CR 02328

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on the information of Paul Craig, Liquor Inspector,

Appellant

- and -

GOLD RANGE INVESTMENTS LTD.

Respondent

REASONS FOR JUDGMENT

1 This summary conviction appeal is brought against the acquittal of the respondent Gold Range Investments Ltd., on a charge of unlawfully allowing a person under the age of 19 years to remain in that part of the respondent's licensed premises at Yellowknife in the Northwest Territories, namely the cocktail lounge known as the Gallery Neighbourhood Pub, where liquor is sold or kept for sale, contrary to s.98(3) of the **Liquor Act**, R.S.N.W.T. 1988, c. L-9, which states:

98. (3) Except as authorized by this Act or the regulations, no licence holder shall allow any person under or apparently under the age of 19 years to remain in that part of the licensed premises where liquor is sold or kept for sale unless that person has in fact attained the age of 19 years.

2 The appeal is brought pursuant to Part XXVII of the **Criminal Code**, which applies by virtue of s.2 of the **Summary Conviction Procedures Act**, R.S.N.W.T. 1988, c. S-15. The appellant relies upon sections 830 and 834 in Part XXVII of the Code, being represented in the proceedings by the Attorney General of the Northwest Territories. The appeal is based upon a transcript of the proceedings at trial, as contemplated by s.830(2). It is only necessary, therefore, to focus upon s.830(1), in conjunction with s.834(1), which read respectively as follows:

830. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that

(a) it is erroneous in point of law;
(b) it is in excess of jurisdiction; or
(c) it constitutes a refusal or failure to exercise jurisdiction.

834. (1) When a notice of appeal is filed pursuant to section 830, the appeal court shall hear and determine the grounds of appeal and may

(a) affirm, reverse or modify the conviction, judgment, verdict or other final order or determination, or
(b) remit the matter to the summary conviction court with the opinion of the appeal court,

and may make any other order in relation to the matter or with respect to costs that it considers proper.

3 The appellant asks for a reversal of the verdict at trial, by entry of a conviction, or that a new trial be ordered.

I. Grounds of Appeal

4 The appellant relies on the following grounds of appeal:

A. That the learned Trial Judge erred in law in determining and applying the test for due diligence.

B. That the learned Trial Judge erred in law in his determination of the standard of due diligence to be applied under s.98(3) of the **Liquor Act**.

C. That the learned Trial Judge erred in law in determining and applying the test for reasonable mistake of fact.

D. Such further grounds as the Appellant may advise and this Honourable Court may permit.

5 As I understand the position of the appellant, these are all grounds within the scope of para. 830(a) only, of the **Criminal Code**, namely that the verdict of acquittal at trial is erroneous in point of law. No question is raised as to the jurisdiction of the trial judge or as to his having acted either in excess of that jurisdiction or so as to refuse or fail to exercise it, as contemplated by paragraphs 830(b) and (c).

II. Factual Background

6 There were two counts in the information on which the trial took place. Count No. 1 was for an alleged offence under s.85(3) of the **Liquor Act**, to the effect that the respondent unlawfully sold liquor to a person apparently under the age of 19 years contrary to that subsection. Count No. 2 was for the alleged offence under s.98(3) in respect of which this appeal is brought. The respondent was acquitted at trial on both counts.

7 On the evening of February 6th 1993, at about ten minutes to 10.00 p.m., the informant Paul Craig, the senior Liquor Inspector for the Liquor Licensing Board under the **Liquor Act**, entered the respondent's premises known as the Gallery Neighbourhood Pub at Yellowknife, being premises licensed as a cocktail lounge under the Act. Near the bar where liquor was sold, Mr. Craig observed a table round which there was seated several young women, at least one of whom appeared to him to be very young. Mr. Craig therefore asked a passing waiter to check the women for "I.D.", which I understand (and counsel agree) means "identification", more particularly identification in documentary form indicating the age of the individual in question (such as a driver's licence).

8 Mr. Craig was accompanied by a member of the Royal Canadian Mounted Police, namely Constable Michael H. Nussbaumer, who also noticed one of the young women at the table as being someone whose age, for purposes of the **Liquor Act**, called for inquiry. Both Mr. Craig and Cst. Nussbaumer testified, and it is not in dispute, that the young woman in question was unable to produce identification of the kind which I have mentioned. The young woman was Ruth Impett, the individual named in each of the two counts of the information sworn by Mr. Craig as described above. (The trial transcript uses a different spelling of the woman's surname, but I shall use this spelling in what follows, both in reference to her and to her mother).

9 Ruth Impett was only 18 years of age at the time in question, as testified by her mother Mrs. Susanne Impett. It follows that the evidence before the trial judge sufficed to establish beyond a reasonable doubt (there being nothing to the contrary in evidence) that Ruth Impett was within a part of the respondent's above mentioned licensed premises where liquor was sold, on the date and at the place charged in the information; and that she was then under 19 years of age. More than that, the evidence shows that she had been served something to drink where she sat with several other customers near the dance floor in those premises. Clearly enough, she was there with the knowledge and consent of the respondent, acting through its employees serving liquor on the premises. The trial judge used different language to make similar findings of fact. Those findings are not in issue on this appeal.

III. The Issues

10 The central issue, as the grounds of appeal indicate, is whether or not the respondent, in the face of those facts, was entitled to a verdict of acquittal on the basis that it had shown due diligence, in the circumstances, to avoid or prevent the offence charged against it under s.98(3) of the **Liquor Act**.

11 In addition, there is an issue as to whether the verdict of acquittal on count 1 is a bar to a contrary verdict on count 2, on grounds of *res judicata* or issue estoppel.

IV. The Due Diligence Issue

12 The Court recently, in the somewhat similar case of **Gold Range Investments Ltd. v. The Queen**, unreported, November 9th 1993 (CR 02026), was called upon to consider a similar issue. At page 5 of my reasons for judgment I referred to the present state of the law in such matters, as follows:

A line of the highest judicial authority, beginning with **R. v. Sault Ste Marie**, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, 85 D.L.R. (3d) 161 and culminating in **R. v. Wholesale Travel Group Inc.**, [1991] 3 S.C.R. 154, 67 C.C.C. (3d) 193, 8 C.R. (4th) 145 and **R. v. Ellis Don**, [1992] 1 S.C.R. 840, 71 C.C.C. (3d) 63n, 92 D.L.R. (4th) 288n, has now clearly established that offences of the kind charged in the present instance are to be classified as strict liability offences and not as true crimes requiring proof by the Crown of *mens rea* (that is to say, a mental element of intentionality as to the prohibited conduct or its consequences). It is enough if the prohibited conduct (whether by act or omission) is proved beyond a reasonable doubt; whereupon, if the defendant shows beyond a balance of probabilities that the conduct occurred notwithstanding the defendant's exercise of due diligence, the defendant is then entitled to an acquittal; but, failing that (or any other valid defence), the defendant is to be found guilty of the offence.

13 Dickson J. (as he then was) described the class of offences of which s.98(3) is but one of a large number, in the following words, at pp. 1326 (S.C.R.), 373 (C.C.C.), and 53 (C.R.):

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be described as offences of strict liability.

14 Reference may also be made to **Papa's Holdings Ltd. v. Liquor Licensing Bd.**, [1987] N.W.T.R. 82 (C.A.), in which an offence contrary to para. 89(b) and s.93 of the **Liquor Ordinance**, 1983 (1st Session), c.26 (in *pari materia* with today's **Liquor Act**) was held to be one of strict liability. There is nothing in s.98(3) of the Act to suggest that it creates an offence of a different type. And no issue on that point arises in the case at hand. However, I have mentioned the

foregoing in view of the decision in **R. v. Mussalem** (1968) 3 C.C.C. 90, 3 C.R.N.S. 46, 62 W.W.R. (N.S.) 385 (N.W.T.C.A.) which must be taken to have been overruled by **R. v. Pierce Fisheries Ltd**., [1971] S.C.R. 5, [1970] 5 C.C.C. 193, 12 C.R.N.S. 272, 12 D.L.R. (3d) 591, 3 N.R.1, on the issue of whether *mens rea* is necessary in respect of a regulatory or public welfare offence, as to which the law in the Northwest Territories is now as outlined above, not least in reference to cases under s.98(3) of the **Liquor Act**.

15 Due diligence means the absence of negligence. In other words, it means the taking of all due care in the circumstances, to avoid or prevent the offence taking place: **R. v. Chapin**, 1970) 2 S.C.R. 121, 7 C.R. (3d) 225, 45 C.C.C. (2d) 333, 8 C.E.L.R. 151, 95 D.L.R. (3d) 13.

16 The defence of due diligence will therefore be established if the accused shows, beyond the balance of probabilities, that the accused took all reasonable steps to avoid or prevent the offence taking place; and the defence will also be made out where the accused shows, once again beyond the balance of probabilities, that the accused reasonably believed in a mistaken set of facts which, if true, would render the accused's actions (or lack of action) innocent. No other defence need be considered in the present instance, since the only defence relied upon by the respondent accused at trial was the defence of due diligence, in both of its above described forms.

A. Did the trial judge err in determining and applying the test for due diligence?

17 At page 2 of the transcript of the trial judge's reasons for judgment acquitting the respondent, the following appears at lines 14 to 19:

> This is a strict liability statute which means that a defendant who takes reasonable precautions not to break the law has available a defence, if that accused person has done what is classified, by law, as a standard of due diligence expected of any reasonable person acting in that position.

18 Although the language used is somewhat less precise or complete than that employed by Dickson J. in **R. v. Sault Ste Marie (City) (*supra*)**, it is apparent that the trial judge was aware of the requirements of the defence of due diligence, in general terms. To the extent above quoted, he was not in error in that respect. He then went on to say, after reviewing some of the evidence (up to page 3, line 24):

> The question with regard to the charges before the court comes down to whether or not the actions of the waiter, in making his assessment of the age of the customers, met the responsibility for what is referred to, in law, as due diligence. Which, if that standard is met, provides the accused with a good defence.
>
> Based on the fact that the inspector himself was of the opinion that the girl or girls would at least be close to an allowable age although he thought they had a youthful look, and on the fact that the police officer thought this group of people looked young, but did not actually state an age as his opinion of their ages. And based on the actions taken by the waiter before the inspector and the police officer arrived, I find that what was done by the waiter under the circumstances was reasonable and as much as could be expected of the waiter on that occasion.
>
> I base this opinion or this finding on the fact that the waiter was told by another waitress about the customers having been there the night before. It is reasonable under those circumstances to have relied on the waitress who served them the night before having acted in what he classified her usual way where she is, in his opinion, usually diligent in the efforts that she makes to ensure customers are of age.
>
> His evidence was that Sue is diligent, usually, and that the waiter thought that she must have known that the customers were all 19 years of age or more. In addition to that, the waiter gave evidence to the court that he made his assessment generally or usually on the appearance and activities, actions and demeanour of persons who are in the bar. He was of the opinion that the lady in question, Ruth Impett, was of age to consume alcohol lawfully.

I am satisfied that there has been a mistake made by the waiter but that he had reasonable and probable grounds to believe that the young lady was of age to be served. His evidence was such that he honestly believed her to be of age and since he has come to court and given an honest but mistaken belief and the basis upon which he formed his mistaken belief are reasonable, then the Defence is entitled on a strict liability offence to have the charge dismissed because it has not been proved beyond a reasonable doubt that a person was, to him, apparently under the age of 19 and also because there was a mistaken belief in the age of the person even though she, in fact, was under-age.

19 The most immediately obvious error in the trial judge's application of the law as to the defence of due diligence is apparent in his closing remarks, in the last paragraph quoted above:

... the Defence is entitled on a strict liability offence to have the charge dismissed because it has not been proved beyond a reasonable doubt that a person was, to him, apparently under the age of 19 ...

20 To begin with, the Crown was under no burden to prove beyond a reasonable doubt, on the charge under s.98(3) of the **Liquor Act**, that the person named in the charge as Ruth Impett was **apparently** under the age of 19, whether to the accused's employee or anyone else. It was enough for the Crown to have proved beyond a reasonable doubt that Ms. Impett was **in fact** under that age. Both the charge itself and s.98(3) make this plain.

21 Next, the Crown was not obliged to prove negligence, or lack of reasonable care, on the part of the respondent or its employees. It was for the respondent to establish, beyond the balance of probabilities, that it had exercised due diligence by taking all reasonable care to avoid or prevent the offence from taking place, in the circumstances. It was not sufficient for the respondent merely to raise a reasonable doubt on this point to be entitled to an acquittal.

22 Unlike the situation where the offence requires proof of *mens rea*, it was not enough for the respondent, in a prosecution for the strict liability offence charged under s.98(3) of the **Liquor Act**, to have raised a reasonable doubt as to the respondent's having acted or omitted to act on the basis of either an honest or a reasonably held mistake of fact as to Ms. Impett's age, in order to be entitled to an acquittal.

23 It is true that the trial judge prefaced his remarks in the last paragraph of his reasons, as quoted above, by saying that he was "satisfied that there has been a mistake made by the waiter that he had reasonable and probable grounds to believe that the young lady was of age to be served". Those grounds evidently consisted of the trial judge's unquestioning acceptance of the waiter's evidence that he had assumed, without any hesitation, that Ms. Impett was of the required age, because a waitress, whom the waiter regarded as diligent, had passed him word as to the

drinks served to Ms. Impett by the waitress during the previous evening in the respondent's premises. The trial judge accepted this as a sufficiently reasonable explanation for the waiter's failure to check Ms. Impett's "I.D." himself, before serving her. There was no evidence as to whether the waitress had ever checked Ms. Impett's "I.D."; but the evidence shows that Ms. Impett lied when she was asked her age by the waiter, after the Liquor Inspector and Cst. Nussbaumer came on the scene, which suggests strongly that, if she had ever been checked before, her word had been taken without the production by her of any "I.D."

24 Given the basis of the trial judge's finding that he was "satisfied that there has been a mistake by the waiter", etc., and his subsequent remarks regarding the absence of proof beyond a reasonable doubt that "a person" (presumably Ms. Impett) was, to the waiter, "apparently under the age of 19", I am driven to the conclusion that the trial judge must have felt that he could be "satisfied" of the existence of a reasonable mistake when he merely had a reasonable doubt on that score. That being so, he erred in point of law, not only in his determination of the test for due diligence as a defence to the charge under s.98(3) of the **Liquor Act**, but also as to the application of that test to the evidence before him.

B. Did the trial judge err in determining the standard of due diligence to be applied under s.98(3) of the **Liquor Act**?

25 It was very forcefully argued before me by counsel for the respondent that the standard of reasonable care or due diligence required by s.98(3) of the **Liquor Act** is not a standard of absolute perfection which will secure the complete exclusion of all under-age persons at all times from licensed premises under the Act. Such perfection, it was argued, is unattainable and so is unreasonable, when all due account is taken of the natural proclivities of young persons who have not yet reached the age of 19 years.

26 This argument, however eloquently and forcefully (or repeatedly) advanced by counsel for the respondent, seems to suggest that any simple system of regularly checking on the age of patrons of licensed premises who appear to be close to or under the minimum age, so as to require them to produce sufficient proof of age in any case where there is a risk of offending against s.98(3) of the **Liquor Act**, is too great a burden to be borne by those in "the hospitality industry" to which the respondent belongs. Yet nothing less than such a simple system was recently relied upon by the respondent, in the earlier case of **Gold Range Investments Ltd. v. The Queen (*supra*)**, as the reasons for judgment in that case reveal. And the evidence at trial in the present case likewise reveals that the respondent had a similar system supposedly in place in its Gallery Neighbourhood Pub cocktail lounge premises on February 6th 1993.

27 Although the trial judge did not mention any detailed specifics in this connection, he did have this to say by way of a general statement (at page 5, lines 19 to 24 of his reasons for judgment):

> A high standard should be required of waiters and persons operating licensed premises, but the court can expect nothing more than a reasonable standard because it is impossible always to have perfect judgment. The courts have recognized that one can not always find a perfect judgment to exist.

28 These words fall short of elucidating the nature of the "high standard" to which the trial judge declared personnel in licensed establishments are to adhere. Is it consistent with such a standard to refrain from checking on "I.D." simply because a young person is said to have been served on the premises on a previous occasion, without knowing (or inquiring) if that person's age was in fact established on that earlier occasion? In my respectful view, it is not. As the evidence in this case reveals, it is not an effective procedure, in terms of compliance with s.98(3) of the **Liquor Act**, to rely on such a flimsy basis for refraining from checking a young person's age when on licensed premises. It is only reasonable, to ensure due compliance, that such checks should be

promptly made by those in charge of such premises in all instances where the actual age of the young person has not been, to their personal knowledge, already satisfactorily established.

29 Counsel for the Crown has referred me to the decision in **R. v. Gonder** (1981), 62 C.C.C. (2d) 326 (Y.T.C.) per Stuart, C.T.J. As the reasons for judgment indicate in that case, what constitutes reasonable care will depend on the facts of the case in question. And while some useful criteria are there suggested, I do not think that any elaboration is required beyond what ordinary common sense indicates as being reasonable in a case such as the present. It is only necessary to bear in mind the clear intention of the legislature in enacting the **Liquor Act**, more especially s.98(3) of the Act and related provisions. Common sense is all that is required to conclude that it should not be left to the self-interest of those in "the hospitality industry" (or their employees, whose income may depend on gratuities from patrons) to decide what is reasonable to secure due and effective compliance with s.98(3) of the Act.

30 The trial judge was correct in declaring that the standard of care required under s.98(3) of the **Liquor Act** is a high one. He was equally correct in saying that the standard cannot be one of absolute perfection, at least to the extent that human judgment may be a factor. Nevertheless, a simple system of surveillance and checking of "I.D.", if followed conscientiously, with checking at the doors at busy times, should enable licensees such as the respondent to ensure due and effective compliance at all times with s.98(3) of the Act. The respondent is said to have had such a system in operation; but what it does not seem to have had was the sort of vigilant supervision which would have made the system work consistently and properly, as was surely intended. Such supervision is clearly an essential element of any such system. As the evidence shows, failures of internal supervision must lead in the end to the imposition of external supervision by the Liquor Inspectors and police.

31 In conclusion, on this ground, while the trial judge spoke of a high standard of due

diligence, I am unable to accept that he applied such a standard in finding that the respondent's waiter made a reasonable mistake in failing to personally take the necessary (and entirely reasonable) steps to check on Ms. Impett's age.

C. Did the trial judge err in determining and applying the test for reasonable mistake of fact?

32 The answer to this question is "yes" for the reasons given above.

V. The *Res Judicata* Issue

33 The respondent submits that its acquittal of the offence under s.85(3) of the **Liquor Act** in Count No. 1, not having been set aside or appealed, must be taken to have been accepted by the Crown, so as to constitute *res judicata* as to the issues of fact and law determined by the trial judge in adjudicating on that count. The respondent relies on **R. v. Fredrek** (1979), 17 A.R. 613 (C.A.) and **R. v. Welyki** (1975), 26 C.C.C. (2d) 484 (Alta. S.C.T.D.) for that submission.

34 Is there an inconsistency between the trial judge's not guilty verdict on Count No. 1 and the possibility of a contrary verdict on Count No. 2, whether it is reached on appeal or only after a new trial? The verdict on Count No. 1 rests on the trial judge's finding that the Crown had not proved beyond a reasonable doubt that Ms. Impett was **apparently** under the age of 19 years. As counsel for the Crown submits, the respondent was correctly held, as a result, entitled to be acquitted of Count No. 1. The *actus reus* of the offence in Count No. 2, under s.98(3) of the **Liquor Act**, is however not confined to allowing a person **apparently** under age to remain on the premises. It extends to a person **actually** under the legislated age. There is therefore no inconsistency, either in fact or in law, in a different verdict being reached on Count No. 2 than on Count No. 1.

35 Accordingly, there is no issue estoppel or *res judicata* to prevent an adjudication on Count No. 2 in favour of the Crown, whether on appeal or after a new trial.

VI. Assessments of Apparent Age

36 In his reasons for judgment, the trial judge made the following remarks (at page 5, line 25):

> My own observation of the young lady on the stand caused me to realize that the public I expect would have the same difficulty I would have in trying to assess the actual age of a person because I found her very self-composed, mature in her quick responses and very definite in the way she acted. There was nothing in the way she acted that would cause me to believe that she was younger than most of the young ladies that are employed in various positions with whom I have some contact as a result of employment.
>
> I can not, of course, let that substantially influence me today, but it does cause me to understand why the waiter may have made the mistake, since he was of the belief that any of us who are over 30 might find that people around 18, 19, 20 years of age do appear to be younger. I expect that we all will experience, as we get older, that each year police officers and people in senior positions always look younger than they did five years before that, but that is just an observation that has no real influence on the court in its decision today.
>
> Because the young lady has come back to the court today and seems to be somewhat different, possibly in her dress or appearance, she looks younger to me today than she did yesterday. She's not before the court as a witness today, but she did attend for the purposes of observing what is happening.

37 In the course of the argument on the hearing of this appeal, I made mention of **R. v. Mussalem (*supra*)** in reference to the trial judge in that case himself assessing the apparent age of the two girls to whom it was alleged the accused had unlawfully supplied liquor. As the report of that case shows, this was done only to enable the trial judge to better assess the credibility of the accused's denial that he had any idea that the girls might be under age. In the present case, Count No. 1 was framed under s.85(3) of the **Liquor Act**, which reads:

> 85. (3) No person shall sell or supply liquor to a person apparently under the age of 19 years unless that person has in fact attained the age of 19 years.

38 That subsection is to be read in conjunction with s.85(5), which specifically empowers the trial judge, in a case under s.85(3), to view the appearance of the person alleged to

have been "**apparently** under the age of 19 years" (my emphasis). Subsection 85. (5) states:

85. (5) In a prosecution for a contravention of subsection (3), the justice shall determine from the appearance of the person and other relevant circumstances whether the person is apparently under the age of 19 years.

39 It was therefore not inappropriate for the trial judge to rely on his own assessment of the apparent age of Ms. Impett, for the purposes of s.85(5) and Count No. 1, or for the purposes of assessing the credibility of the witnesses on Count No. 2, in reference to s.98(3).

40 However, while there is much in what the trial judge had to say about the difficulties of correctly assessing the age of young persons in the vicinity of the legislated minimum of 19 years, this only reinforces the need for due care and caution on the part of licensees such as the respondent, so that the standard of reasonable care which they exercise must be such that compliance with the requirements of s.98(3) will be achieved in all but the very exceptional case, such as where a forged or otherwise false "I.D." has been produced, in which case criminal charges may be laid against the individual producing it, once detected.

VI. Conclusion

41 The appeal is allowed and the not guilty verdict on count No. 2 is set side, with a verdict of guilty being entered in its place.

42 In reaching this conclusion, I note that no question of the credibility of the witnesses or of the weight to be given to their evidence requires to be decided. On the evidence as shown in the record it is plain that the respondent has not shown, beyond the balance of probabilities, that it exercised due diligence in all the circumstances to avoid or prevent the offence charged under s.98(3) of the **Liquor Act**. The high standard of reasonable care required was not met when Ms.

Impett was allowed to remain on the respondent's premises without any check of her "I.D." until the Liquor Inspector asked for it, she being in appearance a young person as noticed by both the Liquor Inspector and the police officer who accompanied him. The respondent having failed to discharge the civil burden of proof as to due diligence, it must therefore be found guilty as charged under s.98(3).

43 Counsel should now notify the Court of their availability for a hearing as to disposition of the matter on the basis of the guilty verdict. I direct that it be set down for hearing before me next month or so soon thereafter as counsel may be available for that purpose.

M.M. de Weerdt

J.S.C.

Yellowknife, Northwest Territories
December 17th 1993

Counsel for the Appellant: Ms. Shannon Gullberg

Counsel for the Respondent: James D. Brydon, Esq.

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