

Neutral Citation No. [2015] NICA 49

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

Delivered: 02/07/2015

IN THE HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND  
ON APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES'  
COURTS (NORTHERN IRELAND) ORDER 1981

BETWEEN:

\_\_\_\_\_  
BRIAN MORRIS

Appellant;

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent.

\_\_\_\_\_  
Before: Morgan LCJ, Gillen LJ and Treacy J  
\_\_\_\_\_

**TREACY J (delivering the Judgment of the Court)**

**Introduction**

[1] This is an appeal by way of case stated from Dungannon Magistrates' Court following the conviction of the appellant/defendant ("the appellant") for two offences of allowing a person under the age of 18 to be in licensed premises during the permitted hours. The offences relate to a teenage disco held at 'Sense Nightclub', part of the Glenavon House Hotel in Cookstown, during which no alcohol was being sold and no children were drinking alcohol. The issue in the appeal is whether Sense Nightclub is "used exclusively or mainly for the sale and consumption of intoxicating liquor" under Art 58(1)(c) of the Licensing (NI) Order 1996 ("the 1996 Order").

**Background**

[2] The appellant is a Director of the Glenavon House Hotel, Cookstown. Complaints were laid on 18 November 2013 alleging that on the 28 June 2013 and 30 August 2013 he allowed a person under the age of 18 to be in licensed premises,

namely Sense Nightclub, during the permitted hours contrary to Art 58(2) and (10) of the 1996 Order.

[3] Following a contested hearing at Dungannon Magistrates' Court District Judge (MC) Meehan ("the District Judge") convicted the appellant of the offences on 14 April 2014. On 17 April 2014, pursuant to Art 147 of the Magistrates' Courts (NI) Order 1981, the appellant applied to the District Judge to state a case for the opinion of the Court of Appeal. The District Judge's Case Stated is dated 9 July 2014 but the Court Office stamp is 24 September 2014.

### **The Offences**

[4] The District Judge made the following findings of fact:

"(i) The appellant is one of the Directors of the Glenavon House Hotel Limited.

(ii) The Sense Nightclub is the commercial title of premises spanning levels 4 and 5 of the Glenavon House Hotel complex which premises are licensed for the sale and consumption of intoxicating liquor in the areas marked on the licensing drawing which is held at Dungannon Courthouse.

(iii) Since 1994 the Hotel has been running a popular teenage discotheque, latterly advertised as Club 13-17. It takes place on a Friday evening once a month - sometimes more often during school vacation periods. Each event attracts upwards of 1,000 people. The event takes place during hours permitted for the sale and consumption of intoxicating liquor. A considerable effort goes into ensuring that no alcohol is consumed at the event.

(iv) Police officers attended to inspect the event on 28 June 2013 and again on 30 August 2013 when they found that-

(a) no alcohol was on display. Optics were removed and refrigerators covered;

(b) the bar was closed for the sale of alcohol. Soft drinks only were served, in plastic cups;

(c) no person on the premises was observed consuming alcohol;

- (d) the youths present were well behaved;
- (e) there was no suspicion of any alcohol consumption; and
- (f) there was a high level of supervision by adults.

(v) Apart from this monthly teenage event, the licensed premises are used as a nightclub each Saturday, marketed as the Sense Nightclub. That is the core event at the licensed premises each week and the said premises are then used for the sale and consumption of intoxicating liquor in the usual way. The premises might also be hired out from time to time for other functions, such as wedding receptions, where likewise alcohol is sold and consumed. Occasionally other kinds of alcohol-free events are held on the licensed premises.”

### **Relevant Statutory Provisions**

[5] Under Art 3(1) of the 1996 Order it is unlawful for a person to sell alcohol for retail unless he has a licence to do so from premises stated in the licence. Art 5 lists the types of premises which are permitted to be ‘licensed’:

- (a) premises in which the business carried on under the licence is the business of selling intoxicating liquor by retail for consumption either in or off the premises;
- (b) premises in which the business carried on under the licence is the business of selling intoxicating liquor by retail for consumption off the premises;
- (c) a hotel;
- (d) a guest house;
- (e) a restaurant;
- (f) a conference centre;
- (g) a higher education institution;
- (h) a place of public entertainment;
- (i) a refreshment room in public transport premises;
- (j) a seamen’s canteen;
- (k) an indoor arena.

[6] In respect of a hotel, 'licensed premises' means the 'hotel premises' (Art 2(2)). Except for Sunday, Good Friday and Christmas day, or where a temporary extension has been granted, the normal permitted hours are 11:30am to 11:00pm (Art 42(1)). Art 58 places restrictions on children being on licensed premises and provides, inter alia:

“(1) During the permitted hours a person under the age of 18 shall not be in-

(a) any part of premises of a kind mentioned in Article 5(1)(a) which is-

(i) structurally adapted for the sale of intoxicating liquor for consumption off the premises; and

(ii) not connected by any internal means of passage open to customers with a part of the premises used for the sale of intoxicating liquor for consumption in the premises;

(b) any part of premises of a kind mentioned in Article 5(1)(b);

(c) any part of any other licensed premises which-

(i) contains a bar; or

(ii) is used exclusively or mainly for the sale and consumption of intoxicating liquor.  
[Emphasis added]

(2) The holder of a licence himself or by his servant or agent, or such a servant or agent, shall not allow a person under the age of 18 to be in any part of the licensed premises as mentioned in paragraph (1) during the permitted hours.

(3) A person shall not cause or procure any person under the age of 18 to go to, or to be in, any part of licensed premises as mentioned in paragraph (1) during the permitted hours.

(4) Paragraphs (1) and (2) shall not apply with respect to a person under the age of 18 who is in a part of premises mentioned in paragraph (1)(a) or (b) and is in the company of a person who is 18 or over.

...

(10) Any person acting in contravention of paragraph (1), (2), (3), (7), (8) or (9) shall be guilty of an offence and shall be liable on summary conviction-

(a) for a contravention of paragraph (1) or (7), to a fine not exceeding level 3 on the standard scale;

(b) for a contravention of paragraph (2), (3), (8) or (9), to a fine not exceeding level 4 on the standard scale.

...

(13) Nothing in this Article shall apply with respect to a person under the age of 18 who is-

(a) a child of the licence holder; or

(b) a person who has attained the age which is the upper limit of compulsory school age and is-

(i) employed by the holder of the licence under a contract in writing; or

(ii) receiving training under a scheme approved by the Department of Enterprise, Trade and Investment; or

(iii) engaged in a placement scheme as part of a further or higher education course; or

(c) resident in the licensed premises, but not employed there; or

(d) in a part of licensed premises as mentioned in paragraph (1) solely for the purposes of passing to or from some other part of the premises which is not such a part as aforesaid and to or from which there is no other convenient means of access; or

(e) in a refreshment room in public transport premises or in a room constructed, fitted and intended to be used for any purpose to which the holding of a licence is ancillary; or

(f) in any part of an indoor arena (which is not a room or other place set apart as a bar) containing a kiosk or other sales point from which food and

beverages, including intoxicating liquor, are made available for purchase.

...”

[7] Art 59 makes provision for ‘Children’s Certificates’ which permits children to be in designated areas of licensed premises, when accompanied by an adult, for the purpose of eating a meal. The phrase ‘bar’ within the statute is defined by the interpretation section merely as “an open bar” (Art 2(2)).

### **Pilkington v Ross**

[8] In Pilkington v Ross [1914] 3 KB 321 the appellant was the licensee of the Globe Inn beer-house in Leigh, Lancaster. Section 120 of the Children Act 1908 (“the 1908 Act”) provided that a licensee “shall not allow a child to be at any time in the bar of the licensed premises except during the hours of closing”. The 1908 Act defines ‘bar’ as meaning “any open drinking bar or any part of the premises exclusively or mainly used for the sale and consumption of intoxicating liquor”. The police found a woman drinking beer, sold to her by the appellant, in the kitchen of the public house together with two other customers. Her two year old daughter was also with her. The ground floor of the public house comprised the bar, parlour, tap room and the kitchen. The kitchen was fitted out to act both as a domestic kitchen and also as a drinking room for customers (there being a long bench with stools and a bell to ring for service). The appellant contended that the kitchen was mainly used as a domestic kitchen and, therefore, did not fall within the definition of ‘bar’ within the Act. The justices rejected this argument finding that simply because the kitchen was used domestically for certain portions of the day did not preclude them from finding that it was mainly used for the sale and consumption of intoxicating liquor during other portions of the day. The appellant appealed by case stated. Dismissing the appeal, Avory J held:

“If the appellant had satisfied us that the justices meant to find that they had to look at that particular period of the day when the offence was alleged to be committed and determine whether at that particular period the room in question was being mainly used for the sale and consumption of intoxicating liquor the case would, I think, have required further consideration. But as I read the case that was not what they meant. There was clear evidence before them that on every day, throughout the whole time that the house was open for business purposes, the kitchen was extensively used for the purposes of drinking. ... I think that the justices intended to find that the user of the room as a whole was mainly for the sale and consumption of intoxicating liquor, and that they were not precluded from so finding by the

mere fact that during certain portions of the day the room was used for ordinary domestic purposes.”

[9] Rowlatt J and Shearman J delivered concurring judgments. Rowlatt J said:

“I wish, speaking for myself, to guard against giving any countenance to the idea that for the purpose of ascertaining what is the main user of a room you can split the day up into parts and say that a room comes within the definition of a bar during certain parts of the day and does not come within that definition during others. It seems to me that this definition contemplates a room either being one which is open to children or one which is forbidden to them at all times. Any other construction would open the door to great danger to children, because in any case in which the justices had to go into the question whether a room was mainly used for the sale of intoxicating drink it would be open to the licensed person to say “Although this is the bar parlour of the public-house I can prove that at this particular time of the day there never was anybody supplied with drink or consuming it there”.”

Shearman J said:

“... what the justices have to consider is what is the regular and general user of the room. ... Those words [in section 108(1)] make it clear that it is intended to impress a regular character on each room in the premises, and to divide them into two classes, those which are prohibited to children and those which are not, and it is a question for the justices in each case to decide whether the room in which a child is found comes within the one class or the other.”

#### The District Judge’s Decision

[10] The District Judge noted that the prosecution did not resist the argument that Art 58(1)(c)(i) did not apply as there was no ‘open bar’ on the night in question. He, therefore, considered that the case turned on the correct interpretation of Art 58(1)(c)(ii). He held that the inclusion of sub-paragraph (ii) created an additional prohibition beyond that contained in sub-paragraph(i). Referring to Pilkington, and noting the remarks of Avory J, the District Judge said he must look to the use to which the licensed premises known as Sense Nightclub are put overall. He found that the nightclub was open every Saturday night and that the main purpose was the sale and consumption of alcohol [para 29]. It can be hired for functions such as

weddings at which alcohol may also be sold; whereas it is only used for the teenage disco once a month. He concluded that, in those circumstances, the licensed premises are used mainly for the sale and consumption of intoxicating liquor.

### **The Questions Posed in the Case Stated**

[11] In the Case Stated the District Judge has posed the following three questions for the opinion of the Court of Appeal:

(i) Was I correct in law in holding that Article 58(1)(c)(ii) of the Licensing Order (Northern Ireland) 1996 prohibits persons under the age of 18 from attending alcohol-free functions on licensed premises which at the material time are not being used for the sale or consumption of intoxicating liquor and does not contain a “bar” within the meaning of Article 2(2) of the said Order (viz., an “open bar”).

(ii) Was I entitled to find as a fact that the main use of the Sense Nightclub, being licensed premises owned and controlled by Glenavon House Hotel Limited, is for the sale and consumption of intoxicating liquor?

(iii) Was I correct in law in holding that where the main use of licensed premises is for the sale and consumption of intoxicating liquor, Article 58(1)(c)(ii) prohibits persons under the age of 18 from being in those premises during the licensed hours even though the said premises are not in fact being used for such sale and consumption while such persons are present?

### **The parties submissions**

[12] The appellant submits that a liberalisation and review of the licensing laws in Northern Ireland in the 1990s led to the 1996 Order. This liberalisation included children being permitted in licensed premises, under certain conditions, during permitted hours when alcohol was being sold; and premises being permitted to open outside of permitted hours if no alcohol was being sold. Furthermore, historically hotels have been treated differently from other licensed premises, as evidenced by the definitions in Art 2 of the 1996 Order. In relation to Art 58(1)(c)(ii) the appellant submitted that the part of the premises in which the teenage disco was being held was used for the purpose of the provision of entertainment, namely music and dancing; therefore, it was not “exclusively or mainly for the sale and consumption of intoxicating liquor”. The appellant contended that the District Judge erred in relying on the decision in Pilkington; that case related to the 1908 Act which has a markedly



different purpose to that of the 1996 Order. The mischief of Art 58(1) is to prevent children being exposed to alcohol; an occurrence which did not arise in the present case because no alcohol was being sold or on view. In any event, the sale of intoxicating liquor in the Sense Nightclub on other occasions is not the main or exclusive purpose; the sale of intoxicating liquor on those occasions is merely ancillary to the entertainment of music and dancing (Re Hegarty's Application [1991] NI 172).

[13] The prosecution contend that Art 58(1) should be interpreted in the context of the general prohibition on children being in licensed premises. The District Judge was correct to rely on Pilkington and any attempt to read into the legislation a proviso that alcohol must be being sold at the time is contrary to the general prohibition within the statute. Furthermore, the floor plans lodged with the licencing application clearly show the area of the nightclub where it was intended alcohol would be sold and consumed; this also being the area being used for the teenage disco.

### **Discussion**

[17] It is common case between the parties that the first limb contained in Art 58(1)(c)(i) does not apply as there was no "open bar" on the night in question. The central question raised by the appeal therefore turns upon the proper interpretation of Art 52 (1)(c)(ii) of the 1996 Order. That provision unambiguously provides that: "During the permitted hours a person under the age of 18 shall not be in ...any part of ...licensed premises which ...is used exclusively or mainly for the sale and consumption of intoxicating liquor". Art 58(2) provides that the license holder himself or his servant or agent shall not allow a person under the age of 18 to be in any part of the licenced premises mentioned in Art 58(1) during the permitted hours. By Art 58 (10) any person acting in contravention of, inter alia, Art 58(1) or (2) shall be guilty of an offence and shall be liable on summary conviction to a fine.

[18] The objective of these provisions is to safeguard children within the licensing context by restricting access to licensed premises, underpinned by criminal sanction for breach. The intended breadth of the prohibition is underscored by the carefully constructed and limited exceptions to the prohibition under Art 58 (13) - none of which are relevant to the present case.

[19] Furthermore Art 58(1)(c) contains not one but two separate clauses prohibiting minors from being in any part of licensed premises which (i) contains a bar or is used exclusively or mainly for the sale of intoxicating liquor.

[20] Similar, but not identically worded, protections were considered by the Divisional Court in Pilkington v Ross [1914] 3 KB 321. The appellant in the present case submitted that the proper construction of Art 58(1)(c)(ii) does not prohibit those under the age of 18 from attending alcohol-free functions in a portion of premises in which the bar is not being used for the sale or consumption of intoxicating liquor and had submitted to the District Judge that "the statutory purpose is not even engaged". However, this contention is not consistent with the approach of the Court

in Pilkington as referred to in the passages set out above. The prohibition under Section 120 of the 1908 Act provided that a licensee “shall not allow a child to be at any time in the bar of licensed premises except during the hours of closing”. The 1908 Act defined ‘bar’ as meaning “any open drinking bar or any part of the premises exclusively or mainly used for the sale and consumption of intoxicating liquor”. Rowlatt J rejecting the notion that you can split the day up into parts and say that a room comes within the definition during certain parts of the day and not within that definition during others, stated: “it seems to me that this definition contemplates a room either being one which is open to children or one which is forbidden to them at all times.” He recognised that any other construction would open the door to “great danger to children”. Shearman J considered that what mattered was “the regular and general user of the room” and that the words [in Section 108 (1)] “make clear that it is intended to impress a regular character on each room in the premises, and to divide them into two classes, those which are prohibited to children and those which are not...”.

[21] The problem with the contention of the Appellant that alcohol-free events for children are exempted under Art 58(1)(c)(ii) is that it ignores the two separate protections which are embodied in Art 58(1)(c). Whilst such an event might not offend the first of the protections in 58(1)(c)(i) because there was no ‘open bar,’ it overlooks or renders superfluous the second limb of the additional protection embodied in 58(1)(c)(ii) which expressly prohibits persons under-18 during permitted hours from being in “any part of ....licensed premises which ...is used exclusively *or mainly* for the sale of [alcohol]”. Had the legislature wanted to exempt alcohol-free events for children on licensed premises used exclusively or mainly during permitted hours it could have said so. Plainly it did not and it is not open to this court to build in such an exemption.

[22] By comparison in England and Wales the Licensing Act 2003 dispensed with the general prohibition against children on licenced premises. Under section 145(1) an offence is only committed if an unaccompanied child (under 16) is on the premises when they are open for the purposes of being used for the supply of alcohol for consumption there. It is noteworthy that in October 2005 the Department of Social Development published a consultation document entitled “Liquor Licensing - The Way Forward, Government Proposals to Reform Liquor Licensing in Northern Ireland”. This included a proposal to remove the general prohibition against young persons being present in licensed premises. These proposals we were informed have not been taken forward by the Executive.

[23] The evidence establishes that the appellant put a considerable effort into ensuring that no alcohol is consumed at the event. That however does not provide an answer to the fact that under the current law it is an offence for a person under-18 during the permitted hours to be in licensed premises used exclusively or mainly for the sale of alcohol.

[24] Whether or not licenced premises are used “exclusively or *mainly*” for the supply of alcohol is a matter of fact and degree. A determination of this issue is a fact sensitive matter depending on the usage of the relevant part of the premises overall

and not at a particular time. On the facts found in the present case the District Judge was plainly entitled to find that the premises were so used. Apart from the monthly teenage event the licensed premises are used as the Sense Nightclub each Saturday. That is the core event the “main purpose [of which] is the sale and consumption [of alcohol]” (para 29 of decision of DJ (MC) Meehan). That finding as to the main purpose of the nightclub is also sufficient to dispose of the point raised on appeal to the effect that the sale of alcohol is merely ancillary to the entertainment of music and dancing.

[25] Accordingly the court answers the questions posed in the case stated as follows:

Question (i) ‘Yes’;

Question (ii) ‘Yes’;

Question (iii) ‘Yes’.