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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES COURTS (NORTHERN IRELAND) ORDER1981

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BETWEEN:

PUBLIC PROSECUTION SERVICE

Complainant/Respondent;

-and-

CHARLES JOSEPH MCGOWAN AND JOHN PATRICK MCGOWAN

Defendants/Appellants.

_____

Before Kerr LCJ, Higgins LJ and Girvan LJ

_____

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of Mr Noel Dunlop, a deputy resident magistrate, sitting at Strabane Magistrates' Court on 23 February 2007 whereby he found both appellants guilty of offences under the Licensing (Northern Ireland) Order 1996. The offences related to the sale or the permitting of consumption of intoxicating liquor at licensed premises known as the Farmer's Home in Strabane on 12 July 2006. At that time, Charles Joseph McGowan was the licensee of the premises. The prosecution case in relation to one of the offences was based on a till roll which the police had seized from the premises. It purported to show that sale of alcohol had taken place at 1.40am on 12 July, forty minutes after the time that intoxicating liquor could be lawfully sold. The magistrate suspended the liquor licence on foot of the conviction of Charles Joseph McGowan, notwithstanding the fact that the licence had been transferred to a third party prior to the convictions.

[2] The questions posed for the opinion of the Court of Appeal concern two issues: firstly, whether the magistrate was correct to admit the till roll in evidence and, secondly, whether he had power to suspend the licence since it had been transferred to a third party before the appellants had been convicted.

The charges

[3] Each appellant had received a summons to appear on the following charges: -

1. Permitting the consumption of intoxicating liquor in licensed premises other than during permitted hours contrary to article 41(1)(a)(ii) and (2) of the Licensing (Northern Ireland) Order 1996.
2. Selling intoxicating liquor in licensed premises other than during permitted hours contrary to article 41(1)(a)(i) and (2) of the Order.
3. Permitting the consumption of intoxicating liquor in an unlicensed part of premises contrary to article 56(2) of the Order.

[4] Both appellants were acquitted of the first of these charges; both were convicted of the second and on the third charge John Patrick McGowan was acquitted, while Charles Joseph McGowan was convicted. A fine of £1000 was imposed on each of the appellants on each of the charges on which they had been convicted. The liquor licence was suspended for a period of three weeks in relation to the conviction of Charles Joseph McGowan on the charge of selling intoxicating liquor other than during permitted hours.

The magistrate's findings of fact

[5] The magistrate made the following findings of fact: -

1. The Farmers' Home is licensed under article 5(1) (a) of the 1996 Order for the sale of intoxicating liquor either on or off the premises. The premises consist of a building and a yard. The yard is not licensed but forms part of the premises.

2. On 12 July 2006, at 4.00am, Sergeant Irvine and Constable Duff, while on mobile patrol, entered the premises through the side gate of The Farmers' Home and observed about 25 people in the yard sitting and standing at picnic tables. People were drinking from beer and alcopop bottles and glasses. One of the police officers smelled some of the glasses and detected the odour of intoxicating liquor.

3. Another police officer, Constable Marley, entered the building, seized the till roll from the cash register and handed it to Sergeant Irvine.

4. After cautioning him, Sergeant Irvine showed the till roll to John Patrick McGowan. It indicated that a transaction for the sale of intoxicating liquor had taken place at 1.40am, 40 minutes after the permitted hours. Mr McGowan made no comment about the till roll. In particular, he did not represent that the time on the till roll was incorrect. He did not suggest that the people in the yard to the rear of the premises were attending a private party.

5. No evidence was called by the defence to challenge the accuracy of the time on the cash register.

6. Charles Joseph McGowan had seven previous convictions between 1994 and 2006 for breaches of the licensing legislation. Six of these were for permitting consumption of intoxicating liquor outside the permitted hours and one was for permitting persons on licensed premises outside the permitted hours. John Patrick McGowan had twenty two previous convictions between 1991 and 2005. Eleven of these were for permitting persons to be present on licensed premises outside the permitted hours. Eight convictions were for permitting consumption of intoxicating liquor outside the permitted hours and two were for selling intoxicating liquor outside the permitted hours. He had one conviction for failing to admit police in to licensed premises.

7. Charles Joseph McGowan was no longer the licensee in February 2007. The licence had been transferred in November 2006 to Larkfield Commerce Limited, a company of which the appellants were directors.

Findings on the law

[6] The magistrate recorded that the prosecution had accepted the fact that the till receipt was hearsay evidence but had argued that it was admissible under article 21 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 on the basis that the document was a statement created or received by a person in the course of a trade, business, profession or other occupation as a holder of a paid or unpaid office. The prosecution further submitted that under Rule 149(8) (a) of the Magistrates' Courts Rules (Northern Ireland) 1984 the court had a discretion to dispense with the requirement for the prosecution to give notice of its intention to adduce hearsay evidence if the court considered that it was in the interests of justice to do so. In fact, there is no Rule 149(8) (a) – it would appear that the resident magistrate was referring to the discretionary power contained in Rule 149AS (8) (a).

[7] The magistrate gave the following reasons for accepting the prosecution's submissions on this issue: -

1. Sergeant Irvine had shown the till roll to John Patrick McGowan and had pointed out the time record.

2. The 'notice to defendant' served with the summons listed the till roll as an exhibit. It stated that the prosecution intended to use it as evidence and advised the appellants of the right to inspect it.

3. The defence was therefore aware that the till roll formed part of the prosecution's case. The appellants were not caught unawares nor by surprise. The summons was served on the 28 November 2006 and the defence had ample time to challenge the accuracy of the till roll.

[8] On the question of suspension of the licence the magistrate expressed the view that the licence attached to the premises. It authorised the holder of the licence to sell intoxicating liquor and authorised the licensed premises for the sale of intoxicating liquor. It was therefore required that a suspension of the licence be ordered since there were no extenuating circumstances in relation to the original offence.

The questions

[9] The deputy resident magistrate posed the following questions for the opinion of this court: -

1. Was I correct in law in admitting the till statements in evidence?

2. Was I correct in law, having admitted the till statements in evidence, not to require the prosecution to establish the accuracy of the said till statements and in particular the accuracy of the times shown thereon?

3. Was I correct in law in relation to the defendant Charles Patrick McGowan in holding I had the power to suspend the licence given the fact that the licence had been transferred in November 2006 to Larkfield Commerce Limited?

The relevant statutory provisions

[10] Article 41 of the 1996 Order deals with the prohibition of sale of intoxicating liquor outside permitted hours. Paragraphs (1)(a) and (2) are relevant for this appeal. They provide: -

> "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
…
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."

[11] Article 73 (1) of the 1996 Order is concerned with suspension of liquor licences after conviction of the holder of the licence for certain offences. It provides: -

"73. - (1) Where the holder of a licence is convicted of –

(a) an offence under Article 3, 5(6), 41(1)(a), 50, 51, 55 or 60(1), committed in or in relation to the licensed premises, and that offence is committed within the period of 5 years from the commission by the holder of an offence under any of those Articles committed in or in relation to those premises, or

(b) an offence under section 13 of the Criminal Law Amendment Act 1885 (permitting premises to be a brothel), where the offence was committed in the licensed premises or in premises which adjoin or are near them,

the court shall, unless satisfied that by reason of extenuating circumstances in connection with the offence (which shall be specified by the order) the licence ought not to be suspended, by order, suspend the licence."

[12] It is to be noted that the power to refrain from making an order relates to the existence of extenuating circumstances in connection with the offence. Mr Martin McCann, who appeared for the appellants, argued that article 73 should be read as applying to the suspension of the licence held by the licence holder who was convicted of the offence. Otherwise, a transferee of the licence, who knew nothing of a pending prosecution against the former

licence holder and who had secured the transfer of the licence in good faith and for full value, could find the licence suspended through no fault of his, and that the dispensing power could not be prayed in aid to avoid the mandatory suspension.

[13] In relation to the admissibility of the till roll, the relevant provisions in the 2004 Order are articles 18, 19, 21 and 33 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. Article 18 deals with the admissibility of hearsay evidence. It is in the following terms: -

> "18. - (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if-
>
> (a) any provision of this Part or any other statutory provision makes it admissible,
> (b) any rule of law preserved by Article 22 makes it admissible,
> (c) all parties to the proceedings agree to it being admissible, or
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)-
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
> (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
> (d) the circumstances in which the statement was made;
> (e) how reliable the maker of the statement appears to be;
> (f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
(h) the amount of difficulty involved in challenging the statement;
(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Part affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

[14] Article 19 makes certain provisions as to the contents of statements that may be admitted and in relation to matters stated: -

"19. - (1) In this Part references to a statement or to a matter stated are to be read as follows.

(2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

(3) A matter stated is one to which this Part applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been-

(a) to cause another person to believe the matter, or
(b) to cause another person to act or a machine to operate on the basis that the matter is as stated."

[15] Article 21 deals with the admissibility of statements made in business or other documents: -

"21. - (1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if-

(a) oral evidence given in the proceedings would be admissible as evidence of that matter,
(b) the requirements of paragraph (2) are satisfied, and

(c) the requirements of paragraph (5) are satisfied, in a case where paragraph (4) requires them to be.

(2) The requirements of this paragraph are satisfied if-

(a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,
(b) the person who supplied the information contained in the statement ("the relevant person") had or may reasonably be supposed to have had personal knowledge of the matters dealt with,

…

(3) The persons mentioned in sub-paragraphs (a) and (b) of paragraph (2) may be the same person.

…"

[16] Article 33 deals with representations made other than by a person. It provides: -

"33. - (1) Where a representation of any fact-

(a) is made otherwise than by a person, but
(b) depends for its accuracy on information supplied (directly or indirectly) by a person,

the representation is not admissible in criminal proceedings as evidence of the fact unless it is proved that the information was accurate.

(2) Paragraph (1) does not affect the operation of the presumption that a mechanical device has been properly set or calibrated."

The admissibility issue

[17] In his skeleton argument, Mr Valentine, who appeared for the Public Prosecution Service, submitted that the statement in the till roll was a

business record asserting that a transaction took place at 1.40am. If it was a 'statement' made by a person within the meaning of article 19, it was admissible under article 21. The statement was made by the person who pressed the appropriate buttons on the cash register to enter the transaction. That person can reasonably be presumed to have performed or at least witnessed the transaction recorded and therefore to have the personal knowledge required under article 21. Alternatively, he argued that the hearsay was admissible under article 18(1)(d) in the interests of justice. By way of final alternative, he contended that the statement was made by the cash machine in which case it was made from information received by a person and admissible hearsay under article 33.

[18] Although in his skeleton argument Mr McCann had advanced rather more wide-ranging arguments on this issue, on the hearing of the appeal, he accepted that the statement would be admissible under article 33, if it was common knowledge that the cash machine on which the till roll operated was of a type that was more often than not in working order. He relied on the following passage from *Cross and Tapper on Evidence* 11th edition, page 40: -

> "Although in *Castle v Cross* [1985] 1 WLR 1372 the court omitted the qualification that the instrument must be one of a kind to which it is common knowledge that they are more often than not in working order, it is submitted that some such qualification is necessary. (Necessary caution) is accorded by not applying this presumption to instruments in respect of which there is no common knowledge that they are more often than not in working order. If there is no such knowledge, evidence should be adduced, though in the case of commonly used instruments, it may come from a regular operator, and not necessarily from a technical expert and is not required if the output of the machine is not itself put in evidence."

[19] The case of *Castle v Cross* concerned the correct operation of a breathalyser machine. In that case the defendant had purported to attempt to blow into the machine on four occasions, but each time the machine failed to register the breath. The defendant was prosecuted for failing to provide a specimen of breath under the relevant English road traffic legislation. During his trial he contended that the print out from the machine was hearsay. This argument was accepted by the magistrates' who directed that there was no case to answer. On appeal to the Divisional Court, it was held that the print out of the machine was 'real evidence' but the court also stated: -

> "The question of computer error does not enter into the ambit of this appeal. As I have already indicated, the justices made no finding which would permit the inference that the intoximeter was in any way defective or not in proper working order. It has to be assumed, certainly for the purposes of the submission of no case to answer, that it was in proper working order and that the proper procedure was followed."

[20] In so far as the passage from *Cross and Tapper* suggests that for the presumption to operate it will always be necessary that the machine was commonly known to be more often than not in working order, we would not accept it. We consider that the presumption must be that machines such as a cash register are operating properly and in working order in the absence of evidence to the contrary. The presumption of the correct operation of equipment and proper setting is a common law presumption recognised by article 33(2). In the modern world the presumption of equipment being properly constructed and operating correctly must be strong. It is a particularly strong presumption in the case of equipment within the control of the defendant who alone would know if there was evidence of incorrect operation or incorrect setting. The appellants gave no evidence here to rebut the reasonable presumption that the equipment was working correctly. We concluded therefore that the magistrate was right to admit the evidence.

The suspension of the licence

[21] In this case the licence was transferred after the offences had been committed and before the appellants were convicted. In *Scott v Cosgrove* [1931] NI 89 a licence had been transferred after an offence had been committed and before the court hearing. The magistrates declined to endorse the conviction on the licence or direct that it be entered in the register of licences, on the ground that the defendant had previously disposed of the public house and transferred the licence. Moore LCJ stated, at page 93: -

> "The transfer of the licence carried with it all liabilities, including of course any defects attaching to it for which Cosgrove was responsible. The magistrates should have directed the conviction to be entered in the register of licences, and should also have directed it to be recorded on the licence".

[22] Mr McCann suggested that it was difficult to discern the Lord Chief Justice's reasoning but that the language that he used might indicate an analogising with the situation that might pertain in contract. He pointed out,

however, that within the law of contract the common law did not recognise the transfer of a contractual liability without the consent of the creditor. We do not consider that Moore LCJ was essaying an analogy with contract. As Mr Valentine submitted, the transfer of the licence with the liability to have the licence suspended does not involve the transfer of a contractual liability, but a potential public liability.

[23] In effect, Mr McCann's argument amounted to the proposition that a licence could only be suspended where the person who was convicted remained the holder of the licence at the time of the conviction. We see no warrant for importing this extra requirement into the legislation. If one applies the natural and ordinary meaning of the words of the article to the present situation, there is no impediment in the way of suspending the licence even though it is no longer held by Mr McGowan.

[24] This does not bring about any injustice to transferees of licences, in our opinion. It is incumbent on those who acquire licences (and, incidentally, their legal advisers) to ensure that there are no proceedings pending or in prospect at the time that the licence is due to be transferred and to cater for the possibility of the mandatory penalty of article 73 taking effect in the arrangements made for the transfer.

[25] Mr McCann sought to persuade us that it would be inequitable to expose the holder of a licence to the mandatory suspension provided for in article 73 (1) (a) on being convicted on one occasion only of any of the offences mentioned in that provision, where there had been a previous offence by a former licence holder within the stipulated period. In the first place, if the provision has that effect (and for reasons that we shall give, we hesitate to agree that it has), we do not consider that this is disproportionate. Breach of any of the provisions referred to in article 73 (1) (a) is a serious matter and it would not be untoward, if there were recurring offences, that the suspension sanction should be available, whether or not the offenders are the same licence holder in respect of each conviction.

[26] In any event, however, we question whether the provision would be construed as Mr McCann suggests. The use of the definite article and the third person singular in referring to 'the licence holder' appears to indicate that it was intended that it should be the same licence holder who was convicted before the automatic suspension provision would be activated. It is unnecessary for us to reach a view on this issue, however, and we would prefer to defer expressing an opinion on the matter until it is necessary to do so.

[27] If article 73 (1) (a) required to be construed as Mr McCann suggested, this could bring about a significant inroad on the effectiveness of the suspension provision. The present case exemplifies this. By the relatively simple

expedient of forming a company, the appellants have sought to avoid altogether the risk of suspension of Mr Charles McGowan's licence when the record of his breaches of the licensing legislation have made him precisely the sort of licence-holder that the provision was designed to target. We cannot believe that it was the intention of the legislature to allow the provision to be circumvented in this way. Contrary to the claims made on behalf of the appellants, it is not necessary to apply a purposive interpretation to the provision in order to achieve the result that the licence was liable to suspension. We are satisfied that this is the consequence of the ordinary and natural meaning of the words of article 73 (1) (a).

Conclusions

[28] We answer each of the questions posed in the case stated, "Yes". The appeal is dismissed.