

## KENNETH MICHAEL JANSON HO

v.

## REGINAM

[SUPREME COURT, 1978 (Kermode J.), 24th February]

## Appellate Jurisdiction.

*Licensing Law—Provision of dancing—whether dancing is “provided” when dancing in fact takes place—Liquor Ordinance (Cap. 167) s. 62—Liquor (Amendment) Act 1972 Section 19.*

Dancing occurred at a nightclub on a Sunday. The appellant contended that he had not provided the dancing within the meaning of the Act.

*Held:* If dancing in fact takes place then dancing is provided and the licensee is liable.

Case referred to:

*Re. Mayfair Property Co.* [1898] 2 Ch. 28

Appeal against conviction in the Magistrate’s Court.

*B. N. Sweetman* for the appellant

*T. Fa* for the respondent

KERMODE J. :

The appellant was on the 10th November, 1977 convicted by the Magistrates Court Suva of the offence of Contravening the Condition of Nightclub Licence contrary to section 62(1A) (a) and (2) and (4) of the Liquor Ordinance as amended by Act No. 34 of 1975. He appeals against conviction.

The particulars of the offence as amended at the trial are as follows:

“KENNETH MICHAEL JANSON HO on Sunday the 27th day of March, 1977 at Suva in Central Division being the holder of a Licence in respect of premises known as Golden Dragon Nightclub did contravene the condition of the said Nightclub Licence by allowing the dance to be held in the said premises.”

There are five grounds of appeal:

- “(a) That the learned trial Magistrate erred in law in holding that your Petitioner contravened the provisions of Section 62 (2) of the Liquor Act, Cap. 167.
- “(b) That the learned trial Magistrate erred in holding that if dancing takes place on nightclub premises on a Sunday whilst the premises are open to the public the offence under Section 62(2) is complete.
- “(c) That the learned trial Magistrate erred in holding that dancing is “provided” by a licensee in terms of Section 62(2) of the Liquor Act, Cap. 167 by providing facilities in the form of a room and music.

- A (d) That the learned trial Magistrate erred in fact and in law in holding that your Petitioner provided dancing in terms of Section 62(2) of the Liquor Act, Cap 167.
- (e) That the conviction is unreasonable and cannot be supported having regard to the weight of the evidence adduced."

B Mr Sweetman, who appeared for the appellant, argued the first four grounds together but did not argue the fifth ground.

Except for a dispute as to where dancing actually took place on the night in question and as to whether the dance floor in the nightclub premises was clear of table and chairs, there was no dispute as regards the facts.

C On the 27th March, 1977, a Sunday, P.W. 2 PC. 1975 Sailosi went to the Golden Dragon nightclub at 11.40 p.m. There was a warship in port that day and the witness saw navy personnel and locals in the club. He saw liquor being served and people dancing to recorded music.

D Under cross-examination he stated he had been inside the Golden Dragon premises previously on a number of Sundays but had not previously seen people dancing. He said there were no tables or chairs on the dance floor on the night in question. On his prior Sunday visits there were tables and chairs on the dance floor.

E P.W. 3 Inspector Antonio Leyaleya also went to the Golden Dragon on the 27th March, 1977. He also saw people drinking and people dancing on the dance floor which he described as a clear place where people normally dance. He had visited the Golden Dragon on Sunday nights previously when he saw no dancing and at times there were tables and chairs in the space reserved for dancing. On the night in question the dance floor was clear of tables and chairs.

The appellant gave evidence in the Court below and called a number of witnesses. The appellant was not in Fiji on the 27th March, 1977 but he was at the relevant time the licensee. During his absence the appellant's father managed the nightclub on his behalf.

F The appellant stated that on Sundays because of the liquor laws they served liquor but did not allow dancing. He said they put tables and chairs on the regular dance floor to stop people dancing there. There were signs in the premises to indicate dancing was not permitted on Sundays.

G The appellant's father, Harry Janson, who was in charge of the Golden Dragon on that Sunday, stated that tables and chairs were placed on the dance floor every Sunday and they were placed "all over it" on the night in question. When a police constable came to the premises on the night in question he went upstairs to the nightclub with him. He saw two or three couples dancing when the constable pointed them out to him. On his earlier inspections of the nightclub that night he had not seen people dancing. The witness turned off the music. The witness mentioned he saw one couple dancing in a passage way a few feet from the dance floor. His description of the dance floor would indicate that dancing could not occur there as it was entirely covered with tables and chairs.

H The learned Magistrate believed P.W. 2 and P.W. 3 to be truthful witnesses. He did not find as a fact that there were no tables and chairs on the dance floor as he considered it was immaterial whether the dancing which he found had taken place was on tiled dance floor or in any other part of the room.

The learned Magistrate considered the interpretation of the proviso to section 62(2) as amended by section 19 of the Liquor Amendment Act 1975 which provides: A

“Provided that neither dancing nor entertainment (but only subdued piped or recorded music) may be provided on Good Fridays, Christmas Days or Sundays.

The Magistrate held that where a person provides facilities for dancing and persons make use of those facilities as they wish, in so providing the facilities it can be said that “dancing is provided”. B

Mr Sweetman contends such an interpretation of the word “provided” is erroneous. He contends that if patrons in a nightclub get up and dance it cannot be said that the appellant “provided dancing”.

There is some merit in Mr Sweetman’s argument but both he and the learned Magistrate overlooked two aspects of the provisions of the Liquor Ordinance. C

One aspect is another interpretation of the proviso to section 62(2) of the Ordinance. Both Mr Sweetman and the learned Magistrate were only concerned with the meaning of the word “provided” used with the words “neither dancing nor entertainment . . . . may be provided on . . . . Sundays”. They assumed that it was the licensee and only the licensee who provided dancing. This was an assumption based on section 62(1A)(a) where it is the expressed duty of the licensee and only the licensee to provide dancing. D

The proviso to section 62(2) however is explicit. Dancing may not be provided on Sundays. If the provision of dancing was limited to the licensee the section would have so provided. There is an absolute prohibition on providing dancing on Sundays and on my interpretation of the proviso it matters not who provides the dancing. Any patron of the club who provides dancing by dancing himself breaches the conditions of the licence. E

It is clear from consideration of the provisions of the Liquor Ordinance that the intention of the legislature is to prohibit dancing on Sundays in nightclubs. Under the proviso to section 62(2) there can be no dancing or entertainment provided on Sundays. Nor can loud music be provided. The use of the word “subdued” in the phrase “but only subdued piped or recorded music” indicates that the legislature legislated for an atmosphere not conducive to dancing. F

The learned Magistrate in his interpretation of section 62(2) in effect applied “the mischief rule” one of the four matters considered in Heydon’s case (1584) 30 Co.Rep. 7a which was referred to by Lindley M.R. in *Re Mayfair Property Co.* (1898) 2 Ch. 28 at p.35. G

Maxwell on the Interpretation of Statutes 12th Edition at p. 96 states—

“It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy.”

Providing music suitable for dancing and a room in which dancing then takes place with the apparent connivance of the licensee or his servants is in my view “providing dancing” whether the dancers were hired or permitted by the licensee to dance. H

A The Magistrate's interpretation of section 62(2) was a possible interpretation if the mischief rule is adopted and I am not prepared to hold he erred in his interpretation.

B My view however is that the proviso to section 62(2) prohibits any person providing dancing on a Sunday in a licensed nightclub. The facts in this case, as the Magistrate held, were that people were dancing on the Sunday night in question and that was a breach of the terms of the licence. An offence was committed and the licensee was properly held liable under section 62(4) of the Ordinance.

There is the second aspect I referred to earlier.

C Under section 62(1), the provisions of the Ordinance relating to restaurants apply mutatis mutandis to the two separate and distinct licenses provided in the next two succeeding subsections. One such licence is a nightclub licence. The first proviso to subsection (1A)(a) of section 62 provides:

"Provided that—

D (i) access by the purchase of a ticket shall not be a prerequisite when neither dancing nor entertainment (and only subdued piped or recorded music) is being provided during any complete separate period of the permitted hours, in which event, notwithstanding the provisions of the next succeeding paragraph, the provisions of an ordinary restaurant licence shall apply;"

When only subdued piped or recorded music is being provided on licensed premises which is the situation on a Sunday, the provisions of an ordinary restaurant licence shall apply.

E Subsection (1B) contains the provisions of an ordinary restaurant licence. Subsection (1B)(b) refers to subdued piped or recorded music. The subsection reads as follows:

"(b) A ordinary restaurant licence shall authorise the licensee holding it to provide subdued piped or recorded music at the licensed premises:

F Provided that there shall be no dancing or other entertainment at the licensed premises."

G This subsection has in my view application to a nightclub licence during permitted hours when only subdued piped or recorded music is allowed by virtue of section 62(1) and proviso (1) of section 62(1A)(a). There is a clear statutory prohibition of dancing and other entertainment when only subdued piped or recorded music is provided which is the situation on Sundays in a licensed nightclub.

The learned Magistrate was correct in his view that if dancing takes place on nightclub premises on a Sunday when the premises are open to the public the offence is complete.

The appellant was properly convicted and the appeal fails and is dismissed.

H *Appeal dismissed.*