to 11.30 p.m.
- (d) If no live entertainment is habitually being provided on nights for which an extension has been granted, the police may apply

to revoke or modify the order subject to the matters which may be disregarded in Article 44(9).

17. For example, if a band cancelled their appearance, a licensee would be committing an offence by selling intoxicating liquor after 11.00 p.m. in the absence of live entertainment.

18. However, such an event would not form the basis of an application to revoke or modify the order on the basis that such a circumstance was a one off event. However, if, as in this case, entertainment is not being habitually provided on the days for which the order was granted, an application may be made to revoke or modify the order in addition to any prosecution for a breach of the permitted hours. I should, of course, add that substantial refreshment may be provided in place of, or as well as, live entertainment.