1 May 2016

The Secondary School Principals
Canterbury

INFORMATION FOR PARENTS/CAREGIVERS - AFTER-BALL PARTIES AND THE LAW

In June last year I wrote to all the Secondary School Principals in Canterbury in relation to "After Ball" parties.

A decision from the Courts only a few months ago now gives a much clearer indication as to what constitutes the offence of "Use of Unlicensed Premises as a Place of Resort for the Consumption of Alcohol". The maximum fine is $20,000.

- People who organise, manage, sell tickets, charge an entry fee, provide security etc. are breaking the law unless they obtain a special licence to sell and supply alcohol.[1]
- It is not possible however to get a Special Licence for BYO alcohol.[2]
- People attending such events are generally also committing an offence[3].

The police position is clear – organised after ball parties involving the consumption of alcohol and a charge of any sort are illegal irrespective of the age of the attendees.

- Minors must have **express consent** of parents/legal guardians to consume alcohol. Notes with "To whom it may concern" do not meet those requirements[4].

Please send this letter and its attachment to all your parents and caregivers and any pupils who may be considering getting involved with this activity.

Yours faithfully,

G J Spite
Senior Sergeant

[1] Sale and Supply of Alcohol Act 2012, s235
[2] Oddballs Adventure Tours Co Ltd v Ferguson, HC Christchurch CIV-2008-409-2032
[3] Sale and Supply of Alcohol Act2012, s236
[4] Sale and Supply of Alcohol 2012, s241

Alcohol Harm Reduction Unit | Canterbury District | NZ Police
Christchurch Central Police Station | 68 St Asaph Street | PO Box 2109 | Christchurch

IN THE DISTRICT COURT
AT NAPIER

CRI-2015-041-000827
[2016] NZDC 2371

NEW ZEALAND POLICE
Informant

v

THOMAS DOUGLAS MACDONALD
Defendant

Hearing:	17 January 2016
Appearances:	Sergeant C J Flood for the Informant M J Phelps for the Defendant
Judgment:	19 February 2016

RESERVED JUDGMENT OF JUDGE M A COURTNEY

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[1] The defendant is charged that on 4 April 2015 being the person having, or taking part in, the management allowed unlicensed premises to be used as a place of resort for the consumption of alcohol in breach of s 235(1) Sale and Supply of Alcohol Act 2012 ("the Act").

Background

[2] The defendant is the sole shareholder and director of Big Money Enterprise Limited. The company advertised on social media that it was holding a house party at 40B Rutherford Road, Napier. Those attending would be charged $5.00 cover charge. A DJ would be playing at the party. Attendees were to bring their own alcohol. No alcohol was to be sold or supplied at the party. Those under 18 years of age would be provided with wristbands so they could be identified as under age and would not be allowed to consume alcohol.

[3] The defendant was unsure if any liquor licensing provisions applied to a BYO party on private property. He therefore checked on the Napier City Council website and could not find any reference to a liquor licence being required for a BYO alcohol party on private property. He was therefore of the view that he did not need a liquor licence, even though there was a cover charge to enter the party.

[4] The party was to be held at the property of an acquaintance of the defendant in Napier. This was a Housing New Zealand property. The defendant had the permission of the occupier of the property to hold the party onsite.

[5] The defendant visited houses in the locality of the party venue in advance of the party to advise the neighbours of the fact the party was going to be held. The defendant also arranged security for the property.

[6] The police became aware of the social media site and of the fact that close to 2,800 people had indicated they would attend the party. The police, understandably, had concerns about the number of people who might be attending a function at a private residence in a Napier suburb.

[7] At around 7.20pm on 4 April 2015, prior to the commencement of the party, Sergeant Steven Murray and Senior Sergeant Bauerfiend attended at 40B Rutherford Road, Napier.

[8] Sergeant Murray enquired as to who was in charge of the event. The defendant explained that he was the organiser of, and in charge of, the event. Following discussion regarding the police concerns the defendant confirmed:

(a) The event was being held to promote a musician.

(b) A $5.00 entry would be charged.

(c) Five security staff would be in attendance, all wearing hi-viz clothing.

(d) No glass containers would be allowed, only plastic.

(e) Wristbands would be used to identify those aged under 18 years who were attending.

(f) He would not be selling or supplying alcohol, but attendees would be bringing their own alcohol.

[9] Sergeant Murray advised the defendant the police would be monitoring the party once it commenced and if there was any indication the organisers were losing control then he would get in touch with the defendant. Sergeant Murray advised the defendant that if it appeared the party was getting out of control then the police would have to close it down. The defendant had no issue with this proposed course of action.

[10] At around 9.15pm Sergeant Murray attended the party location with Constable Munro. He found there were approximately 300 people queuing from the driveway of the property along Rutherford Road in both directions. Most of those people were drinking, or in possession of, alcohol.

[11] On gaining access to the property Sergeant Murray estimated there were around 200 people in the front garden. Most of the people were dancing and drinking alcohol.

[12] Sergeant Murray spoke to the defendant. The defendant explained that his security staff could no longer cope. Sergeant Murray advised the party could no longer continue and the defendant agreed with this.

[13] Sergeant Murray instructed the defendant to have the DJ make an announcement to the effect the party was closing down and for all attendees to leave. In the course of the party closing down and attendees leaving, several incidents of disorder occurred with beer bottles being thrown at police. After approximately three hours the police managed to clear the area. Approximately 20 arrests were made, mostly for disorder offending.

The hearing

[14] The first witness called for the prosecution was Mr Jason Sheehan, Chief Licensing Inspector with the Napier District Licensing Committee. Mr Sheehan confirmed that no alcohol licence of any type had ever been issued by the Napier District Licensing Committee to the defendant or to any other person in respect of 40B Rutherford Road, Napier.

[15] Mr Sheehan advised there are four types of licence that can be issued under the Act allowing the sale and or supply of alcohol by a person controlling a property or an event. They are:

(a) On-licence. This allows the sale of alcohol to be consumed on premises such as a hotel or restaurant.

(b) Off-licence. This allows the sale of alcohol to be consumed other than on the premises from which it is sold. This would apply to bottle stores and supermarkets.

(c) Club licence. This allows for the sale of alcohol to members of a club, such as at the RSA.

(d) Special licence. This allows for alcohol to be sold at one off events, such as sporting events.

[16] Under cross examination it was put to Mr Sheehan that as the defendant was neither selling nor supplying alcohol and as the event was at a private address a licence was not required. Mr Sheehan stated that such a circumstance provided a difficultly and a special licence should be obtained. Mr Sheehan suggested any uncertainty could be avoided by obtaining a licence, which was his advice to anyone proposing to use unlicensed premises as a place of consumption of alcohol. He described the situation as a "grey area".

[17] Sergeant Murray advised the Court that he had made no enquiry of the defendant as to whether or not he held a licence pursuant to the Act with regard to the party. He stated that was not his main concern. Sergeant Murray's concern was the large number of people attending the party and consequent safety issues with regard to the attendees and local residents.

[18] Sergeant Murray advised the Court that he did not have the power to close the function down at that stage. He also confirmed he did not advise the defendant that the function should not proceed.

[19] Sergeant Raymond Wylie, a Police Alcohol Harm Prevention Sergeant, confirmed he was involved in discussions leading to the defendant being charged. Sergeant Wylie said his main concern was the disorder which occurred on the street after the party was closed down and the fact that alcohol was involved.

[20] Sergeant Wylie confirmed that in his view all attendees at the party breached s 236 of the Act by being on unlicensed premises kept or used in breach of s 235. Sergeant Wylie confirmed that none of the attendees at the party were charged under s 236.

[21] The defendant elected to give evidence. He said Sergeant Murray raised concerns regarding the number of people that might be attending the party as a result of the attention that had received on Facebook. The defendant says he sought Sergeant Murray's advice as to whether or not the party should proceed and was advised there was no problem with that. He stated that if he had been told to shut down the party at that stage he would have done so. He believed that, as the police sergeant has said it was okay for the party to proceed, he was allowed to proceed with the party. He said he shut the party down as soon as requested to do so later in the evening.

[22] The defendant stated the cover charge covered the costs incurred in setting up the party and that he made no profit from the party.

Discussion

[23] Section 235 of the Act provides

> **Use of unlicensed premises as place of resort for consumption of alcohol**
>
> (1) A person who is the occupier, or has or takes part in the care, management, or control, of any unlicensed premises commits an offence if that person allows those premises to be kept or used as a place of resort for the consumption of alcohol.
>
> (2) A person who commits an offence against subsection (1) is liable on conviction to a fine of not more than $20,000.
>
> (3) Subsections (1) and (2) do not apply to the consumption of alcohol—
>
> (a) by any person on any premises on which that person resides, whether that person is the occupier of the premises or not; or
>
> (b) supplied to any person by way of gift by any person who resides on the premises on which the alcohol is consumed.
>
> (4) A person who acts as, or as if he or she were, an occupier or a person having any part in the care, management, or control of any premises is to be treated as an occupier of the premises, but without affecting the liability of any other person.
>
> (5) Premises may be treated as being kept or used as a place of resort for the consumption of alcohol even though they are open only for the use of particular people or particular classes of person, and not to all people who wish to use them.

[24] The evidence establishes the premises at 40B Rutherford Road were unlicensed in terms of the Act. That leaves the following elements of the offence which must be established beyond reasonable doubt by the prosecution in order for the defendant to be convicted:

(a) The defendant was the occupier, or had or took part in the care, management, or control, of the premises at 40B Rutherford Road, and

(b) the premises were used as a place of resort for the consumption of alcohol, and

(c) the defendant allowed the premises to used as a place of resort for the consumption of alcohol.

[25] At the conclusion of the evidence counsel for the defendant acknowledged it was never in dispute the defendant was in control of the party. It was submitted the key issue is whether the section was intended to apply to this type of situation.

Was the defendant an occupier or did he take part in the care, management or control of the property?

[26] The defendant was not an occupier of the property in the sense he was the owner of it or the tenant. However, s 235(4) provides that if a person acts as if they are an occupier or a person having any part in the care, management, or control of premises then they are to be treated as an occupier of the premises.

[27] A similar provision under the Sale of Liquor Act 1962 was considered in *Malcolm v Police*[1] where the court stated:

> "For liability to attach under s 264(4) it is not necessary for the defendant to have the sole care, management or control of the premises but merely to be taking part therein. The appellant's opening of the gate and acknowledging that he was in charge that evening, given not only to the police at the time, but also to the court during the course of the appellant's evidence, coupled with his possession of the keys, quite plainly established that he was taking part in the care, management or control of the premises ..."[2]

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[1] Christchurch High Court, Ap. 7/86, 10 March 1986, Hardie Boys J
[2] At page 3.

[28] The fact premises are only used for a single day or night means they still qualify as premises being used as a place or resort. It does not matter that the consumption of alcohol is incidental to activities, so long as the consumption of alcohol was an integral part of the activities in question.[3]

[29] The defendant clearly identified himself to the police as the person in charge of the event. He explained the arrangements to the police, including the purpose of the party and the safety measures put in place. He clearly held himself out as having care, management and control of the property for the duration of the party. The first element of the charge is established.

Were the premises being used as a place of resort for the consumption of alcohol?

[30] Section 235(5) provides that premises may still be considered as a place of resort for the consumption of alcohol despite only certain persons or classes of persons being allowed to access the premises.

[31] In *Browne v Police*[4] Richmond J held premises are kept or used for the consumption of alcohol if the consumption is a substantial, although not necessarily the main, purpose of people attending, and such purpose is actively encouraged or facilitated by the occupier.

[32] There must be more than some isolated or casual consumption of alcohol and the premises in a passing or transitory way.[5] As noted above[6], a building hired for a single day or a single night for a social purpose involving consumption of alcohol can still qualify as premises being "used" on that occasion as a place of resort for that purpose. Premises do not need to have been used on a previous occasion for the consumption of alcohol before they can become a "resort"[7].

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[3] *Police v Clarke and others* [1977] 1 NZLR 621
[4] [1962] NZLR 801, 809.
[5] *Ashford v Police Rotorua High Court AP 65-67/92 21 September 1992, Doogue J at p 8.*
[6] *Police v Clarke and others.*
[7] *Ashford v Police* (supra)

[33] In the present case the property was being used for a one off party. However, the advance publicity regarding the event, the requirement for plastic and no bottles to be bought to the property, the need for security and for wristbands for guests under 18 demonstrate that the consumption of alcohol was to be an integral part of the event.

[34] The prosecution has established the premises were being used as a place of resort for the consumption of alcohol.

Did the defendant allow the property to be used as a place of resort for the consumption of alcohol?

[35] The defendant acknowledged he knew people would be bringing alcohol with them to the property. He advised the police of this. He also took steps to facilitate the consumption of alcohol including banning glass, hiring security and taking steps to ensure those under 18 years of age would not drink. The defendant allowed the premises to be used as a place of resort for the consumption of alcohol.

[36] All elements of the charge are proved beyond reasonable doubt.

Does s 235 apply to these circumstances?

[37] Notwithstanding all elements of the charge having being proved beyond reasonable doubt, counsel for the defendant submits s 235 was not intended to criminalise events such as this. It is submitted the section was intended to cover the situation where a club or a gang allows patrons to consume alcohol on the premises. Whilst most of the decided cases have dealt with situations of that kind there is nothing in the section which limits its application to such circumstances. It is submitted s 235 is not intended to apply to events such as a wedding at unlicensed premises where alcohol is consumed although not sold or to a party at a location such as a hall where guests bring their own alcohol and consume it on site.

[38] It is submitted on the part of the informant that the Sale and Supply of Alcohol Act 2012 has brought about a new and stricter regime aimed to reduce harm to the community from excessive consumption of alcohol, having regard to the

purposes and objects of the Act. However, s 235 is substantially in the same format as similar sections under prior legislation. It needs to be applied according to its tenor.

[39] The function of the Court in this case is not to determine which events might give rise to a successful prosecution under s 235. The Court is solely concerned with whether or not the elements of the charge have been established on the facts presently before it. In this case, all elements of the charge have been established.

Officially induced error

[40] Counsel for the defendant submits the defendant should not be convicted because he has committed the offence believing it to be lawful as a result of the police failing to tell him earlier in the evening he required a liquor licence if he was going to allow people to bring alcohol on to the premises.

[41] As acknowledged by counsel for the defendant, s 25 Crimes Act 1961 provides that ignorance of the law is not an excuse for committing an offence.

[42] Counsel refers to Canadian jurisprudence prudence where a defence of officially induced error arises where a person commits an offence believing it to be lawful based on the advice from an official responsible for administering the law.

[43] In *Crafar and others v Waikato Regional Council*[8] the Court undertook a comprehensive review of the jurisprudence in New Zealand in respect of officially induced error. Having reviewed several High Court decisions Andrews J found:

> ... that the authorities do not establish the existence of a substantive defence of "officially induced error" in New Zealand at this stage. At its highest, all that can be said is that "officially induced error" may support an application for discharge without conviction under s 106 of the Sentencing Act 2002.

[44] Having regard to the decision in *Crafar* I do not find there is a defence available to the defendant for being allowed to proceed with the party following the discussions with Sergeant Murray on the evening.

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[8] *Crafar and others v Waikato Regional Council* HC Hamilton, CRI 2009-419-67, Andrews J

Disposition

[45] Without expressing a view as to whether or not a discharge without conviction under s 106 of the Sentencing Act 2002 is appropriate I do not enter a conviction against the defendant at this stage. The proceeding is adjourned until 2 May 2016 at 10.00am for disposition. If any application is to be made under s 106 for discharge without conviction it is to be filed with the Court and served on the police by 20 April 2016 with the police filing and serving any reply by 27 April 2016.

M A Courtney
District Court Judge