

*Shannon Eves* [2022] SALC 29

**LICENSING COURT OF SOUTH AUSTRALIA**

EVES, Shannon

**JURISDICTION:** S 120 Disciplinary Action

**FILE NO:** 133 of 2021

**HEARING DATE:** 17 March 2022

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 17 March 2022

**REPRESENTATION:**

Counsel:

Applicant: Brevet Sergeant M Osterstock

Respondent: In person

Solicitors:

Applicant: Commissioner of Police

Respondent:

- 1 This is an application seeking a review of the decision of the Commissioner for Liquor and Gambling to grant an unconditional approval to the respondent, Mr Shannon Eves.
- 2 In 2021, Mr Eves made an application to the Commissioner seeking approval as a responsible person pursuant to s 97 of the *Liquor Licensing Act 1997*. The application was opposed by the police who contended that in light of Mr Eves' offending history, he was not a fit and proper person for the purposes of the Act.
- 3 That offending history comprised of Mr Eves being issued with an expiation notice for possession of cannabis in September 2004, being convicted of driving with excess alcohol in 2008, convicted of four counts of dishonestly dealing with property dating back to before 2008, but not dealt with until October 2017, and convicted of three counts of driving whilst disqualified in 2021.
- 4 The Commissioner was not persuaded that this offending history was sufficient to refuse the application. Through his delegate he wrote:

Mr Eves acknowledged his history of offending and apologised.

He noted he does not have a history of drug use or drug related offending apart from the cannabis related expiation some 17 years ago.

Mr Eves emphasised his key dishonesty offending occurred in 2007 and offered a detailed account of how these matters arose and how they were dealt with in the Magistrates Court.

Mr Eves outlined the confusion which surrounded his more recent drive disqualified matters – three such offences having been committed in an eight-week period. These matters arose from an offence of driving with methamphetamine in his system which was subsequently withdrawn.

Mr Eves has explained the change and personal growth he has undergone following his offending and personal challenges in 2007. Since this period of his life he has lived overseas, married his current wife of 13 years and they have three children.

Since 2007, Mr Eves has worked for a number of years in the liquor and gambling sector in senior roles. He is well regarded and has been offered a management position which is dependent on his approval as a responsible person.

The offences Mr Eves committed, involving dishonesty and drive whilst disqualified are serious. This is reflected by the terms of imprisonment, albeit suspended, imposed. In saying that, Mr Eves' most significant offending occurred in 2007 and he has since rebuilt

his life, family and career. Mr Eves' employment in the liquor industry is important to him and to his family and I am confident will provide Mr Eves with strong motivation to continue to operate in a responsible and law-abiding manner.

- 5 The Commissioner found that Mr Eves was a fit and proper person and on 11 November 2021 approved him as a responsible person.
- 6 The police contended that the Commissioner erred in making that finding. Their primary position was that Mr Eves approval should have been refused and that this Court on review should now make that order. Its secondary position was that he should be disqualified from holding office under the Act and that the disqualification be suspended for a period of three years, subject to his continued good behaviour over that period.
- 7 Plainly the principal issues regarding Mr Eves' fitness and property concern the theft and drive disqualified convictions.
- 8 Because he had left Australia before the theft matter was dealt with by the Courts, a warrant was issued in 2010 for Mr Eves' arrest, which was served upon him when he returned to Australia some years later culminating in his appearance before a Magistrate in 2017.
- 9 The circumstances of Mr Eves' theft emerge from the sentencing Magistrates' remarks.
- 10 They reveal that during Mr Eves' employment he falsified accounts diverting money that was ostensibly to be paid to his employer's creditors, into his own bank account. He pleaded guilty to four counts and accepted that he had made an unlawful gain of \$14,823.
- 11 The sentencing remarks reveal that Mr Eves had a challenging childhood. Sometime after he left school, drugs and alcohol became an issue for him. He married in 2007, but the relationship quickly failed, and his alcohol and drug use escalated. It was in this context that his offending against his former employer occurred.
- 12 The sentencing Magistrate imposed just under ten months imprisonment, suspended upon Mr Eves entering into a good behaviour bond. The Magistrate also ordered Mr Eves to recompense his former employer. I was informed that regular payments have and continue to be made.
- 13 As for the more recent drive disqualified convictions, following a drug driving test, Mr Eves tested positive and was issued with a notice of immediate disqualification. I gather that Mr Eves was convinced that the test was incorrect, and he continued driving. As indicated the charge was later withdrawn.

- 14 With due respect, I take a different view of Mr Eves' offending to that taken by the Commissioner's delegate.
- 15 Mr Eves committed repeated acts of aggravated theft. Stealing from one's employer is a particularly egregious form of theft as it involves a serious breach of trust. It must be accepted that the offending occurred many years ago, but it nevertheless casts a grave shadow over Mr Eves' fitness and propriety. It is notable that s 55 of the Act expressly requires a licensing authority to take into account a person's reputation for honesty and integrity in determining the person's fitness and propriety.
- 16 In 2007, Mr Eves left the jurisdiction. He must have known that criminal charges against him were pending. His failure to remain in the State to face those charges reflects poorly on him.
- 17 The fact that Mr Eves was not successfully prosecuted with drug driving, does not reduce his culpability in driving whilst disqualified. He was told by the police that he was not to drive, and he repeatedly ignored that direction. That behaviour shows a lack of respect for authority.
- 18 When an applicant has prior offending that casts a doubt of his or her fitness and propriety, a licensing authority has a duty to allay the public's concern that the applicant might not prove to possess the qualities required of a responsible person.
- 19 A licensing authority has several options available to it, to allay that concern.
- 20 Sometimes the offending is such that the application should simply be refused.
- 21 In other cases, where the offending, although concerning, is not of a nature to rule out granting the application, but the time gap between the offending and the making of the application is relatively short, the licensing authority might think that further time is required to enable the applicant to demonstrate that the prior offending was an aberration or that he or she has truly changed. In such a case, it can adopt what is known in the criminal law as a *Griffith's* remand, the purpose of which was explained by Smart AJ (Spigelman CJ and Grove J agreeing), in *R v Trindall* as follows:

Often a Court experiences difficulty when sentencing an offender in determining the offender's prospects of rehabilitation and whether the foreshadowed rehabilitation will occur. In many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way. That was the present case. It is so much better for the court to have evidence of what has actually

taken place than to have to base its decision on the opinions of experts, assertions by the offender and what has happened over a short period of time, that is, since the commission of the offence or the offender's arrest.<sup>1</sup>

- 22 In like manner, a licensing authority may adjourn an application for approval to enable an applicant to establish that the foreshadowed change in behaviour has indeed occurred.
- 23 In other cases, a licensing authority might consider only granting an interim approval pursuant to s 53(2a) of the Act, and to make that interim approval subject to a period of good behaviour.
- 24 Another option, which is really a variation of an interim approval, is to invoke 53(4) of the Act, which provides:

If a licensing authority considers that an applicant should satisfy the licensing authority as to a certain matter for the purposes of determining the application, the licensing authority may, if the licensing authority thinks fit, nevertheless grant the application on the condition that the applicant satisfies the licensing authority as to the matter within a period determined by the licensing authority.

- 25 The approval process required by the Act that a licensing authority must undertake, involves an evaluative judgment, and at the margins, the exercise of that judgment may be a matter over which reasonable minds might differ. If this had been such a case, I would have deferred to the decision of the Commissioner because for this Court to intervene on a review, it must be satisfied that the Commissioner erred.<sup>2</sup>
- 26 In my respectful opinion, on the evidence presented, this was a case where the applicant's prior offending was such that an order granting him unqualified approval should not have been made. The public would be concerned about Mr Eves' offending and they were entitled to have safeguards put in place to allay those concerns. The Commissioner erred in not doing so. Accordingly, the order of the Commissioner cannot stand and requires revision.
- 27 As I have indicated several options were available: Refusal, deferral, the grant of an interim approval, or the grant of an approval subject to compliance with conditions.
- 28 If I had been dealing with the matter at first instance, I would have come to the view that Mr Eves, through his prior misconduct, had cast such a serious doubt over his fitness and propriety to hold office under the Act that I would not have been satisfied that he is a fit and proper person for

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<sup>1</sup> (2002) 133 A Crim R 119, at [60]– [61]:

<sup>2</sup> *Hove Sip N Save* [2021] SALC 7 at [78].

the purposes of the Act and would have refused his application. I would have formed the view that his recent commission of multiple offences of driving whilst disqualified against a background of historic offences of serious dishonesty, required further time for Mr Eves to demonstrate that he was a fit and proper person worthy of approval under that Act. I therefore would have deferred further consideration of the application to a later date to enable that to occur.

- 29 Whilst in the ordinary course of events, this would warrant an order simply revoking the order of the Commissioner and substituting it with an order that Mr Eves' application for approval as a responsible person under s 97 of the Act be refused and further consideration adjourned to a later date, there were matters that suggested to me that an alternative order was warranted.
- 30 The first is that although for now, I am not satisfied that Mr Eves is a fit and proper person, he falls short of meeting that threshold by a relatively small margin. If the only matter related to the historic offences of dishonesty, subject to granting an interim approval to allay any ongoing concerns, I would have granted the application. It was the more recent offending of multiple driving whilst disqualified that to my mind tipped the balance.
- 31 Secondly, had Mr Eves put some distance between his more recent offending and his application, and during that period was of good behaviour, I would have made a finding that he is a fit and proper person.
- 32 The third is that by reference to the principal of 'double jeopardy,' I felt a sense of unease in simply revoking his approval. In this case a licensing authority found that Mr Eves was a fit and proper person, and he arranged his affairs and secured employment on that basis. In conformity with the principle of double jeopardy in respect of criminal matters, the common law baulks against the notion of crown appeals against acquittal. As Deane J put it in *Davern v Messel*:

The citizen who is told by a competent court of the state that the state's proceedings against him are resolved in his favour should not awake on the morrow to be told he faces renewed jeopardy on that charge either by reason of the institution by the state of new proceedings against him or by reason of an appeal by the state against its own court's decision.<sup>3</sup>

- 33 Plainly this principle cannot apply in the same manner in connection with proceedings before this Court. This Court is guided by what is in the public interest, and in the context of approving a person as a responsible person, the protection of the public must be at the forefront of what the Court does.

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<sup>3</sup> [1984] HCA 34; (1984) 155 CLR 21 at 68.

Accordingly, the principle of double jeopardy cannot override a compelling need to protect the public by overturning an erroneous decision about an applicant's fitness and propriety.

- 34 But in cases where that need is not especially compelling, if appropriate safeguards can be put in place, the Court, on an application for review, might, having regard to the principle of double jeopardy, be prepared to entertain the resolution of the matter in a more generous way than had it been determining the matter for itself at first instance.
- 35 To put it another way, notwithstanding its view that an applicant falls short of establishing his or her fitness and propriety, on an application for review the Court, in the exercise of its discretion, might nevertheless allow the applicant's approval to stand, provided it would not be an affront to the public conscience to allow that approval in some form to effectively remain.
- 36 Initially I was attracted to the secondary position put forward by the police and contemplated a suspended disqualification. Had this been a disciplinary matter that would have been an available option. But upon reflection, as this is an application for review and not a disciplinary matter, I do not consider that this option is available.
- 37 Upon further reflection, I think that 53(4) of the Act enables me to effectively achieve the same outcome. In the unique circumstances of this case, I am prepared to grant Mr Eves his approval as a responsible person effective immediately, on the condition that he fulfils my expectation of a period of good behaviour, which I nominate as three years from the date of my order. If that condition is fulfilled, his ongoing approval will continue without qualification. If the condition is not fulfilled, his approval will automatically lapse, because a condition precedent to its grant will have not been fulfilled.
- 38 Accordingly, the application for review is allowed and orders in the above terms are substituted in lieu of the Commission's unqualified approval.