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1983 No. 258 S.S.

THE STATE (AT THE PROSECUTION OF WILLIAM
HAROLD ARMSTRONG)

-v-

DISTRICT JUSTICE THOMAS F. DONNELLY

JUDGMENT OF MR. JUSTICE BARRON DELIVERED THE 23RD DAY OF
FEBRUARY 1984

The facts in this case are relatively simple. The Prosecutor is the owner of premises at No. 1, Lincoln Place, in the City of Dublin. By a lease dated the 29th of April 1980 the premises were let by the Prosecutor to Phonemate Limited for a term of 2 years and 9 months commencing on the 18th of April 1980 and expiring on the 18th of January 1983. The Lessees interest under the lease subsequently became vested in Mates Limited. This company held over upon the expiry of the term granted by the lease and by a surrender dated the 13th of April 1983 surrendered its interest in the premises to the Prosecutor. At the date of this surrender the tenant was the holder of a Wine Retailers On-Licence

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(ordinary). On the same date there were pending against the tenant two prosecutions under the Intoxicating Liquor Act 1927 for alleged offences under the provisions of the Act relating to prohibited hours. These prosecutions related to events which occurred on the nights of the 23rd, 24th November, 1982 and 26th, 27th November, 1982 respectively. The prosecutions were heard together on the 20th of April 1983 and the tenant was convicted in respect of each occasion of permitting intoxicating liquor to be consumed on the premises at a time prohibited by law and of permitting persons to be on the said premises at a time prohibited for those purposes by the Licensing Acts 1833 to 1977.

On the 29th of April 1983, the Prosecutor applied to the Respondent for a certificate of no objection to the transfer to the Prosecutor of the licence held in the name of the tenant. This application was refused by the Respondent on the ground that as a consequence of the convictions imposed on the 20th of April the licence had become forfeit and there was on the date of the application no licence to be transferred. On the 2nd of May, 1983 the Prosecutor obtained a Conditional

Order of Certiorari to quash the order of the District Justice on the ground that the licence was still valid, unendorsed and subsisting. Cause has been shown on behalf of the Respondent and the matter now comes before the Court for an Order to make absolute the conditional order notwithstanding the cause shown.

The forfeiture of a licence is dependent upon the number of previous convictions recorded on the licence and the date or dates upon which such convictions were so recorded.

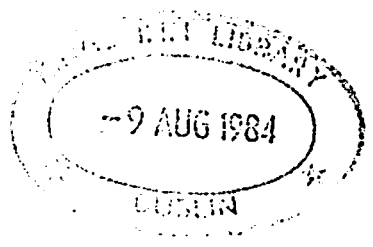
Provisions relating to the recording of convictions on licences and to the circumstances in which such recording makes the licence forfeit are contained in part III of the Intoxicating Liquor Act of 1927. Section 25 deals with the recording of convictions on licences. It is as follows:-

"25 (1) Whenever the holder of any licence for the sale of intoxicating liquor by retail is convicted of an offence to which this Part of this Act applies the conviction shall ... be recorded on such licence.

(2) Whenever a conviction of the holder of a licence is under this section recorded on such licence

17
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such conviction shall, in the case of the first conviction so recorded on such licence after the passing of this Act, continue so recorded for the period of five years from the date of the conviction and in the case of the second conviction so recorded on such licence after the passing of this Act, continue so recorded for the period of seven years from the date of the conviction and, in the case of the third conviction and of every subsequent conviction so recorded on such licence after the passing of this Act, continue so recorded for the period of ten years from the date of the conviction.



- (3) Every conviction recorded on a licence under this section, shall at the expiration of the period during which under the foregoing sub-section the same is to continue recorded, cease for all purposes to be so recorded."

Sections 26 and 27 afforded some relief against the mandatory provisions of Section 25 (1). So far as they

are material these provisions are as follows:-

"26 (1) Whenever the holder of a licence for the sale of intoxicating liquor is convicted by a Justice of the District Court of an offence to which this Part of this Act applies such Justice may, if satisfied that by reason of the trivial nature of the offence such conviction ought not to be recorded on such licence, make an order stating the circumstances which reduced the offence to one of a trivial nature and declaring that such conviction shall not be recorded, and whenever such order is so made such conviction shall not be so recorded."

"27 (1) Whenever the holder of any licence for the sale of intoxicating liquor is convicted by a Justice of the District Court of an offence to which this Part of this Act applies an appeal shall lie from such conviction to the Judge of the Circuit Court within whose circuit the district or any part of the district of such Justice is

situate and the decision of such Judge shall be final and not appealable and on the hearing of such appeal such Judge may, through affirming such conviction, if satisfied that by reason of extenuating circumstances (to be stated in the order of the Court) such conviction ought not to be recorded on such licence, make an order declaring that such conviction shall not be recorded, and whenever such order is so made such conviction shall not be so recorded and shall for all purposes be deemed never to have been so recorded and accordingly any forfeiture occasioned by the recording of such conviction shall be deemed to be cancelled."

Section 28 which provided for the forfeiture of licences is as follows:-

"28 (1) Whenever the holder of a licence for the sale of intoxicating liquor by retail is convicted of an offence to which this Part of this Act relates and such conviction is by virtue of this Part of this

Act recorded on such licence, and at the time of such recording two convictions (subsequent in date to the passing of this Act) are by virtue of this Part of this Act recorded on such licence, such licence shall thereupon be forfeited."

Section 29 further mitigates against the mandatory provisions of Section 25 (1). It is as follows:-

" 29. Whenever the holder of a licence for the sale of intoxicating liquor by retail is convicted of two or more offences of which this Part of this Act applies and such offences were committed on the same day, the Court by which such holder is so convicted or the Court by which such conviction is affirmed on appeal (as the case may be) may if it so thinks fit order that such one or more as such Court shall think fit but not all of such convictions shall not be recorded on such licence, and whenever such order is made the conviction or convictions in respect of which the order is made shall not be recorded on such licence

1690
21

notwithstanding the provisions of this Act, and, in the case of an order made on appeal, shall for all purposes be deemed never to have been so recorded."

The effect of these provisions was that every conviction for an offence to which Part III of the Intoxicating Liquor Act 1927 applied had to be recorded on the licence unless the ameliorating provisions of either Section 26, Section 27 or Section 29 were applicable, in which case the recording of the conviction or, in the case of section 29, of some but not all of the convictions, was at the discretion of the Court. Section 29 recognised that the recording of convictions in relation to offences committed on the same day, which would usually though not necessarily arise out of the same incident, might require different treatment from convictions arising from circumstances in which only one offence had been committed. I propose for the purpose of this judgment to refer collectively to all convictions imposed in respect of



offences committed on the same day as "a multiple conviction"; and to all other convictions, including those imposed on the same day, but in respect of offences committed on different days, as "a single conviction."

These provisions of the Intoxicating Liquor Act 1927 were amended by the Intoxicating Liquor Act 1943. Section 25 (1) of the 1927 Act was amended so as to give the Court an absolute discretion whether or not to record any conviction, and a similar absolute discretion was given to the Circuit Court on appeals. The provisions of sections 26, 27 and 29 which had qualified the terms of Section 25 (1) as already indicated were strictly no longer required. Nevertheless, only the discretion contained in Section 27 (1) was expressly repealed; the operation of Section 26 was suspended and Section 29 was left undisturbed. In addition, it was provided that all convictions then recorded ceased for all purposes to be so recorded. The effect of these amendments was to give every licensee a clean licence and to give to the Court an absolute discretion whether or not to record any

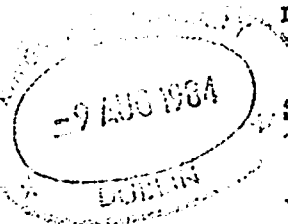
conviction. Further amendments were enacted by the Intoxicating Liquor Act 1960. The absolute discretion given to the Courts whether or not to record a conviction was revoked. In place of the discretion, a mandatory provision was enacted as a further sub-section to Section 25. This provision which was enacted by Section 37 of the 1960 Act was as follows:

"(4) Notwithstanding anything contained in sub-section (1) of this Section, where a person is convicted in relation to any premises in respect of which he holds a licence for the sale of intoxicating liquor by retail of an offence to which this Part of this Act applies and the conviction is the first conviction of that person in relation to those premises of an offence to which this Part of this Act applies, the conviction shall not be recorded on the licence."

This Section 37 also amended S. 25 (2) by reducing the periods of time during which convictions remained recorded on licences. In addition, as with the 1943 Act,

all convictions then recorded ceased for all purposes to be so recorded. The effect of these amendments was to give every licensee a clean licence and to provide that all convictions save a first conviction had to be recorded on the licence.

The main issue in the present case is as to the meaning of the expression "first conviction" as used in Section 25 (4). In the present case, each incident with which the licensee was charged gave rise to a multiple conviction. Each such multiple conviction comprised two convictions. The Respondent contends that one of the convictions comprised in the first multiple conviction was exempted from being recorded by virtue of the provisions of Section 25 (4), but that the other of such convictions had to be recorded. He then contends that each of the two convictions comprised in the second multiple conviction had to be recorded and that, when the second of such convictions was recorded, there must then have already been two convictions recorded. Accordingly, the licence became forfeited.



The Prosecutor denies that such a result has been achieved. His submissions are based upon what he contends are the true meanings of Section 25 (4) and Section 28. He contends that in relation to a multiple conviction the expression "first conviction" contained in Section 25 (4) means in a case where there are no previous convictions all the convictions comprised in the multiple conviction and not just one of such convictions. In relation to Section 28, he further contends that even if one of the convictions comprised in the first multiple conviction was properly endorsed on the licence, the convictions comprising the second multiple conviction having been pronounced at the same time must be deemed to have been recorded at the same time. This would mean that when each of the convictions in relation to the events of the night of the 26th, 27th November, 1982 were recorded only one conviction would already have been recorded on the licence, so that no forfeiture of the licence took place.

The Prosecutor made one further submission. He submitted that since the licence in fact never had any of

the convictions recorded on it, it had not been forfeited.

He relied upon the decision of Finlay P. in In the Matter of the Licensing Acts 1933 - 1962 and Doreen O'Riordan, I.L.R.M.

2. That was a case in which, by virtue of the number of convictions which ought to have been recorded on the licence it had become forfeit by reason of the provisions of Section 28. The existence of such convictions was over-looked and the licence was renewed annually for the next 4 years. It was held that such renewals could not be quashed on certiorari because such orders were made within jurisdiction. That is a very different case from the case here. There is no similar Order made within jurisdiction upon which the Prosecutor seeks to rely. There is an obligation under Section 32 (1) of the Intoxicating Liquor Act 1927 to produce the licence to the Court at the hearing of a charge; and an obligation under sub-section (2) upon the officer of the Court to record any conviction required to be recorded on such licence, and where the licence becomes forfeited to retain the licence and to notify the Revenue Commissioners accordingly. Even if this is not done,

the same consequences ensue as if it had been done:

See Section 31. I do not accept this further submission.

In order to construe properly the meaning of the words "first conviction" as used in Section 25 (4) it seems to me that it is necessary first to establish the manner in which Section 28 of the Act operates. For this purpose, it is necessary to consider the second submission made on behalf of the Prosecutor. In support of this submission, the Prosecutor relies upon a passage in the judgment of O'Dalaigh C.J. in the Attorney General (O'Muireadhaigh) -v- Boles, 1963 I.R. 420. In Boles case the issue before the Court was whether or not a conviction for an offence committed before the licensee had been convicted of any offence was itself "a first conviction." The licensee had been convicted on the same day in the District Court of two offences, one committed in the month of July, 1960 and the other committed in the month of August 1960. It was common case that the conviction for the offence committed in July 1960 was "a first conviction." It was contended further that the conviction for the offence

committed in August, 1960 was also "a first conviction" upon the ground which I have indicated. This submission on behalf of the licensee was rejected by the Court. The passage upon which the Prosecutor relies is at page 426 where O'Dalaigh C.J. says:

"the forfeiture provisions of Section 28 do contain this safeguard, that a licensee cannot lose his licence on a single "appearance" in Court: The endorsement which effects the forfeiture has to be additional to two endorsements which are recorded, i.e., already recorded on the licence, and that necessarily means that he "has been to Court" at least once before."

In this judgment O'Dalaigh C.J. was essentially drawing the distinction between an offence and a conviction. In the passage which I have cited, he was referring to section 28 to show that it also contained a protection in the case of a first appearance in Court. Nevertheless, it seems to me that he has not drawn a distinction between the imposition of a conviction and the recording of that conviction on the licence. Section 32 (1) of the

Intoxicating Liquor Act 1927 requires the holder of the licence to produce his licence to the Court at the commencement of the trial. If at that stage there is only one conviction recorded on the licence, then it would certainly be arguable that on the imposition of any convictions arising as a result of the trial that there were not then already two convictions recorded on the licence. However, once the convictions are imposed, they must forthwith be recorded. If there was one conviction recorded when that licence was handed in and two convictions imposed, then when the first of those convictions was recorded on the licence there would have been two convictions so recorded so that when the second conviction imposed on that day was recorded there would already have been two convictions recorded on the licence and it would have become forfeit. This approach is supported by a passage from the judgment of Walsh J. in the same case in which he says at page 435: "... and of course by virtue of Section 28 of the Act a licence was forfeited when it contained three recorded convictions." I reject

LIBRARY
-9 AUG 1984

the Prosecutor's submission. A distinction must be drawn between imposition of a conviction and its being recorded on the licence. It is not the number of convictions recorded on the licence at the moment when further convictions are imposed which is material, but the number so recorded as each conviction imposed is recorded. The Prosecutor also submitted in relation to section 28 that since his licence was clean on his first appearance in Court it could not have become forfeit. Even if this construction is open under section 28, the accident that two prosecutions are heard on the same day does not make the second prosecution part of a first appearance: see Kingsmill Moore J. in Boles case at p.431. Upon this view of the effect of Section 28, then, unless the Prosecutor's main submission is correct, the licence was forfeited by virtue of the recording of the convictions comprised in the second multiple conviction imposed on his lessee.

The essence of the Prosecutor's first submission as to the meaning of the expression "first conviction" is that Section 25 (4) may also by reason of the Interpretation

Acts be read as if the provision had been enacted in the plural. He submits that in relation to a multiple conviction of a licensee with no previous convictions it should be so read. Both the Interpretation Act 1923 and the Interpretation Act 1937 are to the same effect so that whichever is the appropriate Act to apply to the provisions of Section 25 (4) of the Intoxicating Liquor Act 1927 it is immaterial which is taken for consideration. The Interpretation Act 1923 Section 1 (1) provides:-

"In this Act and in every Act passed after the commencement of this Act, unless the contrary intention appears - ... (b) words in the singular shall include the plural, and words in the plural shall include the singular."

The Interpretation Act 1937 Section 11 provides:

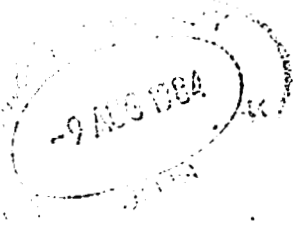
"The following provisions shall apply and have effect in relation to the construction of every Act of the Oireachtas and of every instrument made wholly or partly under any such Act, that is to say:-

(a) singular and plural. Every word importing the singular shall, unless the contrary intention appears,

be construed as if it also imported the plural, and every word importing the plural shall, unless the contrary intention appears, be construed as if it also imported the singular."

Read in the plural Section 25 (4) would read as follows:

"Notwithstanding anything contained in sub-section (1) of this section where a person is convicted in relation to any premises in respect of which he holds a licence for the sale of intoxicating liquor by retail of offences to which this Part of this Act applies and the convictions are the first convictions of that person in relation to those premises of offences to which this Part of this Act applies, the convictions shall not be recorded on the licence."



The language of the provision is in no way strained by reading it in the plural. The word "first" is normally used in relation to one person or thing, but its dictionary definition includes its use as in "the first two, three etc." Nor is it unusual to use it without

such numbers but with plural nouns as for example in the expression "the first men" to land on the moon.

This interpretation should be considered in the light of the discretion granted to the Court by the provisions of Section 29 in relation to a multiple conviction. When first passed, the effect of Section 29 was to qualify the mandatory provision of Section 25 (1) so as to give the court a discretion in the case of a multiple conviction to treat it, if it saw fit, in effect as a single conviction. Following the passing of the Intoxicating Liquor Act 1943 this discretionary power lapsed since it was also included in the wider power contained in Section 25 (1) as amended. By virtue of the provisions of Section 37 of the Intoxicating Liquor Act 1960, the discretion has effectively been revived. The section applies to the recording or non-recording of convictions comprised in a multiple conviction. The use of the words "such one or more as such Court shall think fit but not all or such convictions" suggests that the intention of the provision was to create a discretion to ameliorate in part but not totally the harshness of the

provisions of Section 25 (1). The use of the words later in the provision "notwithstanding the provisions of this Act" suggests that the intention was to grant the discretion in relation to convictions which would otherwise have had to be recorded. If Section 25 (4) may be read in the plural, then none of the convictions may be recorded. The words "notwithstanding the provisions of this Act" do not apply to such convictions and so Section 29 has no application. If Section 25 (4) may only be read in the singular, the nature of the discretion given by Section 29 is less clear in that it can be read in one of two ways. In the case of a multiple conviction which contains say four convictions, Section 25 will require three of such convictions to be recorded. The normal prosecution in relation to after hours offences is to charge six separate offences so that the example I have taken need not be an exceptional case. If the discretion is to ameliorate in part the effect of Section 25 (1) as amended, then the discretion cannot relate to more than two of these three convictions. If so, at least one conviction must be recorded. This would have been a likely result even without Section 25 (4). On the other hand, if the discretion relates only to convictions which would otherwise have had to be recorded, then it can be construed

to apply to all three convictions since it will still be applied to "one or more...but not all of such convictions". On this basis, if the Court exercises the discretion then none of the convictions need be recorded.

Consideration must also be given to the use of the expression "first conviction" in Section 25 (2) of the 1927 Act. It is used in relation to the expressions "second conviction" and "third conviction". Since the words "second" and "third" unlike the word "first" can only be used in a singular context, the proper construction of the expression in this sub-section must be in the singular. Nevertheless, there is no rule of construction which requires that an expression must be given the same meaning whenever used in the same instrument regardless of context. Moreover, there is nothing in the expression "first conviction so recorded" as used in section 25 (2) which denies the possibility that the number of convictions prior to the first conviction to be recorded must be limited only to the one conviction.

I propose to evaluate these considerations in the light of the intention of the legislature to be gained from the provision of Sections 25 to 29 of the Intoxicating Liquor Act 1927 as originally enacted and as subsequently amended. It seems clear that in

LIBRARY
-9 AUG 1984

enacting Section 25 (4) the legislature intended first to provide some relief against the otherwise mandatory provisions of Section 25 (1) and, secondly, that the granting of such relief should not be dependent upon the discretion of the Court.

Undoubtedly a singular construction of the expression "first conviction" as used in Section 25 (2) suggests that "a contrary intention appears" and that the construction of the same expression in Section 25 (4) should also be in the singular. Further, if a plural construction may be applied to Section 25 (4) then Section 29 has no application to convictions coming within the provisions of that sub-section. Ordinarily a construction which deprives a provision of its effect should be rejected, but where the provision as here had been deprived of any effect between the years 1943 and 1960 this consideration bears little weight.

Notwithstanding these two arguments in favour of the construction of Section 25 (4) being limited to the singular it seems to me that a contrary intention does

not appear and that the weight of these two arguments is more than counter-balanced by the other considerations which I have indicated. A construction which includes the plural enables the construction of Section 29 of be clear and unambiguous, whereas on a construction which is limited to the singular, there must be doubt as to the extent of the discretion given. Secondly, in the example taken, even if the discretion granted by Section 29 is unambiguous, the forfeiture or non forfeiture of the licence is at the discretion of the Court. While it cannot be presumed that the legislature intended relief to be granted in respect of more than one conviction, nevertheless it seems unlikely that the legislature would have intended granting a relief under S. 25 (4) which in any circumstances might have to depend for its efficacy upon the exercise of a discretion by the Court.

For these reasons, I am of the opinion that the Prosecutor's main submission is correct and that, in respect of a multiple conviction of a licensee with no previous convictions none of the convictions comprised therein may

be recorded on the licence. The effect of this interpretation in the present case is that only two of the licensee's four convictions were required to be recorded on the licence. As a result, at the date of the hearing of the application made on behalf of the Prosecutor on the 29th April, 1983 the licence was valid and subsisting. Accordingly, the Respondent was wrong in law to decline jurisdiction to hear such application. The Conditional Order granted in this case will be made absolute.

Henry Harrison
23/2/84

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