

LICENSING COURT OF SOUTH AUSTRALIA

THE COMMISSIONER OF POLICE FOR THE STATE OF SOUTH
AUSTRALIA

v

FONTANA, Daniel

JURISDICTION: Application for Review of or an Appeal from a
Decision of the Commissioner

CASE NO/S: LC-22-00068

HEARING DATE: 4 April 2023

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 13 April 2023

REPRESENTATION:

Counsel:

Applicant: Acting Sergeant M Osterstock

Respondent: Mr M Anders

Solicitors:

Applicant: n/a

Respondent: Fletcher & Lawson Lawyers

- 1 This is an application made by the Commissioner of Police (the Police Commissioner) seeking a review of a decision of the Liquor and Gambling Commissioner (the Liquor Commissioner) to grant an interim approval to Daniel Fontana enabling him to act as a responsible person for the purposes of the *Liquor Licensing Act 1997*.
- 2 Pursuant to s 97(1) of the Act a business conducted under a liquor licence must, whilst open to the public, be personally supervised and managed by a responsible person. That person can be either a director of the licensee or a person approved as a responsible person. It is an important position. The person is “responsible” for the business and is obliged to ensure that it is properly supervised and managed.
- 3 Licensed premises can take a variety of forms, but the approval does not differentiate between them, such that unless there is a condition of the approval that provides otherwise, once approved, a responsible person can work in that capacity in any licensed premises. Thus, absent a condition on an approval that limits where the person can work as a responsible person, in granting an approval, the licensing authority that grants the approval is holding out to the public that the person approved can be expected to act “responsibly” in any licensed premises.
- 4 Some licensed premises can be challenging to supervise and manage. They may attract minors. They may attract persons of ill repute. People frequenting licensed premises might do so with the intention of partaking in illegal activities such as unlicensed gambling, drug dealing, and fencing stolen goods. They may be intoxicated by drugs or alcohol. Such persons may be vulnerable to unwelcome overtures by others within the licensed premises. They may act inappropriately towards others, by being loud, offensive or even violent. All of this requires close supervision by a “responsible person”.
- 5 In *Paul Roper*¹ this Court outlined the qualities expected of a “responsible person” as follows:

When a licensing authority authorises a person under the Act it holds that person out as trustworthy. The public can assume that the person is honest and reliable. In the case of a Responsible Person they can assume that the person can be trusted to take appropriate steps to ensure that intoxicated persons and minors are not supplied with alcohol; that the person will do his or her best to ensure that patrons will be safe while under their charge; and that the obligations imposed by the Act and the conditions of the licence will be adhered to. The public can assume that the person will, without hesitation, when appropriate, engage with law enforcement agencies on issues concerning the licensed premises and the safety of patrons using

¹ [2013] SALC 34.

those premises and that he or she will be candid and cooperative with such agencies.²

- 6 The Court then went on to explain the impact of criminal conduct in respect of approval:

The significance of serious criminal offending is that it might prove that the person cannot be trusted to properly discharge the duties required of a Responsible Person. In that case to protect the public permanent disqualification would generally be the only sanction that the Court could contemplate.

Sometimes the offending and the respondent's circumstances may simply raise a doubt as to whether the person can be trusted. A shadow might be cast upon their integrity. Such persons might be seen, as a result of their offending, to be compromised in dealing with some members of the public. There might be a question mark as to their willingness to engage with law enforcement agencies or to be completely candid with them. They might be seen as lacking the integrity and respect expected of persons occupying, what is after all, a position of trust. In such cases something short of permanent disqualification might be contemplated. A long period of good behaviour might restore confidence.

Sometimes, notwithstanding the offending, the respondent's circumstances are such that there is no real risk that the person cannot be trusted to properly discharge the duties required of a Responsible Person. But even in such a case action might still be required. The criminal history might be such that right thinking members of the public might be affronted that a person with that criminal history should be employed in a position of trust and be held out as trustworthy by a licensing authority, without qualification. To maintain public confidence in the relevant licensing authority and the process of certification the authority might need to consider a period of suspension or a disqualification, suspended upon compliance with certain conditions.³

- 7 In this case Mr Fontana made an application for approval under the Act and despite opposition from the Police Commissioner, he was granted approval by the Liquor Commissioner's delegate on 18 October 2022. The approval was granted on an interim basis for a period of two years and was subject to a condition that he be of good behaviour over that period. Upon the expiration of that period, if that condition was complied with, the interim approval was to be replaced by an ongoing unconditional approval.
- 8 The Police Commissioner opposed that application for approval because of Mr Fontana's conviction for drug trafficking on 26 June 2019. Over a

² Ibid at [20].

³ Ibid at [21]-[23].

year earlier, on 6 May 2018, police searched his motor vehicle and found 15 tablets of MDMA, otherwise known as ecstasy. In *R v Turner Kourakis CJ* said of that drug:

There is some reason to suspect that the social harm caused by drugs like ecstasy is not as great as amphetamine. On the other hand drugs like ecstasy have been responsible for the tragic deaths of too many of our youth and there is reason to think that the use of the drug is very prevalent.⁴

- 9 Mr Fontana was charged with trafficking in a controlled drug. He pleaded guilty. The sentencing judge accepted that in terms of drug dealing Mr Fontana's offending was at the lower end of the scale. But he also noted that the drug involved was harmful and that the law took a "very stern view" of his crime. He was sentenced to 18 months imprisonment with a non-parole period of 10 months which was suspended on his entering into a good behaviour bond for a period of two years. A condition of that bond was that he be subject to random drug testing. I was advised that he was subjected to such tests for six months following his conviction, all of which were negative. No further testing was conducted.
- 10 Mr Fontana advised the Liquor Commissioner's delegate that he took full responsibility for his actions in 2018 and that since then he had turned his life around. He said that he no longer associates with the persons he was with when the offending occurred. He said that he had secured stable employment in the construction industry, and he sought approval under the Act so as to progress in his second job in the hospitality industry. He stated that he would never again engage in the actions that led to his conviction, being aware of its shameful consequences that would tarnish a reputation that he had sought to rebuild.
- 11 The Liquor Commissioner's delegate noted that Mr Fontana's current hospitality employer, Mr Tony Tropeano, being fully aware of his offending history, supported the application for approval and believed that Mr Fontana has the potential to fulfil a managerial position in hospitality.
- 12 The Liquor Commissioner's delegate noted that the May 2018 offending was Mr Fontana's only drug related conviction, that four years had passed since it occurred, that he had not committed any offence in that period, and he had satisfactorily completed the terms of his bond. She thought that sufficient time had elapsed since the offending to cause her to accept that Mr Fontana had truly turned his life around and, subject to initially only allowing an interim approval, that approval should be granted.
- 13 The Police Commissioner contends that the Liquor Commissioner's delegate erred in reaching that conclusion. His primary contention is that

⁴ [2016] SASFC 61 at [20].

Mr Fontana's offending was so serious that it falls within that category of offending described in *Paul Roper* as warranting the conclusion that Mr Fontana cannot ever be trusted to properly discharge the duties required of a responsible person.

- 14 In the alternative, he contended that given that even now it is less than two years since Mr Fontana completed his bond, insufficient time has passed to restore the confidence required to grant him approval.
- 15 Mr Anders, counsel for Mr Fontana, submitted that the Liquor Commissioner's delegate had carefully considered the matter and correctly formed the view that what was involved here was a grave mistake by a young man who had since redeemed himself and who deserved a second chance. He suggested his drug dealing was simply symptomatic of his involvement in the drug scene and these days offending of the type involved here would not be treated as a major indictable offence.

Consideration

- 16 It can be accepted that there is a public interest in encouraging people to redeem and rehabilitate themselves. As Kirby P observed in *Dawson v The Law Society of New South Wales*:

[T]he public is better served if, in appropriate cases, those who have offended, once they have affirmatively proved reform, are afforded a second chance, under whatever conditions and after whatever time, the Court considers appropriate.⁵

- 17 In this case, as the sentencing judge noted, Mr Fontana's offending was at the lower end of the scale. At the time of his offending, he was a young man, being 21 years of age. As Latham CJ, Dixon and Williams JJ observed in *Ex Parte Lenehan* "... the false steps of youth and early manhood are not always final proof of defective character and unfitness."⁶
- 18 But even if Mr Anders is correct in contending that the Director of Public Prosecution's attitude to this type of offending has softened, there is no getting away from the fact that Mr Fontana is a convicted drug dealer. In *Peter Rosier*⁷ this Court made the following observations about drug offending and those involved in the management of licensed premises:

The Court in a number of decisions has expressed its concern about having persons involved in illicit drugs being involved in licensed premises for a whole variety of reasons. It is notorious that places like hotels are venues where drugs can be bought and sold. There are also issues that if people are involved in illicit drugs they might be

⁵ [1989] NSWCA 58 at [10].

⁶ (1948) 77 CLR 403 at 424.

⁷ [2019] SALC 14.

not as coming forward in calling the police or being as cooperative when on duty at licensed premises. In dealing with these sorts of cases, it is not just about the individual, it also concerns the sort of message that the court has to send generally. To put it bluntly, the Court starts from the premise that persons involved in illicit drugs have no place to play in connection with the management of licensed premises.⁸

- 19 Such persons bear a heavy onus in establishing that, despite their prior involvement with illicit drugs, that they have reformed and can now be trusted to properly discharge the onerous responsibilities that come with approval under the Act.
- 20 And in connection with discharging that onus, sometimes, more than time is required to allay concerns about a person's character. In *Ex parte Tziniolis; Re Medical Practitioners Act*, Walsh JA made the following comments that are particularly relevant in this case:

Reformations of character and of behaviour can doubtless occur but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by, and it is not proved that anything of a discreditable kind has occurred. If a man has exhibited serious deficiencies in his standards of conduct and his attitudes, it must require clear proof to show that some years later he has established himself as a different man.⁹ (Emphasis mine)

- 21 For the reasons explained in *Peter Rosier*, drug dealing is utterly incompatible with occupancy of a position of authority in licensed premises. For a licensing authority to be satisfied that a convicted drug dealer should be approved as a responsible person for the purposes of the Act, the authority would need very clear evidence that the person was no longer involved in the drug scene and even then, strict controls to ensure that that remains so would need to be put in place. That is why in *Fillipp Ludovici*¹⁰ this Court in connection with a convicted drug dealer was not prepared to allow him to continue to be approved as a responsible person notwithstanding cogent evidence that he had been drug free for the best part of two years. It required him to allow further time, to produce ongoing evidence that he was drug free and then indicated that his approval would be subject to a condition requiring ongoing evidence that he remained drug free.
- 22 In this case, in the period between his arrest and sentence we know that Mr Fontana was gainfully employed. But in terms of other aspects of his behaviour, and in particular his relationship with illicit drugs, there is no

⁸ Ibid at [4].

⁹ (1966) 67 SR (NSW) 448 at 461.

¹⁰ [2014] SALC 9.

objective evidence that established that that relationship had ended. As for the period after he was sentenced, although it was a condition of his good behaviour bond to be subjected to drug testing, when this Court sought information regarding this it was advised that Mr Fontana was only drug tested for the first six months of his bond. It might be accepted that the results were routinely negative which is why the testing ceased. Plainly that was very much in Mr Fontana's favour, but with respect, more was required. The Liquor Commissioner's delegate should have required cogent objective evidence that, as at the date of the application, Mr Fontana was drug free.

- 23 If this Court had been determining the application for approval it would have adopted a course similar to that adopted in *Fillipp Ludovici*. In this case the only objective evidence that Mr Fontana was drug free was for the period of six months at the commencement of his bond in May 2019. This Court would have advised Mr Fontana that his application would only be considered after he had produced objective evidence that he was drug free for a period of at least six months immediately prior to his renewed application. Upon production of that evidence, all other things being equal, he would have been granted interim approval subject to ongoing proof that he remains drug free.
- 24 Whilst I accept that in matters such as these there is a discretionary element in the judgment involved and that no one approach is necessarily the only one that is reasonably open, with respect, in my opinion, on the state of the evidence presented, Mr Fontana's application for approval should not have been granted as of October 2022.
- 25 But I cannot ignore the fact that Mr Fontana was granted approval nearly six months ago. As was explained in *Shannon Eves*¹¹ in a case where after a contested hearing an applicant is approved, and secures employment consistent with that approval, there is a sense of unfairness consistent with the principle against double jeopardy to simply revoke the approval on review. In such a case, if there is a way in which the public interest can be suitably protected, something short of revocation of the approval can be considered.
- 26 If Mr Fontana gave a solemn undertaking to this Court that he does not take illicit drugs and no longer associates with persons who do so, in the knowledge that if he is not being truthful about these matters he could be held guilty of a contempt of the Court,¹² this would go a long way to allaying the Court's and the public's concern that Mr Fontana might still be a risk. Upon giving that undertaking Mr Fontana would be granted an interim approval for a period of two years, with the Police having liberty

¹¹ [2022] SALC 29.

¹² Section 24C(1) of the Act provides: A contempt of the Court is a summary offence punishable by a maximum fine of \$10 000 or imprisonment for a maximum term of 6 months.

to apply to the Court to bring to its attention any matter of concern. In addition, it would be a condition of the interim approval that Mr Fontana be subject to random drug testing.

- 27 Accordingly, the application for review is allowed and Mr Fontana's interim approval under the Act will be revoked at midnight on Friday 28 April 2023. In the meantime, Mr Fontana can reflect upon these reasons and is granted liberty to apply. If he is prepared to give the undertaking discussed in these reasons, the matter will be re-listed to enable that to occur in open Court and consequential orders in the above terms will be made.