THE INTOXICATING LIQUOR ACT and the BURDEN OF PROOF

The introduction into New Brunswick of The Intoxicating Liquor Act, being Chapter 28, R.S.N.B., 1927, has given rise, as in other Provinces with similar legislation, to numerous prosecutions for violations of the provisions thereof. Consequently we have many interpretations of this legislation. In particular is this so with respect to the "burden of proof" sections, viz. ss. 103 to 110 inclusive.

By virtue of s. 108 (1), once prima facie proof is given that a person charged with selling or keeping for sale or giving, keeping, having, purchasing or receiving liquor had such liquor, in respect of which he is being prosecuted, in his possession, charge or control, he may be convicted of such offence unless he proves that he did not commit the offence with which he is charged. The burden of proving the right to have, keep, sell, etc. is, by s. 109 (1) on the accused. These sections were considered in the case of R. vs. Jones (1933) 6 M.P.R. 599. The facts were that a bottle of alcohol was found in the unoccupied taxi of the accused, Jones. The liquor was not purchased from the New Brunswick Liquor Commission in violation of s. 56 (2) and consequently a charge was preferred against him. The prosecution relied simply upon the statutory onus placed on the accused by virtue of ss. 108 (1) and 109 (1) and did not attempt to answer the defendant's defence. Hazen, C. J., delivering the judgment of the Court of Appeal, Grimmer and Baxter, J. J. concurring, cited with approval the principle laid down by Lord Wright in his judgment in the case of Winnipeg Electric Company vs. Geel (1932) A.C. 690. In this case s. 62 of the Manitoba Motor Vehicle Act was under consideration. s. 62 provided as follows:

> "When any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle and that the same had not been operated at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of the highway or place where the accident happened or so as to endanger or likely to endanger the life or limb of any person or the safety of any property, shall be upon the owner or driver of the car."

Lord Wright enunciated this principle thus:

> "The onus which it (the section) places on the defendant is not in law a shifting or transitory onus. It cannot be displaced by the defendant giving some evidence that he was not negligent if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent. The burden of proof remains on the defendant until the very end

> of the case when the question must be determined whether or not the defendant has sufficiently shown that he did not cause the accident by his negligence. If on the whole of the evidence.....the issue is left in doubt or the evidence is balanced and even, the defendent will be held liable in virtue of the statutory onus."

See also R. vs. Reardon (1935) 10 M.P.R. 191; and R. vs. Richard (1940) 14 M.P.R. 561.

The provisions of ss. 108 (1) and 109 (1) do not arise, however, when liquor is found in the residence of the accused. s. 32 provides that liquor legally purchased may be kept in the purchaser's residence. In R. vs. Mullin 3 C.R. 70 a quantity of liquor legally purchased was found at the residence of the accused, Mullin, and a charge of unlawfully keeping liquor for sale contrary to s. 56 (1) was laid against him. The prosecution merely gave evidence of the finding of the liquor and the magistrate relying on s. 108 (1) held that a prima facie case had been established. No defence was offered and the accused was convicted and sentenced to the minimum sentence of two months and a fine of $200.00 with costs. On appeal the decision of the magistrate was reversed on the ground that s. 108 (1) does not come into operation until a prima facie case is established. Liquor lawfully purchased and kept in the residence of the purchaser is prima facie lawful by virtue of s. 32. Harrison J. distinguishes R v Jones because in that case the liquor was found in the accused's taxi-cab and was unlawfully purchased. The Manitoba court of Appeal comes to the same conclusion in considering a corresponding section to our s.108 (1).

In R. v Kozub 9 C.R. 390, liquor lawfully purchased was found in the residence of the accused A charge and conviction of keeping liquor for sale followed and the conviction upheld by the Court of Appeal, two of the learned justices dissenting. Evidence was given that within approximately four and one-half months the accused purchased liquor to the value of $577.05, although during such period he was receiving Unemployment Insurance. Analagous sections in the Manitoba Act to our s. 103 and 107 were applied. s. 103 provides that in certain prosecutions (including keeping for sale) that as soon as it appears to the magistrate that the circumstances in evidence sufficiently establish the offence complained of he shall put the defendent on his defence and in default of his rebuttal of such evidence to the satisfactoin of the magistrate shall convict him accordingly. s. 107 provides for the drawing of inferences of facts. Thus Harrison J. in the Mullin case states:

> "I do not however exclude the possibility of the magistrate drawing inferences of fact from the kind and quantity of liquor found, coupled with evidence as to the occupation and income of the accused. Such facts might establish

> a prima facie case of keeping liquor for sale. And when a prima facie case has been proved the accused would have to answer and discharge the burden of proof which then rests on him."

Bearing in mind the sections considered, the question frequently arises, has the accused the benefit of relying upon the doctrine of reasonable doubt? In R. v Peleshaty 9 C.R. 97 the Manitoba Court of Appeal held that the doctrine of reasonable doubt applies as did the British Columbia Court of Appeal in R. v. Haughan. Adamson J. A. in the Peleshaty case makes reference to R. v Jones as follows:

> "In the eyes of the law a person is not guilty if there is a reasonable doubt. If an accused raises a reasonable doubt that he "committed the offence" it must be found that he has proved "that he did not commit the offence." The doctrine of reasonable doubt is the very cornerstone of our criminal jurisprudence and is not to be whittled away, cut down or modified except by explicit words. The Legislature did not mean that a person may be convicted when there is a reasonable doubt. The principle of the Winnipeg Electric Co. v Geel (1923) 3 W.W.R. 49, (1932) A.C. 690, 101 L.J.P.C. 187, 40 C.R.C. 1, (1932) 4 D.L.R. 51, 28 Can.Abr. 321, with respect does not apply in Rex vs. Jones 6 M.P.R. 399 61 C.C.C. 346 (1934) 2 D.L.R. 499, 24 Can. Abr. 512.

It is apparent that the Manitoba legislation does not contain a section similiar to our s. 110 which provides that it is not necessary to prove the commission of the offence beyond a reasonable doubt as in a criminal matter, and that the duty is satisfied by a preponderence of evidence according to the rule prevailing in the trial of civil causes. A recnt New Brunswick case, Walsh v The King 25 M.P.R. 255, deals with this section. Walsh was charged with unlawfully selling liquor. Briefly the facts were that two police officers observed the accused drive his taxi-cab into the driveway of his residence. Two passengers were in the cab at the time. Shortly after the passengers emerged from the driveway and liquor was found on them as a result of a search by the officers. Both gave evidence at the trial that they purchased the liquor from the accused. The defence was a complete denial with one witness for the defence swearing that he had sold the liquor to both passengers. At the close of the Crown's case the magistrate held that a prima facie case had been established. However,after hearing two defence witnesses and at the close of the case the magistrate dismissed the charge on the basis of a reasonable doubt. The Crown appealed to the County Court Judge who reversed the decision of the magistrate. The accused then appealed to the Court of Appeal and the appeal was dismissed. Hughes J. states:

> "On the record, therefore, there was ample evidence for either a verdict of guilty or not guilty. It was only a question

> of deciding which side was telling the truth. The police magistrate was unable to decide this. He thought the case had to be proved beyond a reasonable doubt; but that advantage to the defendant has been taken away by s. 110 of the Intoxicating Liquor Act. Therefore the magistrate was wrong in the reason given for his decision."

The law in this province with regard to the burden of proof is now well settled. Bearing in mind these sections and the interpretations that have been placed upon them the magistrate must apply them to the facts before him and accordingly either convict or acquit the accused.

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