

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr J J H
(represented by Mr John Prior , instructed by Mr Peter Whennan and Ms Jo Bunny of Dwyer Durack Lawyers)

Respondent: Commissioner of Police
(represented by Mr Cheyne Beetham of State Solicitor's Office)

Commission: Mr Eddie Watling (Presiding Chair)
Mr Greg Joyce (Member)
Mr Alastair Bryant (Member)

Matter: Appeal pursuant to subsections 28(1) and 28(4a) of the *Liquor Control Act 1988* of determination no. LC 38/2012 of a single member of the Liquor Commission dated 24 October 2012.

Date of Hearing: 13 December 2012

Date of Determination: 18 December 2012

Date of Reasons: 22 January 2013

Determination:

The terms of the barring notice issued by the Commissioner of Police to J J H on 27 July 2012 be varied as follows:

J J H, is prohibited from entering any licensed premises in Western Australia, except those premises licensed under a liquor store licence, for a period of six months ending 26 January 2013.

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224 [70]
- *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259
- *V S v Commissioner of Police* (LC 19/2011)
- *K R B* (LC 33/2011)
- *L M C* (LC 5/2012)
- *T J G* (LC 56/2011)
- *G M L* (LC 58/2011)
- *A R Q* (LC 46/2011)
- *M R P* (LC 55/2011)
- *E C P* (LC 41/2012)

Background

- 1 On 27 July 2012, the delegated officer of the Commissioner of Police (“the Police”), Detective Superintendent J M Migro, issued a barring notice pursuant to section 115AA(2) of the *Liquor Control Act 1988* (“the Act”) to the appellant, prohibiting him from entering any licensed premises within Western Australia except those premises licensed under a liquor store licence, for a period of twelve (12) months from the date of the notice until 26 July 2013. The barring notice was issued as a consequence of an incident on 25 May 2012 at licensed premises, namely the Albion Shamrock Hotel, Boulder where it was alleged the appellant committed offences of assault occasioning bodily harm and deprivation of liberty and for which he was charged accordingly.
- 2 The appellant pleaded guilty to these charges in the Kalgoorlie Magistrates Court on 12 July 2012.
- 3 On 24 August 2012, the appellant applied to the Liquor Commission of WA (“the Commission”) for a review of the barring notice pursuant to section 115AD (3) of the Act.
- 4 Under cover of a letter dated 5 September 2012 the respondent provided the following information to the Commission:
 - (a) the barring notice issued on 27 July 2012;
 - (b) service endorsement of the barring notice dated 13 August 2012;
 - (c) a statement of material facts dated 26 May 2012;
 - (d) memorandum from Acting Inspector Stafford to Director Superintendent Migro dated 20 July 2012;
 - (e) memorandum from Acting Senior Sergeant Pullan to Acting Inspector S dated 17 July 2012;
 - (f) memorandum from First Class Constable Velios to Acting Senior Sergeant P dated 16 July 2012;
 - (g) Incident Report 260512 0720 11037;
 - (h) photographs of the victim’s injuries;
 - (i) unserved copies of covering letter and Barring Notice;
 - (j) witness statements of;
 - (i) B A W, dated 26 May 2012;
 - (ii) the victim; dated 28 May 2012
 - (iii) J J H, dated 26 May 2012;
 - (iv) K E J, dated 8 August 2012;

- (v) Detective Senior Constable William John Little dated 8 August 2012;
 - (vi) Senior Constable Kyran Martin O'Donnell, dated 30 July 2012;
 - (vii) Constable Carla Mottershead, dated 8 August 2012;
 - (viii) Senior Constable Lyndsay Pankhurst, dated 8 August 2012; and
 - (ix) Dr Tom Erclave, Emergency Department Consultant, dated 3 July 2012.
- 5 On 5 October 2012 the appellant provided the following information to the Commission:
- (a) statement of the appellant dated 5 October 2012;
 - (b) twelve character references;
 - (c) a letter from the appellant's parents to the Presiding Magistrate at the Kalgoorlie Court.
- 6 The review was heard by the Chairperson of the Commission on 19 October 2012, and a determination dismissing the application was issued on 24 October 2012 with reasons for the determination published on 20 November 2012.
- 7 On 19 November 2012 the appellant appealed the decision of the Chairperson of the Commission pursuant to section 28(1)(b) of the Act, which requires a panel of 3 Commissioners constituted under section 28(4a)(a) of the Act to hear and determine the appeal.
- 8 The appellant submitted to the Commission the following 4 grounds of appeal on the 4 December 2012:
- 1. the single member of the Liquor Commission erred in finding that the applicant has demonstrated a propensity for violence and a propensity to overreact to provocation;
 - 2. the single member of the Liquor Commission erred in finding that the act of stealing from the applicant's employer was a provocation in the context of the applicant's offending;
 - 3. the single member of the Liquor Commission erred in finding that the barring notice was necessary to protect the general public; and
 - 4. the single member of the Liquor Commission erred by failing to consider whether the barring notice should apply to all categories of licence.

Subsequently by paragraph 11 of an undated submission the appellant abandoned grounds 2 and 3 of the appeal. This change, and changes to the remaining grounds, were accepted by consent at the hearing.

- 9 The appeal was heard by the Commission on 13 December 2012 and a determination issued on the 18 December 2012 with reasons to follow.

Submissions on behalf of the appellant

- 10 At the hearing the appellant submitted that under the Act the issuing of a barring notice has three stages:
- (a) firstly the determination that a barring notice should be issued pursuant to section 115AA;
 - (b) then an assessment must be made pursuant to section 115AA (2) as to what class of licensed premises the barring notice will apply (amended ground 4 of the appeal);
 - (c) finally, a determination must be made as to what length of time the barring notice applies under section 115AA (5) of the Act (amended ground 4 of the appeal).

The appellant submitted that the Chairperson in his review failed to adequately exercise his discretion in respect of the latter two stages. The published reasons do not disclose any consideration as to the class of licensed premises to be included in the barring notice other than oblique references in clauses 30 to 35 of the determination. The guiding principles of protection to the public, the licensee and the person himself were not adequately applied. Similarly there was no consideration as to the length of time of the barring notice. The appellant provided the Commission with a list of 8 previous decisions of the Commission (refer to “Authorities Referred to in Determination” above) and argued the merits of the subject case in contrast to these cases would require that the appellant receive a lesser period than the maximum of 12 months.

- 11 The appellant submitted that the barring notice which allows access to liquor store licensed premises did not appear consistent with the admitted offence that occurred on liquor store premises. To bar the appellant from all other types of licensed premises except where the offence was committed appears questionable.
- 12 In respect of ground 1 of the appeal the appellant took issue with the finding of the Chairperson at paragraph 33 of his determination that the appellant had a ‘propensity’ for violence and a propensity to overreact to provocation. There was no evidence in the papers that the appellant had ever been violent on any previous occasion. The references that have been provided demonstrate that the appellant is of good character and had no history of violence. The Commission should accept the ordinary meaning of ‘propensity’ which would imply some history of violence. The Chairperson failed to give sufficient weight to the past behaviour and good record of the appellant.
- 13 The appellant was generally remorseful for his behaviour as indicated by his pleas of guilty to the relevant criminal charges and his co-operation with police investigating the charges.

- 14 The appellant had not consumed any alcohol on the day the alleged offences took place.

Submissions on behalf of the respondent

- 15 The respondent raised a preliminary matter with the Commission as to the type of hearing being conducted. Whether an appeal under sections 28(1) and 28(4a) of the Act is an appeal in the ordinary legal sense of that word or a review analogous to that under section 115AD of the Act. If it is an appeal in the ordinary legal sense of the word, whether it is an appeal in the 'strict sense', an appeal by way of rehearing, or an appeal de novo.
- 16 In respect of ground 1 of the appeal 'propensity' is defined in the Macquarie Dictionary as:

'Natural or habitual inclination or tendency.'

The respondent submitted that the term 'propensity' as used by the Chairperson should be understood to mean a natural, rather than a habitual, inclination or tendency. Understood in this way it expresses the Chairman's view that the appellant has demonstrated a capacity for violent behaviour and overreaction to little provocation.

- 17 This view is supported by the appellate principle that the appellate body should not search with a fine tooth comb for error and should understand the reasons of the Chairman in context as a holistic set of reasons. (*Hancock v Executive Director of Public Health [2008] WASCC 224 [70]* Martin C J citing the High Court decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259*).
- 18 In respect of ground 4 of the appeal it was submitted that the Commission is not bound to take into account whether the barring notice should apply to all categories of licence but in any event it was submitted that it was implicit in the Chairperson's determination at paragraph 35 that the Chairperson considered the conditions of the barring notice including conditions as to categories of licence.
- 19 The incidents that occurred were very serious acts of vigilantism and the barring notice is in place to ensure the public is protected from repetition. The conditions of the barring notice are appropriate to the nature of the offences. If the appellant was remorseful then why did he take the victim out to a remote place and leave him rather than take him to hospital.

Determination

- 20 This is an appeal of a decision by a single member of the Commission pursuant to section 28(1)(b) of the Act and was heard by the Commission duly constituted under section 28(4a) of the Act.

- 21 Four grounds of appeal were initially submitted to the Commission. Two of these grounds were subsequently abandoned leaving grounds 1 and 4. At the hearing the Appellant submitted amendments to the remaining grounds in the following way:

Appeal Ground 4 is amended to the following:

4. The Single Member of the Liquor Commission erred in law by failing to consider whether the barring notice issued to the Appellant should apply to all classes of liquor licences and apply for the maximum term of 12 months.

Appeal Ground 1 is amended to the following:

1. The Single Member of the Liquor Commission erred in fact and law in finding that the Appellant had demonstrated a propensity for violence and a propensity to over react to provocation.

The Commission agreed to these amendments by consent.

- 22 Consideration was given to the submissions of the respondent in respect of the type of hearing being conducted (as detailed in paragraph 15 of this determination). The Commission was in agreement with the reasoning provided by the appellant. The scheme of the Act contemplates section 28 being an appeal process rather than a review. This is made clear by the wording of section 28 and the existing review provisions. The Commission also adopted the view that the appeal should be conducted by way of rehearing rather than an appeal in the strict legal sense or an appeal de novo. If either of the latter processes were contemplated this would have been made clear in the Act.
- 23 At the commencement of the hearing the Commission raised with both parties the provisions of section 115AA of the Act which requires the alleged offences of the appellant to have been committed “on licensed premises”. None of the evidence provided to the Commission proved this matter to the complete satisfaction of the Commission. The Commission took notice of the records of the Department of Racing, Gaming and Liquor which prescribe licensed premises by plans which delineate in red the licensed areas. This information was provided to the parties at the hearing.
- 24 It is clear from this information and the witness statements that the substantial part of the alleged offences of the appellant did not occur on licensed premises. The only involvement on licensed premises occurred when the victim was carried into the storeroom by third parties for a short period and further assault and deprivation of liberty occurred by third parties. The subject storeroom would appear to be part of the licensed premises. However, having regard to the witness statements (see paragraphs 83-92 of the applicant dated 26 May 2012; paragraphs 144-174 of the statement of B W dated 26 May 2012 and the memo of First Class Constable Chris Velios to Acting Senior Sergeant Pullan dated 16 July 2012) the appellant played no role in the further assault or deprivation of liberty, but was present for a short period of time in the storeroom. One possible view is that there was continuity to the alleged

offences of the appellant on licensed premises. Neither party objected to this analysis and the Commission proceeded on the basis that part of the offences occurred on licensed premises. However a serious question arises for another day whether such a tenuous link to licensed premises and the appellant's lack of involvement in offences whilst on licensed premises is sufficient to trigger the issuing of a barring notice.

25 The Commission takes note of the various principles to be applied when assessing barring notices:

- during the introduction of the barring notice provisions, the Hon Terry Waldron, the then Minister for Racing and Gaming stated that: *"This legislation seeks to give protection to the general public from people who have engaged in disorderly or offensive behaviour, who threaten people et cetera and who put people in dangerous situations. The whole idea of this legislation is to protect the general public, the licensee, which is pretty important and also the person. That is the aim of this legislation."* Western Australia, Parliamentary Debates, Legislative Assembly, 19 October 2010, page 7925;
- the primary and secondary objects of the Act found at section 5;
- the purpose of issuing a barring notice is not a penalty but a protective mechanism. This has been decided in several Commission cases including *V S v Commissioner of Police (LC19/2011)* at [12];
- the Commission may make its determination on the balance of probabilities (section 16(1)(b)(ii) of the Act)

26 In respect of ground 4 of the appeal there is evidence in the reasons of the Chairperson that he did consider both the types of licences and the length of time of the barring notice. Paragraphs 30-35 all imply this reasoning. Explicitly paragraph 35 contemplates this process and the Chairperson made a judgment that no variation of the original terms of the barring notice were appropriate.

27 The Commission has examined the eight cases referred to by the appellant in respect of time and type of licence exclusion. This exercise is fraught with difficulty because each case depends on its own circumstances and comparisons can be misleading and unfair. The subject case differs from all of the cases cited in that the appellant was an employee of the licensee and working on the premises at the time the offences occurred, whereas all of the other cases were concerned with patrons being involved with incidents whilst consuming liquor. What does emerge from the cases is at least the following:

- the maximum period of 12 months should be reserved for the most serious cases;
- the Commission as a general rule does give consideration to requests to allow admittance to certain types of licences where circumstances are warranted.

The single exclusion of liquor stores from the barring notice is also consistent with the determinations of the eight cases referred to by the appellant and, under appropriate circumstances, provides minimal access to liquor services and products for those the subject of a barring notice.

- 28 12 months is the maximum term for which a barring notice can be issued (section 115AB(5) of the Act). This should be reserved for those cases at the high end of the scale. An analysis of the 8 cases provided by the appellant which were considered by the Commission would suggest that the subject case falls below some of those cases in seriousness. Indeed in some of the cases cited the barring period was for 6 months for offences not less serious than the subject offences. This is not in any way meant to mitigate the seriousness of the subject offences but to provide a comparative assessment. Keeping in mind always that the intention of this legislation is to protect the public, the licensee and the appellant himself and not punish the appellant, it is considered imposing a 6 month barring period is appropriate to the circumstances. The period imposed in the barring notice is to protect the public against further reoccurrence. Given the actions of the appellant in cooperating with the Police, providing a full confession, pleading guilty and showing genuine remorse the probability of reoffending on licensed premises is unlikely.
- 29 In respect of ground 1 of the appeal the Commission finds that there is no evidence to suggest the appellant has a propensity to violence. He was a person of previous good character who made a mistake. The appellant pleaded guilty to the charges and has shown genuine remorse. Whilst the respondent submitted that weight is placed on the difference between a 'natural' and 'habitual' inclination there is no evidence that the appellant has a propensity or inclination for violence. Accordingly, it is the Commission's decision to reduce the barring period.
- 30 Pursuant to section 28(6) of the Act the current barring notice is therefore varied to a period of 6 months to terminate on 26 January 2013.



EDDIE WATLING
PRESIDING MEMBER