

LICENSING COURT OF SOUTH AUSTRALIA

SULLIVANS HOTEL PTY LTD T/AS ROBE HOTEL & RYAN HUGHES,
AMELIA COOPE AND DAVID MURCH [No. 2]

JURISDICTION: S 120 Disciplinary Complaint

FILE NO: 3869, 3870, 3871 and 3873 of 2016

HEARING DATE: 20 October 2017

JUDGMENT OF: His Honour Judge Gilchrist

DELIVERED ON: 20 November 2017

*Application to reconsider a previous ruling regarding the admissibility of certain transcripts of interview that included admissions obtained with some unfairness to the interviewees – **Held** that although the Court is not persuaded that the test of admissibility is as it applies in criminal proceedings, upon reflection it was wrong to then conclude that the appropriate test was the one that applies in civil proceedings – **Held** that the Court should have had regard to the public interest in ensuring that the extensive powers granted to authorised officers under s 122 of the Liquor Licensing Act are appropriately used and that in the circumstances of this case, when that public interest is taken into account, the Court in the exercise of its discretion should not admit the admissions – S 122 Liquor Licensing Act 1997.*

Sullivans Hotel Pty Ltd & Ors T/as Robe Hotel & Ors [2017] SALC 12
Police v Gardner, Selleck and Firstlite Pty Ltd Unreported delivered 11
November 2013

R v McCarthy [2015] SASC 11

K-Generation Pty Limited v Liquor Licensing Court [2009] HCA 4

REPRESENTATION:

Counsel:

Police: Ms H Stanley

Respondents: Mr M Griffin QC with Mr J Firth

Solicitors:

Police: Crown Solicitor's Office

Respondents: Gilchrist Connell

- 1 This is an application asking me to reconsider a ruling I previously made¹ concerning the admissibility of certain admissions made in connection with disciplinary proceedings issued against the respondents, Sullivans Hotel Pty Ltd, Euralia Pastoral No 2 Pty Ltd, Mr Cyril Lampard, Ms Irene Toohey, Ms Irene Hann, Mr Colin Hann and Ms Deborah Hann trading as the Robe Hotel, Mr Ryan Hughes, Ms Amelia Coope and Mr David Murch contending that all are properly the subject of disciplinary action pursuant to the *Liquor Licensing Act 1997*.
- 2 Underpinning the complaints is an allegation by the police of the supply of liquor at the Robe Hotel to an intoxicated patron on Saturday 7 November 2015. The patron subsequently died as a result of injuries that he received in a motor cycle accident that happened shortly after he left the hotel.
- 3 Following the accident the police conducted extensive investigations that included interviews with Mr Hann, Mr Hughes, Ms Coope and Mr Murch.
- 4 Mr Hann is a director of one of the corporate entities that operates the Robe Hotel. He accepts the validity of the ruling that I made regarding the admissibility of the transcripts of his interview. I previously found that despite deficiencies in the warning that he had been given, there was no sense of unfairness and that the transcript should be admitted into evidence. He does not take issue with that ruling.
- 5 At all relevant times Mr Hughes was a manager of the hotel, Ms Coope was a duty manager and Mr Murch was a casual barman.
- 6 When they were interviewed by the police, the police were exercising the powers conferred by s 122 of the Act. That section provides amongst other things that an authorised officer may require any person who is in a position to provide information relating to the sale, purchase or supply of liquor, to answer any questions put by the authorised officer on that subject. It also makes it an offence for a person to fail without reasonable excuse to answer to the best of the person's knowledge information and belief, a question put by an authorised officer. Section 122(4) provides that "a person may decline to answer a question put under this section if the answer would tend to incriminate the person of an offence."
- 7 In contending that the transcripts of the interviews should be excluded they said that the police should have informed them at the outset that they were being interviewed in accordance with the powers conferred by s 122 of the Act; that they might be the subject of a charge of sale or

¹ *Sullivans Hotel Pty Ltd & Ors T/as Robe Hotel & Ors* [2017] SALC 12.

supply of liquor to an intoxicated person; and that they were obliged to be advised as follows:

“You are required to answer these questions and it is an offence not to do so unless you believe you have a reasonable excuse. A reasonable excuse includes, but is not limited to, an answer which may tend to incriminate you of an offence.”

- 8 They said that this was required because without it, they were not in a position to make a genuinely informed choice as to whether to speak or to remain silent.
- 9 Magistrate Fahey came to a similar conclusion in *Police v Gardner, Selleck and Firstlite Pty Ltd.*²
- 10 Mr Hughes, Ms Coope and Mr Murch submit that the decision is significant in two respects.
- 11 First, that it establishes that the caution used here is inadequate and that in connection with these proceedings I should follow the approach used in criminal proceedings and come to the same conclusion as the Magistrate and refuse to admit the evidence.
- 12 Second, that I should find that in light of the fact that the Officers from the Liquor Enforcement Branch are continuing to use a caution similar to that criticised by the Magistrate in that case, it is apparent that the Officers have not responded to that criticism. They contended that this Court should exercise its discretion to exclude the evidence to fortify that criticism.
- 13 They submitted that what is at stake here is the fundamental privilege against self-incrimination and that it is a substantive right of universal application that is not limited to criminal proceedings.
- 14 The police submitted that the records of interview cannot be excluded from evidence on the basis that the jurisdiction of the Licensing Court does not allow a discretion to exclude evidence.
- 15 In the alternative, if there is a discretion to exclude evidence, it should not be exercised on the basis that the interviews were not a result of compulsion and there was no unfairness in how the interviews were conducted.
- 16 They submitted that if there was unfairness, the admittance of the evidence is not contrary to community standards and is outweighed by the need for the Court to have regard to the objects of the Act.

² Unreported delivered 11 November 2013.

Analysis

- 17 I commence with the submissions put on behalf of the police.
- 18 In *K-Generation Pty Limited v Liquor Licensing Court* French CJ described the Licensing Court as follows:
- “There is no doubt that various classes of decision which the Licensing Court is authorised to make may be informed by public policy and public interest considerations and to that extent have a polycentric character about them. That is particularly so in relation to the grant or withholding of licences. But the application of public interest criteria has a long history as part of the judicial function. And the intrusion of policy considerations in its decision making does not necessarily deprive a tribunal of the character of a court. The Licensing Court is not bound by the rules of evidence and may inform itself as it sees fit. This can be an indicator of an administrative rather than a judicial body, but it is not determinative. It does not negate the requirement that the Court act lawfully, rationally and fairly. Many important rules of evidence will arise as a consequence of the application of those criteria to the decision-making process.” (footnotes omitted)³
- 19 If this Court is to act lawfully, rationally and fairly, it must have the discretion to decline to admit evidence. The first argument put forward on behalf of the police must therefore be rejected.
- 20 As to the submission that there was no unfairness in how the interviews were conducted, I previously found that there was, and nothing that was put to me in this application persuades me that I should find otherwise.
- 21 The only issue is whether in light of that unfairness the Court should use its discretion to exclude the evidence of the admissions.
- 22 In my earlier ruling I concluded that because disciplinary proceedings were sui generis and had as their ultimate focus the public interest, the test of admissibility as it applies in criminal proceedings did not apply. I formed the view that the public interest in being protected by the misconduct of those covered by the Act generally trumps the competing public interest of the respondents being treated fairly. I concluded that the need to express judicial condemnation of unfair practices in connection with the gathering of evidence was not a relevant factor in determining whether to receive evidence of admissions against interest in disciplinary proceedings before this Court, unless the conduct of the police was so egregious as to be excluded in civil proceedings

³ [2009] HCA 4 at para 82.

- 23 I thought there was some level of unfairness in the way the interviews were conducted in the sense that I suspected that the police may have contemplated laying a complaint for disciplinary action against them before the interviews commenced and thought it likely and found that they did so before the interviews were completed. I thought that to be scrupulously fair, the police should have informed the interviewees of that fact as soon as the possibility of potential disciplinary action loomed.
- 24 However, taking into account all of the circumstances of the case, I formed the view that the admission of this evidence and the fact that it may contribute to a finding that it is appropriate to take disciplinary action against Mr Murch, Ms Coope and Mr Hughes, did not come at a price which is unacceptable, having regard to contemporary community standards.
- 25 I then went on to hold that even if the test as it is applied in criminal proceedings applied, I would nonetheless admit the evidence. I thought that it was significant that the police made it clear that they will not be charging any of the interviewees in connection with this matter in the future. Having had my attention brought to other authorities and in particular the judgment of Blue J in *R v McCarthy*,⁴ I accept that I was wrong to so conclude.
- 26 Having reconsidered the matter I remain of the view that the test of admissibility is not the same as it is in criminal proceedings. However, upon reflection, I think that to then effectively conclude that the civil test of admissibility applies was in error.
- 27 In a speech delivered by former High Court Chief Justice Murray Gleeson⁵ he made the point that especially in connection with civil penalties the distinction between civil and criminal becomes quite blurred. Upon reflection I failed to give this sufficient weight in determining what test should apply.
- 28 Importantly, I now accept that just as in the criminal courts it is for the courts in the exercise of their discretion to decline to admit admissions against interest to express judicial condemnation of unfair police practices, especially when what is involved is a deliberate course of action which might lead to widespread and arbitrary infringements of civil liberties, statutory rights or common law privileges, such as the right against self-incrimination, similar policy considerations may apply in this Court when dealing with disciplinary action.

⁴ [2015] SASC 11.

⁵ Civil or Criminal –What is the difference? Delivered 24 February 2006, Summer Law School, Perth.

- 29 Section 122 of the Act grants an authorised officer extensive powers. They can enter, remain on and inspect licensed premises and if refused entry may employ such force as is reasonably necessary to gain entry. They can require any person, whether on licensed premises or otherwise, who has possession of books of account, records required to be kept under this Act or any other records relevant to a business conducted under a licence, or to transactions involving the sale or purchase of liquor, to produce those books of account or records for inspection. They can examine, copy or take extracts from such books of account or records. They can remove and retain such books of account or records for so long as is reasonably necessary for the purpose of making a copy of the book of account or record. They can require any person who is in a position to provide information relating to the sale, purchase or supply of liquor to answer any question put by them. A person's non-compliance, hindrance or obstruction in connection with these is an offence.
- 30 Just as there are sound public policy considerations in using disciplinary action to protect the public there are also sound public policy considerations in ensuring that the extensive powers granted to authorised officers under s 122 are appropriately used.
- 31 Upon reflection I failed to adequately recognise this. What I should have done in reflecting upon all of the circumstances of the case is to include undertaking a balancing act between these competing public interest considerations. I should have asked myself the following questions: If the evidence is probative, having regard to the seriousness of the alleged breach to what extent will the interests of the public be compromised if the evidence is not admitted? If I were to conclude that the powers conferred by s 122 were not appropriately used, does the public interest in being protected, trump the public interest in ensuring that the extensive powers provided for by s 122 are appropriately used, such that an abuse of those powers can pass without consequences?
- 32 To not admit into evidence the transcripts of the interviews with Mr Murch, Ms Coope and Mr Hughes, should it lead to the dismissal of the complaints concerning them, will not unduly compromise the public interest in being protected for unsafe practices at these licensed premises. In this case the action against Mr Hann will proceed with the admission of the transcripts of his interview. If the allegations against him are made out, the case will serve as a deterrence to the Robe Hotel and a reminder to it and to those involved in the hospitality industry generally, that the sale or supply of liquor to an intoxicated person is not on, and that it can have tragic consequences. If the transcripts were admitted and led to proof that disciplinary action as against Mr Murch, Ms Coope and Mr Hughes was appropriate, in the circumstances of this case, their breaches would be regarded as at the lower end of the scale. Moreover, I am in no doubt that in light of the circumstances of this case, Mr Murch,

Ms Coope and Mr Hughes are now well aware of the tragic consequences that can follow from the sale or supply of liquor to an intoxicated person. As such, any sanction that this Court might impose upon them would simply be reinforcing to them what they already know. To put it another way, the dismissal of disciplinary action against these individuals, will not, in my view, compromise public safety.

- 33 On the other hand, refusing the admission of these transcripts will serve as an important reminder to the police that the extensive powers conferred by s 122 come with the responsibility of ensuring that these powers are not abused. Some time before these interviews occurred the police were informed through the decision in *Police v Gardner, Selleck and Firstlite Pty Ltd* how the caution was to be issued. The police should have issued the proper caution in this case. A ruling that the transcripts of the interviews with Mr Murch, Ms Coope and Mr Hughes not be admitted in evidence will act as an encouragement for the police to adopt the correct practice.
- 34 Returning to the questions that I should have asked myself.
- 35 If the evidence is probative, having regard to the seriousness of the alleged breach, will the interests of the public in being protected be compromised if the evidence is not admitted? To that, my answer is: No, not really.
- 36 If I were to conclude that the powers conferred by s 122 were not appropriately used, does the public interest in being protected, trump the public interest in ensuring that the extensive powers provided for by s 122 are appropriately used, such that an abuse of those powers can pass without consequences? To that, my answer is: No, it does not.
- 37 In the exercise of the Court's discretion I therefore rule that the transcripts of the interviews with Mr Murch, Ms Coope and Mr Hughes are inadmissible in the within proceedings.
- 38 I adjourn these matters and the matters of Sullivans Hotel Pty Ltd, Euralia Pastoral No 2 Pty Ltd, Mr Cyril Lampard, Ms Irene Toohey, Ms Irene Hann, Mr Colin Hann and Ms Deborah Hann to 10.00 am on Tuesday 12 December 2017.