PARTIES:	**JOHNNY RALKURRA MARIKA**
	v
	SCOTT ANDREW MANLEY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPELLATE
FILE NO:	JA No 158 of 1997 (9624775)
DELIVERED:	21 APRIL 1998
HEARING DATES:	6 APRIL 1998
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Justices Appeal – evidence result of Drager Alco - test inadmissible as evidence – no jurisdiction for Magistrate to gather evidence.

Justices Appeal – prohibition orders – standard of proof for prohibitions order – pre-order procedures for Court – Prohibition order part of courts armoury to effect rehabilitation and not to be made where no prospects of rehabilitation exist.

Legislation

Trespass Act
Sentencing Act – s103(1); 101;104(1)(7);(8);(9)(10)(11)
Liquor Act – s122; s122(1)(6)(12)(13); s66(1)(b)
Traffic Act– s23(1)

Cases

1) *Sam Freedy and Others v Hatzimalis*: *Eddie Darby v Murphy* (unreported, S.C.N.T., 30.5.98) Gray AJ, followed.

REPRESENTATION:

Counsel:

Appellant:	M Jones
Respondent:	J Blokland

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	MIL98003
Number of pages:	7

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA No 158 of 1997
(9624775)

BETWEEN:

JOHNNY RALKURRA MARIKA
Appellant

AND:

SCOTT ANDREW MANLEY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 21 April 1998)

MILDREN J: The sole ground of appeal against the learned Magistrate's decision is whether the learned Magistrate erred in ordering that no person sell or supply liquor to the appellant and that no person permit the appellant to be at or on licensed premises in respect of which a licence permits consumption of liquor on or at those premises for a period of 6 months.

After hearing submissions, I allowed the appeal and set aside that order for reasons to be published later. I now publish my reasons.

On 16 December 1997 the appellant pleaded guilty to a number of charges in the Court of Summary Jurisdiction sitting at Darwin. The first count is not relevant, as it did not proceed. The remaining counts are:

2. Resist police (24/8/95)
3. Aggravated assault (8/11/96)
4. Aggravated assault (15/11/96)

The "resist police charge" occurred at the Arnhem Walkabout Hotel. The appellant, having been served with a trespass notice under the *Trespass Act* earlier that day in respect of the Arnhem Walkabout Hotel, returned to the hotel later that afternoon. Police were called and the appellant was arrested. The appellant resisted police efforts to take him into lawful custody. It was not alleged that the appellant was intoxicated.

The aggravated assault on 8 November 1996 occurred in the Saloon Bar of the Gove Resort Hotel when the appellant punched his wife about three times in the face, knocking her to the ground. The appellant had by this time consumed about 20 cans of Victoria Bitter beer during the day. In a record of interview, he told the police that he assaulted his wife because she had been talking with other men and had refused to leave the bar with him.

The aggravated assault on 15 November 1996 occurred at Nhulunbuy. The appellant, who was heavily intoxicated, saw his wife in Endeavour Square and punched her twice in the face. In a record of interview he told police he hit her because he was still angry with her from the proceeding Friday.

The appellant's prior convictions included five prior convictions for exceed 0.08% (in 1983, 1986, 1988 (three times)). He had a prior conviction for failing to quit licensed premises in 1985, and two convictions for consuming liquor in a restricted area (1986 and 1988). There were no other alcohol related convictions proven and his last conviction of any kind was in 1992 when he was fined in relation to traffic offences. The appellant was in regular employment and had since separated from his wife.

Before hearing submissions, the learned Magistrate told the appellant's counsel that the appellant came to the court on 10 December and appeared to be intoxicated; that he was remanded in custody, and at the learned Magistrate's request a hand-held Drager Alco-Test was administered; and that the learned Magistrate was later told that the appellant had a reading of 0.245% at 11.15 am on 10 December. The learned Magistrate then said:

> When I look at his record, his record speaks very strongly of a man who is troubled by alcohol and I'm considering, amongst other things, a liquor prohibition order.

Counsel for the appellant submitted that such orders make criminals out of those with the illness of alcoholism, and whilst he conceded that the appellant had difficulty with breaking the alcohol habit, there were more appropriate options, including a suspended sentence with supervision by a probation officer. The learned Magistrate then stood the matter down for a report, as required by s103(1) of the *Sentencing Act*. When this became available, the report indicated that the appellant was suitable for supervision

but added nothing to the information available to the court about the appellant's alcohol problem.

In his remarks on sentence, his Worship noted that the matters before him were quite old, that the appellant had stayed out of trouble since then but that

> …when he attended court last week he came to court intoxicated and he was prepared to come to court intoxicated. It's probably the case that during the last 12 months he's spent time affected by liquor and although he's spent time affected by liquor he hasn't brought himself to police attention by committing criminal acts.

His Worship imposed a suspended sentence of imprisonment with supervision by a probation officer, which included a condition that he obey the directions of the Director of Correctional Services as to, amongst other things, alcohol counselling. In addition his Worship made the order previously noted, pursuant to s122 of the *Liquor Act*, upon a finding that the appellant was a person who, by excessive use of liquor, is likely to injure his health.

It is not clear what lawful authority existed for the learned Magistrate to request the Drager Alco-test, or what lawful authority existed for whoever carried out that test, to administer it. I suspect there was none, although I made no finding to that effect. The only statutory provision enabling such a test to be administered is to be found in s23(1) of the *Traffic Act*, which applies only to very limited circumstances. Be that as it may, there is no provision in the *Traffic Act* or the regulations made thereunder or in any other statute which makes the result of that test admissible as evidence in a court of

law. Moreover, it is quite improper for a magistrate to gather evidence or to cause others to gather evidence to be used in proceedings before that magistrate. Ms Blokland, counsel for the respondent conceded this, but submitted that no substantial miscarriage of justice occurred as a result of the irregularity in the proceedings. Whilst I accept that a magistrate could take into account his own observations provided that he gave the appellant notice of what they were and an opportunity to contradict them, here the learned magistrate clearly took into account the result of the Drager Alco-test which was not permissible. As counsel for the appellant submitted, there was little other evidence that at the time of sentencing, the appellant was "a person, who by habitual or excessive use of liquor…is likely to injure his health"(s122(1) of the *Liquor Act*). The mere fact that the appellant had appeared to be intoxicated on the 10th of December 1997, coupled with a concession by his counsel that he had difficulty breaking the alcohol habit, was not enough to indicate that the appellant's health was at risk due to habitual or excessive use of liquor, as at the date of the sentence. The incidents in 1996 were more than a year ago, and the appellant's record showed that he had had no prior convictions for alcohol related offences for some 9 years.

Counsel for the respondent, Ms Blokland, conceded that the standard of proof required before an order could be made was proof beyond reasonable doubt, but in the absence of more compelling evidence than this, such as continuous alcohol-related offending or medical evidence as to the effect the level of his addiction was likely to have on his health, the evidence did not even establish the relevant proof upon the balance of prohabilities. I am therefore unable to

accept Ms Blokland's submission that no substantial injustice occurred as a result of the irregularly in the proceedings.

In *Sam Freedy and Others V Hatzimalis; Eddie Darby v Murphy* (unreported, S.C.N.T., 30/3/98) Gray A.J. said (Tr. p8):

> I consider that such orders should only be made after a full investigation of the circumstances and in a case where there is some reasonable ground for believing that the order will be compiled with. The authority of the court is not enhanced by the making of orders which are likely to be widely disregarded.

I agree with these remarks. The effect of a prohibition order has wide-ranging ramifications. First, it is an offence for the person against whom the order is made to obtain or attempt to obtain liquor, or without reasonable excuse, to enter upon or remain upon licensed premises upon which liquor is permitted to be consumed: s122(13). Secondly, it is an offence for any person to sell or supply liquor to such a person or to permit such a person to be upon such licensed premises: (s122(12)). A licensee may also be in jeopardy of having his licence suspended *vide* s66(1)(b) of the Act. The Act provides elaborate machinery where an application is made by the Registrar of the Liquor Commission to the Local Court for a prohibition order: see ss122(6), (7), (8), (9), (10), and (11) which are designed to ensure, *inter alia*, that before an order is made, the Court is furnished with an appropriate report prepared by the Registrar of the Liquor Commission, and that, if an order is made, each licensee in an area specified by the Commission is notified of the order. Before a magistrate makes such an order in criminal proceedings, ordinarily

the magistrate should, in my opinion, seek a report from the Registrar pursuant to s104(1) of the *Sentencing Act*, unless there are circumstances which would make such a course unnecessary: for example, if the offender lived in a remote community and there were effectively only one or two liquor outlets in the area, and at which, it can be inferred, the offender is already well-known. If an order is made, the Court should at least notify the Commission of the making of the order so that licensees can be notified.

In any event, even if there is an appropriate evidentiary basis, the Court has a discretion whether or not to make an order, and like all discretions, it must be exercised judicially. Of critical importance must be whether the order is likely to be obeyed both by the offender and by others affected by the order. It would be relevant to consider whether the offender has consented, vide s101 of the *Sentencing Act*, to an order that he undergo an alcohol rehabilitation program and whether the making of the prohibition order would be likely to enhance the offender's chances of successfully completing the program or not; alternatively whether orders pursuant to s122(4) ought be made and the likely impact upon the effectiveness of those orders a prohibition order would have. In the present case, the appellant consented to an order that he obey the reasonable directions of the Director as to drug and alcohol counselling, but there was no evidence that the appellant was suitable for, or able to undergo, any formal program in the area in which he lived. Prohibition orders should be seen as part of the court's armoury to effect rehabilitation, where there are prospects of rehabilitation, and should not be used where the offender is bound to fail, only to face further summary charges for breaches of the *Liquor Act*.