



DESMOND v Kennedy

1982 No. 430 S.S.
90

THE HIGH COURT

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN:-

GARDA MICHAEL DESMOND

Complainant

-and-

JAMES KENNEDY

Defendant

Judgment of Miss Justice Carroll delivered the 4th day of November 1983.

This is a case stated for the opinion of the High Court by District Justice James O'Sullivan on the application of the Defendant. The facts of the matter are set out in the case stated.

At the sitting of the District Court held in Kilmainham on the 15th of February 1982 the Defendant was charged with the offences as follows:-

"Whereas a complaint has been made to me that you the said Defendant being a person duly licensed to sell intoxicating liquor by retail at your licensed premises at "The Laurels", New Road, Clondalkin, County Dublin, within the Court area and District aforesaid, did, at a time when the sale of intoxicating liquor on the said premises was prohibited by law and when the said premises were by law required

to be closed, to wit, at 2.16 a.m. on the 2nd of June 1980 a
Monday;

1. Sell intoxicating liquor,
2. Expose intoxicating liquor for sale,
3. Open said premises for sale of intoxicating liquor,
4. Keep open said premises for the sale of
intoxicating liquor,
5. Permit intoxicating liquor to be consumed on the said
premises,
6. Permit persons to be on the said premises.

contrary to the statutes in such cases made and provided."

The facts as proved and admitted were as follows. Garda Michael Desmond gave evidence which was not challenged and which the District Justice accepted that on the 2nd of June 1980 at 2.16 a.m. he saw on looking through the windows of the said premises, the Manager of "The Laurels", Thomas Ryan inside the bar counter and supplying intoxicating liquor to persons outside the counter, who were consuming intoxicating liquor.

Cross-examined by Counsel for the Defendant the said Garda confirmed that all such persons as he observed in the said premises claimed to be

members of the staff of the said public house who claimed that their continued presence on the premises was to be explained by delays on making up the cash taken during the previous evening.

The Defendant gave evidence on oath and the District Justice found as a fact as follows: That he had been at the premises before closing time on the said night, that the Manager of the premises, Thomas Ryan was in charge of the business and premises and that he, James Kennedy had gone home to bed, the clearance and locking up of the premises at closing time being the responsibility of the said Manager. That the licensed premises is a lock-up premises and that no member of the staff had his or the owner's authority, approval or permission to remain on same after his or her duties had been completed, or to consume intoxicating liquor thereon outside the permitted hours, and that he was unaware that any employee had remained on the premises or consumed intoxicating liquor thereon as alleged. That while he was nominee for Clondalkin Inns Limited he did not take an active part in its operation or management, but delegated the management of the premises to Thomas Ryan who was the duly appointed full-time Manager, and who was charge as Defendant alleging that on the same occasion he (Thomas Ryan) did aid, abet and counsel the Defendant, James Kennedy in the commission of the alleged breaches of the Licensing Acts. That no prosecution had been taken

against Clondalkin Inns Limited as owner and that the Defendant, James Kennedy was not a person duly licensed to sell intoxicating liquor by retail.

The said Thomas Ryan gave evidence on oath and the District Justice found as a fact as follows: That he had instructions to clear the house on closing on the said night but by reason of delays in making up the cash during which time he caused or allowed the staff to remain on in the premises and later during that night on his own initiative he dispensed drink to the staff before they left the premises. That he did not charge the staff for such drink and that the giving of drink to staff on closing up of the premises was a custom of the trade. That he had no permission or authority to permit drink to be consumed on the premises outside permitted times nor was the said James Kennedy or the said owners, Clondalkin Inns Limited aware of same having been served or consumed.

Counsel for the Defendant applied to the District Justice to dismiss the summons at the close of the defence case on the following grounds:-

- (a) that having regard to the unreported decision of Mr. Justice Barrington in McMahon v. Murtagh Properties Limited delivered on the 20th of October 1961, the said company was the proper person to be charged with the offences complained of as it was

the holder of the licence and the licensee of the said premises

- (b) that the Defendant not being the Manager or in control of the business or present when the alleged offence took place had not committed any offence in law arising from the unauthorised acts by other persons of which he had no knowledge.

The District Justice refused to strike out the summons and at the request of the Counsel for the Defendant referred the following questions law to the High Court for determination:-

- (a) Whether he was right in law to refuse to dismiss the summons as applied for and
- (b) Whether there is evidence upon which he is entitled to convict the Defendant of the offences charged.

The case of McMahon .v. Murtagh Properties Limited and Thomas Wright (now reported at 1982 I.L.R.M. 342) must be distinguished from the present case. In that case the owner of the licensed premises in question was a limited company and the licence was held by their nominee, Thomas Wright, who was also Manager. The company was charged on the usual six count summons as holder of an on-licence in respect of the premises and Thomas Wright, the nominee, was charged with aiding and abetting the company. Thomas Wright was proved to have dispensed drink after hours. Barrington

held (at page 348 as follows:-

"First, a limited liability company is entitled itself to hold its licence without resorting to the device of having a nominee.

Secondly, it is not incorrect to refer to the nominee as being the "holder" of the licence as long as it is remembered that the company is the beneficial and as previously indicated, the real holder of the licence. The nominee must comply with all legal instructions of the company in relation to the licence, and he is, in effect, no more than a peg on which the company finds it convenient to hang its licence. This being so, if the company, through its agents, breaks the law in the running of the business, it is at all times liable as the holder of the licence. The nominee, provided he does no more than hold the licence, commits no offence, but if the nominee is also the Manager of the business or if he assists in the commission of an offence then he may be liable for aiding and abetting the company as holder of the licence notwithstanding that he is a nominal "holder" himself.

Under these circumstances, I think the learned District Justice was wrong to dismiss the summons against the defendants and I will send the case back for him to enter continuances."

In my opinion that judgment is not authority for the proposition that a nominee, provided he does no more than hold the licence, can commit no offence under the Licensing Acts. All that Barrington J., decided was that a nominee who does nothing except hold the licence cannot commit the offence of aiding and abetting. He was dealing with such a charge and his remarks must be construed in that context.

In this case the nominee of the company, the Defendant, was charged not with aiding and abetting but with breaches of the Licensing Acts on the usual six count summons "as a person duly licensed to sell intoxicating liquor by retail."

In this connection it is necessary to make one observation on paragraph 4 of the consultative case stated. The learned District Justice found as a fact that the Defendant was nominee for Clondalkin Inns Limited but he delegated the management of the premises to Thomas Ryan. At the end of that paragraph he also found as a fact that the Defendant James Kennedy was not a person duly licensed to sell intoxicating liquor by retail. This latter finding is actually a finding of law. Once it has been found that the Defendant was the nominee for Clondalkin Inns Limited it is a matter of law for this Court to decide whether he was or was not a person duly licensed to sell intoxicating liquor by retail. Therefore

8.

do not consider myself bound by that particular statement in the case stated at the end of paragraph 4.

In my opinion it cannot seriously be argued that the nominee of a limited company who has been appointed by it to hold the licence and to whom the licence has actually been granted is not "the holder of a licence," even though he is not beneficially the owner of the licence or the licensed premises.

The fact that the State, in lieu of prosecuting the nominee, may (as held by Barrington J., in McMahon v. Murtagh Properties) prosecute the company as the beneficial holder of the licence does not assist the Defendant in his argument. In my opinion either option is open to the State. There is nothing to prevent a prosecution being brought against a nominee as the actual holder of the licence as an alternative to suing the limited company as beneficial owner thereof.

That being so, it is necessary to consider whether a nominee who has delegated the management of the licensed business (albeit at the direction of the limited company) to a full time manager and takes no active part in the business, can claim as a defence that he has not the necessary mens rea to commit the offences alleged.

I have been referred by Mrs. Donham to the judgment of Lord

Alverstone C. J. in the case of Emery .v. Nolloth (1903 2 K.B. 264 at 268) That case related to the prosecution of a licensee under Section 2 of the Intoxicating Liquor (Sale to Children) Act, 1901 for the sale knowingly to a child under the age of fourteen years of intoxicating liquor in a bottle neither corked nor sealed by a servant of the licensee contrary to the express orders and without the knowledge of his master who was himself in charge of the premises at the time of the sale.

In the course of his judgment Lord Alverstone C. J. abstracted three general principles, the second of which is in my opinion applicable to the present case. This principle is expressed as follows:- (at page 269).

"But it has been held, and this is the second principle to be extracted from the decisions, that if the licensee delegated his authority to someone else, delegating, as my brother Challis says, "his own power to prevent" and the person left in charge commits the offence, the licensee is responsible for permitting it; this is a reasonable and logical view to take, and is necessary in order to prevent the Act of Parliament from being defeated."

The Defendant as actual holder of the licence delegated his authority to the Manager. If the Manager committed any of the offences charged, the Defendant is responsible for permitting it. He cannot disclaim

responsibility on the basis that he is not the beneficial owner. In my opinion by agreeing to be nominee and by applying for the licence, a nominee impliedly undertakes responsibility under the Licensing Acts to see that the business is run in accordance with the law. In the general scheme of things, failure to do so may lead to prosecution of the nominee, conviction, indorsement and ultimately forfeiture of the licence.

For these reasons the first question in the case stated is answered yes.

With regard to the second question I am of opinion that as there is no evidence of sale, there is no evidence to convict in respect of counts 1 to 4.

There is evidence on which the District Justice would be entitled to convict on count 5.

In relation to count 6 there is evidence on which the District Justice would be entitled to convict unless he were satisfied that the employees in question were on the premises in the ordinary course of their employment at 2.16 a.m. on the date mentioned in the summons, the onus of proof being on the Defendant (see McCarthy v. Murphy, 1981 I.L.R.M. 213)

THE HIGH COURT

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN:-

GARDA MICHAEL DESMOND

Complainant

-and-

JAMES KENNEDY

Defendant

Counsel for the Complainant.

Susan Denham

Counsel for the Defendant.

Brian Dempsey

Cases Cited.

Emery .v. Nolloth, 1903 2 K.B. 264.

McMahon .v. Murtagh Properties Limited and Thomas Wright, 1982 I.L.R.M. 342.

Sherras .v. Derutzen, 1895 1 Q.B. 918.

McCarthy .v. Murphy, 1981 I.L.R.M. 213.