

Northern Territory Licensing Commission

Decision

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| Premises: | Rapid Creek Supermarket |
| Licensee: | Liu Enterprises Pty Ltd |
| Licence Number: | 80900103 |
| Nominee: | Ms Jinxia Zhong |
| Proceeding: | Complaint pursuant to Section 106C of the <i>Liquor Act</i> |
| Complainant: | Ms Elisha J Aberdeen |
| Heard Before: | Mr Peter Allen Mrs Shirley McKerrow Mrs Barbara Vos |
| Date of Hearing: | 14, 15 February and 11, 12 March 2002 |
| Date of Decision: | 11 April 2002 |
| Date of Submission as to Penalty: | 19 April 2002 |
| Date of Decision as to Penalty: | 13 May 2002 |
| Appearances: | Mr Peter Wilson assisting the Commission Mr T S Lee as a Director of Liu Enterprises Pty Ltd |

Two complaints against the Rapid Creek Supermarket were made to the Licensing Commission under Section 48 of the *Liquor Act* by Ms Elisha J Aberdeen.

Ms Aberdeen notified the Commission of her first complaint in an e-mail dated 27 December 2001, which was followed by a Statutory Declaration undated, but determined to be made out in the presence of Licensing Inspector D Bell on 28 December 2001, and followed further by a letter dated 14 January 2001. The substance of this complaint was that about 16.30 hours on 26 December, her 14 year-old son Joseph and his friend Patrick Berts, also 14 years old, purchased 4 cans of vodka and orange at the Rapid Creek Supermarket.

Mrs Aberdeen's second complaint, received in the form of a signed letter dated 5 February 2002, concerned the purchase from the same licensed premises of a 375ml bottle of Bundaberg Rum and a 375ml bottle of Jim Beam, by Joseph and his 15-year-old brother Shane. This purchase was said to have occurred on 27 December 2001.

The Licensee and the Nominee were notified of this second matter by letter from the Director of Licensing dated 7 February 2002. Mrs Jinxia (lvY) Zhong, in her dual capacities of Director of the Licensee and Nominee wrote to the Director of Licensing on 8 February denying the allegations of this complaint and requesting that this latest complaint be dealt with at the same time as the hearing into the earlier complaint.

The hearing commenced with a request from Mr T S Lee, representing the licensee, that criminal history records of Joseph and his brother Shane should be admitted as evidence. Counsel Assisting advised that the requested documents were available and there was no objection to them being made available to Mr Lee.

Mr Lee's next request was that an interpreter be provided for his clients prior to the commencement of proceedings, mentioning that in the absence of an interpreter there was the possibility of a future appeal under Sec 23N of the *Crimes Act 1914* "inadequate knowledge of the

English language". Counsel Assisting submitted that any interpreter must be at arms' length from the individuals involved in the case and be accredited in the appropriate language/dialect. Counsel Assisting also queried whether the circumstances of this case necessitated the use of an interpreter, and whether the translations would be confined to those words spoken by the witnesses and from the bench, or all words spoken during the Hearing.

The Commission adjourned to consider the submissions.

The Commission agreed to provide an interpreter and adjourned until one became available. The interpreter provided, Eileen Edwards, speaks Mandarin and Cantonese but is accredited for Mandarin only. Ms Edwards was not acquainted with any of the witnesses and had previous experience acting as an interpreter in the Courts on four to five occasions. Mr Lee accepted her services.

On resumption of the proceedings Mr Lee did not pursue his request for the admission of criminal records.

Mr Lee raised the question of the competence of the Licensing Commission to hear a complaint which, as in the case of Mrs Aberdeen's e-mail of 27 December (Exhibit 6), was not signed and was not worded as a formal complaint.

The Commission determined that the letter dated 14 January 2001 and the Statutory Declaration at Folio 4 (Exhibit 7), regardless of format, together constitute a complaint as they are in writing, signed and lodged. The date of 14 January 2001 was identified as a typographical error and it was accepted that the date should have read 14 January 2002.

Dealing with the first complaint, the Commission heard evidence from Joseph Edward Aberdeen, born 13 June 1987 (see Exhibit 1, Birth Certificate of Joseph Aberdeen). Joseph's evidence was that his friend, Patrick Berts, (born 5 June 1987) had advised him that he could buy alcohol at the Rapid Creek Supermarket. Patrick had been in there before. At approximately 4pm on 26 December 2001 Joseph and Patrick entered the Rapid Creek Supermarket with the intention of purchasing a 4-pack of UDL. This was the first time Joseph had been in that supermarket. There were no customers in the shop. They first went to the soft drink section and then to the liquor section which is two to three metres behind the counter and in clear view of anyone standing at the checkout.

Joseph stated that he and Patrick stayed in the liquor section for about five minutes, looking at the products available and checking their alcoholic content. There were only bottles on the shelves. They were searching for a 4-pack of UDL cans. They asked the "old man" (later identified as Mr Yih Uen (David) Zhong, father of Mrs Jinxia (Ivy) Zhong) if the shop had any UDL 4-packs. Mr Zhong left the check-out counter and came into the liquor section. The boys moved some cans at the front of the refrigerated cabinet and Mr Zhong pulled out a 4-pack of UDL orange and vodka from the back section of the cabinet.

Mr Zhong then looked at Patrick, the taller of the two, who was standing behind Joseph, and asked him to turn out his pockets, which Patrick did. Mr Zhong communicated only a couple of words to Joseph. He did not ask Joseph or Patrick for ID. Joseph volunteered to Mr Zhong that he had no ID on him and Mr Zhong said "That's alright", and led Joseph to the counter. A young man had come to an internal doorway and stood looking whilst Patrick was turning out his pockets. The young man did not say anything. The young man was later identified as Mr Jianbiao ("Bill") Liu, husband of Mrs Ivy Zhong.

Asked in evidence about his height, Joseph said that he is approximately 175cm and Patrick is four to five centimetres taller. Asked if he (Joseph) was often taken for being older than 14 years, he responded that he had been refused entry to certain movies and in any case "I've got braces on my teeth – not many 18 year-olds have those". He said that his friend, Patrick, does not wear braces on his teeth.

At the commencement of his cross-examination of Joseph, Mr Lee stated that the licensee was denying that the sale of liquor took place, claiming that Joseph stole the liquor. He claimed that

Joseph is not an honest witness but the Commission noted that no reports of theft had been lodged with the police.

Cross-examined by Mr Lee, Joseph said that he and Patrick purchased the cans as an “experiment to see what it is like”. Asked how much the 4-pack cost, Joseph said that at the counter he offered money to the “old man” and he “took \$14 - \$15 off me. I just paid”. Joseph was not issued a receipt.

In response to questioning by Mr Lee, Joseph said he did not go to the Sabine Road supermarket to buy the alcohol because that supermarket does not sell liquor and they would tell his parents. He did not go to Happy Foodland because the people there were good friends and had known him since he was five. He had never been to either of the two other liquor retailers in the general area. In response to a further question, he replied that he went to the Rapid Creek Supermarket because his friends at school told him that they buy cigarettes and alcohol there, but “if there is someone in the shop they won’t sell it to you”. Joseph added that he and Patrick carefully checked out if any other customers were in the shop before they went to the liquor section.

In response to Mr Lee’s repeated accusation that Joseph stole the four cans, Joseph’s response was “You couldn’t. It’s pretty big, a 4-pack, the cans obviously bulge”.

At the conclusion of his cross-examination Mr Lee claimed that Joseph had come back to the Rapid Creek Supermarket on two later occasions, 9 and 10 January 2002, showed aggression and was abusive, and therefore this complaint is because Joseph feels vindictive against this supermarket. Mr Lee also stated, “We infer he stole the liquor from other stores”.

At the resumption of the Hearing on 15 February, Mr Lee requested permission from the Commission to “trawl” a photograph of Joseph around the neighbouring supermarkets and shops, claiming that Joseph was not a reliable or trustworthy witness. Mr Lee also applied to recall Joseph to the witness stand, basing this request on the fact that Sec 51 (3) (d) of the Act states that the Commission is not bound by the rules of evidence.

The Commission’s decision was that as the Commission tends to follow the rules of evidence as a matter of continuing practice, to depart from those rules the Commission would need compelling reasons, which in the Commission’s view had not been demonstrated. The Commission denied Mr Lee permission to trawl a photograph of Joseph for the stated purpose, and refused his request for the recall of Joseph Aberdeen, on the grounds that the grounds for the recall were not relevant.

Shane Aberdeen gave evidence that he was not aware of the substance of the first complaint until he learnt about it on December 27. Shane’s evidence related to the second complaint, and will be dealt with later.

Mrs Elisha Aberdeen works shift-work as a prison officer. She was not required to work on 26 December, the day on which she found the 4 UDL cans in the bottom of the refrigerator at her home at 4.30 – 5pm. The cans stood as individual cans, and the wrapping was in the bin. She confronted Joseph at approximately 8pm that evening. When challenged Joe told her that he and Patrick Berts had purchased the 4-pack, when asked “where?” he replied from the Rapid Creek Supermarket earlier that day, “all the kids do”. When asked “why?” he responded “I told you I could do it.” When questioned “how much?” - “\$13-\$14. When Joe was asked how did he get it he told his mother that on 26 December there were no trucks around, he entered the supermarket, went to the liquor section. Old man helped him, someone else helped too. No receipt. No I.D.

Mrs Aberdeen was queried as to whether she had ever had any comments about Joe or Shane ever appearing to be 18 years old? “No”.

Prior to being called to the witness stand on the second day of the hearing, Mrs Aberdeen went to the Rapid Creek Supermarket to purchase a 4-pack of UDL. Her evidence was that she enquired of the man behind the counter if he had any 4-packs. The man was the older man she had seen in the foyer of the Licensing Commission the previous day. In Mrs Aberdeen’s words he “went to the fridge and moved some things around and said “None there””. “He had no difficulty understanding what I was after”. Mrs Aberdeen then left the supermarket and purchased a 4-pack from another

outlet. She thought she had paid approx \$14.00, and was surprised when the receipt showed the price of the 4-pack as \$8.47.

The 4-pack of UDL Vodka and Orange purchased that day by Mrs Aberdeen was submitted as Exhibit 4.

Although Mr T S Lee was not present at Rapid Creek Supermarket any of the days in question and could not give personal evidence of what occurred, he did give evidence of his involvement with the company and with the running of the business. It was of interest to note that Mr Lee and Mrs Ivy Zhong attended the Responsible Service of Alcohol course in May 2001. No interpreter was present and all particulars of this course were given in English.

Mr Lee said that the letter at Folio 19-21 (Exhibit 13) from Liu Enterprises Pty Ltd, dated 14 January and signed by Ms Zhong was their defence against the charge.

It was during Mr Lee's evidence that the identifying catchword "boy with braces" first emerged. The importance of this phrase is that Joseph Aberdeen wears braces on his teeth, and it is this feature that was used by the witnesses for the licensee to differentiate between the boys in the shop on different occasions.

At the conclusion of his evidence, Mr Lee stated that he would submit that there was no case to answer, on the ground that the specific sections of the Act said to be breached were not notified.

The hearing was adjourned to 11 March 2002.

At the resumption of the hearing, Mr Lee did not proceed with his submission that there was no case to answer.

Mrs Jinxia (Ivy) Zhong, Director and Nominee of the licensee, testified that she normally stands adjacent to the register, but was not in the shop on 26 December. The shop does not normally sell 4-packs. The packs are broken open and the cans sold individually. They are sold for \$3.50 per can.

When asked whether she had seen the boys before prior to 27 December in the shop Mrs Zhong replied "with braces yes, not other one. First time was two weeks before Christmas. They didn't do anything, look around then go".

Mrs Zhong said that after being notified of the complaint by Licensing Inspector D Bell on 27 December, she conferred with her husband and her father and they told Mr Lee everything that had happened. She told Mr Lee what she wanted to write in her response to the complaint. Mr Lee wrote the letter at Exhibit 13, which she signed. Mrs Zhong stated that the contents of the letter were correct.

Under cross-examination Mrs Zhong admitted that there were inaccuracies in the letter from Liu Enterprises constituting Exhibit 13.

Exhibit 13 claims that "about a week before 26 December 2001, two male persons, by their physical appearance, apparently over 18 years old, as they were about 180cm and 150cm in height, went to the liquor sale section. They were suspected to be acting suspiciouslythey finally left the liquor section without buying any item.... "

Exhibit 13 further states "On the 26 December 2001, my father and my husband were again on duties in the supermarket. The same person of about 180cm in height and another male person of about 175cm in height went to the liquor section. Judging by their heights and demeanours, and recognising one of the taller ones, they were reasonably believed to be above 18 years old. As my father had recognised one of the male persons who had previously acted suspiciously, my father, in between serving other customers, kept an eye on them. He asked one of them whether one of them had taken the whisky. One of them who had braces in his teeth replied that he did not have any liquor on him. He emptied out his pockets to show there was nothing in any of his pockets. They did not purchase any goods or liquor from the shop. .By reason of their heights and physical statures, they certainly appeared to be over the age of 18 years old".

The use of this method of age verification was verified by Mrs Zhong, who, when queried as to why the boys were not asked for proof of age, replied "He did not look like 14. Very big boy". But the sizes quoted for the boys were different on the occasion two weeks before Christmas to the 26 December and no mention is made of braces until a search for a bottle of whisky was made.

Ivy Zhong herself was not present on the first occasion, only David Zhong is mentioned. Yet when asked whether she had seen the boys before in the shop Mrs Zhong stated that she had seen the boy "with braces, yes, not other one". "I remember two boys come to liquor store. Tall one trying to shade shorter one". This conflicts with Joseph's statement that 26 December was the first time he had entered the store and conflicts with Exhibit 13. Contradiction was also noted regarding who emptied his pockets, it was subsequently confirmed by the evidence of Mr David Zhong that it was not the boy with braces.

In order to confirm that no UDL product was sold on that date at that time Mrs Zhong was asked to present the till tapes for 26 December, Mrs Zhong said that when she looked at the roll it was in upside down. Her husband had "used either side – double side", and she put a new tape in. The relevant tape was not available.

The evidence of Mr Jianbiao (Bill) Liu confirmed that he was present in the shop on 26 December. "I heard my father talking to two kids... I keep my eye on them. The two boys went into liquor section ... We suspect them but nothing in pocket". When questioned if he had seen the boys before 26 December Mr Liu replied "yes, they come in on a few occasions". When asked how did he recognise the boys, Mr Liu said "one had braces plus they always behave suspiciously when they come in". When asked about the inaccuracies of Exhibit 13 Mr Liu stated "misunderstanding of the language therefore mistakes".

Under cross-examination Mr Liu stated that he first became aware of the boys on 26 December "only when I heard noise I came out from another compartment inside bottleshop (like a storeroom)... I didn't pay attention to his age, but tall .. more concerned with their stealing something. ... I asked them to go away." When asked whether he saw these boys come into the shop two weeks before Christmas, Mr Liu replied "I can recognise one of them, they come before, the boy that is tall with braces came before".

Mr Yih Uen (David) Zhong, father of Mrs Ivy Zhong, is retired but helps as a processor at an associated business, Wah Ning Seafood, and also helps out at the shop. Mr Zhong detailed what he saw on 26 December. "two boys coming in, one very tall, one a bit shorter... I see they were by (sic) liquor and beer. I suspect stealing, tall one emptied out his pockets. My son-in-law asked them to leave". Under cross examination, Mr Zhong was asked "had you seen the boys before?" he replied "first time".

Mr Zhong said that he loads the shelves of the refrigerated cabinet with liquor from the cool-room behind the cabinet. Whilst in the coolroom he breaks open the packages of the 4-packs and places the individual cans on the shelves. Inside the storeroom it is still in packs. Occasionally he finds it necessary to interrupt this work to go into the store to serve a customer, or if the phone rings.

Turning to the second complaint of Elisha Aberdeen, this concerned the purchase from the same licensed premises of a 375ml bottle of Bundaberg Rum and a 375ml bottle of Jim Beam, by Joseph and his 15-year-old brother Shane, which was said to have occurred on 27 December 2001.

The evidence of Joseph Aberdeen with regard to the second complaint is that on 27 December he and his brother visited the store between 2pm and 3pm. "Shane had bought a flask and wanted to fill it. Knew we could buy the alcohol from there. No-one outside or inside. Entered store. Went straight to the Liquor section. Took Bundaberg 375 and Jim Beam 375 off shelf. Went to counter. My brother gave me \$50 to buy them. Came to \$45.00 total. There was no conversation. My brother was with me the whole time. He is 15 yrs old, born 25.3.1986. Other customers came in right at the end when paying, no idea who."

Shane's testimony corroborated his brother's but was more fullsome, especially in respect to service. He states they were "served by an old looking Chinese man with grey hair". This complaint

therefore turns on the description by Shane of who served them. Mr Zhong stated that he was not in the store on that day “only when free I’ll give my daughter a hand”. It was not established whether any other person could have been helping out who fitted the description, therefore evidence given by Shane left questions unanswered.

In regard to the second complaint, it was not sufficiently substantiated by cross-examination. The process through translation was painstaking but it was decided that it would be unfair to sustain the second complaint as there was not the same totality of evidence as for the first complaint. The evidence of Joe was compelling. However, Shane Aberdeen’s claim to have been served by “an old looking Chinese man with grey hair” is not substantiated. Mr David Zhong stated he was not there on that day and no details were heard of anyone else serving who could fit that description. Accordingly the complaint relating to the events of 27 December was dismissed.

In relation to the first complaint, the Commission is positively persuaded by the detail and the body of evidence put before us that the sale of a 4-pack of UDL vodka and orange to a minor occurred on the 26 December, and the complaint is upheld.

In reaching this decision the Commission took into account all the conflicting points of evidence and noted that the evidence of Joseph was the most consistent and persuasive. T.S.Lee repeatedly emphasised that the evidence of the minor, Joseph Aberdeen, could not be taken as credible due to his age. However, no authorities were provided to support his argument of weight of evidence of adults versus children.

Joseph had nothing to gain from the situation he found himself in due to his mother’s complaint to the Commission. The Commission found him to be honest and frank in his responses, aware of the seriousness of the situation and both restrained and convincing when accused of theft. His descriptions of layout of the supermarket and price of the product were corroborated. Having followed the evidentiary process, the Commission was positively persuaded by the evidence that this serious complaint was proven.

The evidence of the witnesses for the licensee, on the other hand, was not entirely consistent. There was some conflicting evidence about the heights of the boys and which boy was wearing braces, the 175cm Joseph, or the 180cm Patrick. The licensee’s claim that the boys stole the 4-pack was hardly credible. The size and shape would preclude either of the boys fitting it in a pocket of their clothing, and at no stage was it claimed that the boys were carrying a backpack or any other bag which could conceal such a bulky package. Despite Mrs Zhong’s claim that the shop did not sell UDL cans as a package, only as individual cans, Mrs Aberdeen’s evidence was that Mr David Zhong, when asked for a 4-pack, went to the refrigerated cabinet to look for some. It may be the shop rule to sell only individual cans, but it would appear that on some occasions a 4-pack may be available.

It is the view of the Commission that Exhibit 13, the basis of the licensee’s defence, is a summation of the problems and some of the events experienced by the Rapid Creek Supermarket at various times, but not a clear and persuasive defence of the specific complaint relating to 26 December 2001.

There was one point of evidence that was not in conflict. It was not disputed by any of the parties that the boys entered the shop on 26 December and entered the liquor section, and remained in the liquor section for quite some minutes (variously described as five or more minutes), during which time they were handling bottles of liquor. They were not challenged as to their presence in that section, even though they were in clear view of the person standing at the counter. The definition of “sell” in the NT *Liquor Act* includes “offer or expose for sale”. Section 106C prohibits the sale or supply of liquor to a “person who has not attained the age of 18 years”. A breach of the Act occurred when the minors remained in the liquor section exposed to the display of liquor for sale, and were not challenged or removed from that section within a reasonable time.

After receiving written submissions from Counsel Assisting and from Miss Cheung of Hunt and Hunt in relation to penalty, the Commission made the following ruling.

It is the Commission's view that the penalty, although it is for a first breach, nevertheless should be tied to the possible detrimental impact on society occasioned by the breach, and also tied to the degree of culpability. Service to a minor is a very serious matter. Although Joseph Aberdeen is tall for his age, he does not have the appearance of an 18 year old. It is the responsibility of the licensee to check a customer's age to ensure that the law is upheld. This was not done. It is the decision of the Commission to suspend the licence of the Rapid Creek Supermarket for a period of 5 days. The period of 5 days will commence on Wednesday 15 May and shall apply Wednesday 15, Thursday 16, Friday 17, Saturday 18 and Monday 20 May 2002.

In addition, although not by way of any penalty, the Commission directs pursuant to Section 50(2)(b) of the *Liquor Act* that a notice containing the following words be placed in the licensed area or at the entrance to the licensed area. This sign should be clearly visible throughout the premises when anybody approaches the liquor section, and should be professionally constructed. The sign must contain these words:

A person who has not attained the age of 18 years shall not enter this liquor section.

Peter R Allen
Chairman

21 October 2009