

CITATION: *JB v Racing, Gaming and Licensing* [2007] NTMC 001

PARTIES: JB
v
RACING, GAMING AND LICENSING

TITLE OF COURT: Local Court

JURISDICTION: Appellate Jurisdiction pursuant to the *Private Security Act*

FILE NO(s): 20621543

DELIVERED ON: 2 January 2007

DELIVERED AT: Darwin

HEARING DATE(s): 23 November 2006

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

PRIVATE SECURITY ACT – “APPROPRIATE PERSON” – DISQUALIFYING OFFENCES – SPENT CONVICTIONS

REPRESENTATION:

Counsel:

Appellant: Self
Respondent: Mr Lye

Judgment category classification: A
Judgment ID number: [2007] NTMC 001
Number of paragraphs: 32

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

No. 20621543

[2007] NTMC 001

BETWEEN:

JB

Appellant

AND:

RACING, GAMING AND LICENSING

Respondent

REASONS FOR DECISION

(Delivered 2 January 2007)

Ms Oliver SM:

1. The appellant appealed to the Local Court against a decision of the Licensing Authority cancelling his licences as a Crowd Controller and Security Officer. At the conclusion of the hearing I made an order that the decision of the Licensing Authority be set aside so that the licences be restored and said that I would provide reasons for that decision in due course. As the central issue in this matter is the use of spent convictions for the purposes of entitlement to licences under the *Private Security Act* it is appropriate that the appellant not be identified in the publication of these reasons.
2. Section 33(3) of the *Private Security Act* provides that an appeal is to be by way of re-hearing, unaffected by the Licensing Authority's decision. Section 26(1) provides for the following grounds only for cancellation of a licence:
 - (a) the licence was obtained on the basis of incorrect or misleading information;
 - (b) the licensee has contravened a condition of the licence;

- (c) the licensee has committed an offence against this Act;
- (d) the licensee, or another person required to be an appropriate person for the grant of the licence, is not, or is no longer, an appropriate person.

Subsection (2) provides that the question of whether a person is “an appropriate person” is to be decided in the same way as the question whether the person would be an appropriate person for the grant of the licence. In other words under the terms of section 15 which provides for an entitlement to licences provided that certain conditions are met including that the applicant is an “appropriate person” to hold a licence.

3. On 25 September 2006 the Registrar of the Local Court made orders that the appellant file and serve any references or witness statements upon which he wished to rely within fourteen days and that the respondent file and serve any affidavits upon it wished to rely within fourteen days. The appellant had already filed four references on 8 September 2006 which had been provided to the Licensing Authority and did not seek to rely on any further references. The Licensing Authority did not file any affidavits in relation to the matter, however, did file a number of photocopies of email correspondence and letters between the Office of Consumer and Business Affairs in South Australia and an officer of Racing, Gaming and Licensing in Northern Territory Treasury. As I indicated to Mr Lye on behalf of the Respondent, I was not prepared to accept those documents as evidence on the appeal. The respondent was directed to file evidence on which it proposed to rely in affidavit form but chose not to do so. Notwithstanding that the Court in hearing license matters is not bound by the rules of evidence, it is required to observe natural justice. It would not have provided procedural fairness to the appellant to admit and act upon those documents which were filed in disregard of the order of the Registrar.
4. At the hearing neither party called oral evidence but made submissions.

5. The history of the matter given by the appellant was that he was granted licences in South Australia in May 2004 as a Crowd Controller, Security Officer and canine handler. Before he took training and applied for those licences he obtained a police check with South Australia Police and was issued with a National Police Certificate which showed that as of the date of the issue of the certificate he was not recorded as being wanted or recorded in the indices of any Australian police service. A copy of that certificate which had previously been filed was tendered. The certificate is dated 30 March 2004. The certificate contains the following statement

“This document has been prepared in accordance with the Spent Conviction provision of the Commonwealth Crimes Act, SAPOL policy and other states spent conviction legislation and policies for the recording and keeping of court outcomes. Spent or rehabilitated convictions (if applicable) are not included.”

The certificate provided to the appellant states that he is not at the date of issue recorded as being wanted or recorded in the indices of any Australian Police Service. The appellant stated in his notice of appeal and before me that although he was aware that he had convictions for offences as a juvenile in the Northern Territory he assumed they were not relevant “as possibly juvenile convictions are not revealed in South Australia”. I accept this as having been his honest belief and one which he might reasonably form given the reference to spent convictions on the certificate he obtained.

6. Having obtained the S.A. licences he said he worked in crowd control and security in South Australia for two and half years prior to coming to the Northern Territory in May of 2006. This fact was not disputed nor was anything put forward to suggest that he had not properly performed his duties in the use of those licences. On arrival in the NT he applied for and was granted licences as a Crowd Controller and Security Officer. It was submitted by the respondent that these licences were granted to him

“provisionally” or “conditionally” prior to a police check being run in the Northern Territory on the basis that he had held the SA licences. When that police check was returned the convictions that the appellant had received as a juvenile in the Northern Territory were revealed. His licences were cancelled.

7. The appellant submitted that he had not attempted to deceive the South Australian Authorities in obtaining a licence there and that it was only when his convictions were revealed on a police check in the Northern Territory in July 2006 that he became aware that they were relevant to his application. He believed that because he had not committed any offence since he was sixteen or seventeen and that he had learnt from “the roughest to the highest venue in South Australia” how to perform duties as a crowd controller and security officer that he had therefore proved himself to be an appropriate person to be granted licences under the *Private Security Act*. In that regard he relied on the references as to his character to which I have referred.
8. Mr Lye on behalf of the respondent submitted that the licences in the Northern Territory were granted to the appellant as part of a system of mutual recognition. On my querying the legislative basis for such a system he submitted that it was governed by the Commonwealth *Mutual Recognition Act*. Mr Lye advised the normal process is to check with the jurisdiction in which the person holds licences that they have not been cancelled and that a licence is then issued in the Northern Territory upon to the presentation of receipt for a finger print check. Such a licence is apparently regarded as conditional or provisional pending the outcome of the criminal history check.
9. Mr Lye submitted that there was nothing in the Northern Territory or South Australian legislation that excluded juvenile convictions and referred me to the *Security Investigations Act (SA)* with regard to applicable disqualifying offences. The question of whether any of the appellant’s convictions as a

juvenile are disqualifying offences in South Australia or the application of mutual recognition principles is not in my view the determinative issue. The issue is not whether the appellant was entitled to hold licences in South Australia but whether he is entitled to hold the licences in the Northern Territory under the terms of the *Private Security Act*.

10. Section 15(3) provides that a person is entitled to be granted a provisional licence if the Minister has approved a code of practice under section 48, and competency standards and training under section 53, in relation to that category of licence; and the Licensing Authority is satisfied that the person is an appropriate person to hold the licence. A person is entitled under section 15(4) to be granted a crowd controller's licence, a security officer's licence, or a category of licence (other than a provisional licence) declared under section 8, if –
 - (a) the Minister has approved a code of practice under section 48, and competency standards and training under section 53, in relation to that category of licence;
 - (b) the licensing authority is satisfied that the person has successfully completed the course in training approved under section 53 in relation to that category of licence; and
 - (c) the licensing authority is satisfied that the person is an appropriate person to hold the licence.

Each of these entitlements is subject to refusal under section 15(8) on the grounds of bad character. It was not suggested to me that the appellant is a person of “bad character”.

11. In determining whether a person is an appropriate person to hold a licence the licensing authority is limited to consideration of the matters set out in section 15(6) and 15(7). Section 15(6) specifies particular matters for consideration to which I will turn in due course whilst section 15(7) provides that a person is not an appropriate person to hold a licence if the

person, within 10 years of applying for a licence, has been convicted of a disqualifying offence in relation to such a licence; or an offence that would be a disqualifying offence in relation to such a licence if committed in the Territory.

Does the Appellant have a disqualifying offence within the meaning of section 15(7)?

12. The definition of disqualifying offences for the purpose of section 3 of the *Private Security Act* is set out in Regulation 3 of the Private Security (Crowd Controllers) Regulations and in Regulation 2 of the Private Security (Security Firms) Regulations. The offences listed in those regulations are identical.
13. Mr Lye submitted that the Licensing Authority has no discretion in terms of granting a licence where a person has a disqualifying offence. I agree that this is the effect of the provision. If a person has a disqualifying offence he or she cannot be an appropriate person and therefore is not entitled to the grant of a licence. Section 210 of the Criminal Code is one of the prescribed disqualifying offences provided that it was one for which a custodial sentence was imposed. If the appellant's custodial sentence of 14 days detention for an offence against section 210 of the Criminal Code as a juvenile in 1999 is a disqualifying offence the appellant will not be an appropriate person for the grant of a licence.
14. The appellant's convictions for offences committed as a juvenile have all spent convictions within the meaning of the *Criminal Records (Spent Convictions) Act*. Section 6(2) of that act provides that a criminal record is a spent conviction after the expiration of a period following immediately after the date of conviction of the offence provided that during that period the offender has not been convicted of an offence punishable by imprisonment or has served all or any part of a sentence of imprisonment. The statutory expiration period differs depending on whether the conviction was as a

juvenile (that is under the *Youth Justice Act* or its predecessor the *Juvenile Justice Act*) or as an adult. Where an offender was a juvenile at the time of the conviction the period that enables the conviction to become spent is five years whereas if the conviction was recorded when the person was an adult the conviction will only become spent after a period of ten years. A criminal record cannot become a spent conviction where a sentence of imprisonment for more than 6 months was imposed. The appellant's last conviction was as a juvenile on 14 January 2000 for the offence of entering a building with intent. All of his convictions are ones capable of becoming spent (the maximum sentence he received was 14 days detention) and therefore as no further offending has occurred his criminal record became spent as of 14 January 2005.

15. Where a record is a spent record section 11 of the *Criminal Records (Spent Convictions) Act* provides that a person is not required to disclose a spent record (s11(a)). Further, subsections (b) and (c) provide as follows:
 - (b) a question concerning a person's convictions, criminal history or criminal record or a record of a similar kind shall be taken to refer only to a record which is not a spent record; and
 - (c) in the application to a person of a provision of an Act or instrument of a legislative or administrative character –
 - (i) a reference to a conviction, criminal history or criminal record or record of a similar kind shall be taken to be a reference only to a record which is not a spent record; and
 - (ii) a reference to a person's character or fitness shall not be taken as permitting or requiring a spent record to be taken into account.
16. However, section 16(3)(a) of the *Private Security Act* provides that the Commissioner of Police, upon receiving the signed authority of an applicant, is to give the Licensing Authority a written report of the criminal history of the applicant notwithstanding that part of a criminal history is a spent

conviction within the meaning of the *Criminal Records (Spent Convictions) Act*. Consequently, the appellant's convictions as a juvenile were presented to the Licensing Authority and formed the basis for its decision to cancel the licences that had been issued to the appellant on the basis that he had a disqualifying offence within the terms of section 15(7).

17. However, the fact that the Commissioner of Police can provide a report including spent convictions to the Licensing Authority is not determinative of the issue. The question that must be addressed is the use that can be made of those convictions when that information is received by the Authority. There are two purposes for which the report obtained from the Commissioner of Police pursuant to section 16(3)(a) might be put under the *Private Security Act*. The first is that spent convictions might be produced for the purpose of identifying disqualifying offences. Secondly, and either additionally or in the alternative, they might be produced for the purpose of consideration as to whether an applicant is an appropriate person taking into account and limited to their relevance to the matters set out in section 15(6).
18. The purpose of the *Criminal Records (Spent Convictions) Act* as expressed in the preamble is to facilitate the more effective rehabilitation of certain offenders by providing that, in certain circumstances, their criminal records relating to relatively minor offences may be spent and not form part of their criminal history. In simple terms, the policy behind a legislative scheme of this nature is to prevent criminal convictions from impeding the subsequent progress in life of persons who have been able to demonstrate that they have been fully rehabilitated. The differentiation of the expiration period in section 6 of the *Criminal Records (Spent Convictions) Act* to provide for a shorter period (5 years) for juvenile convictions than adults (10 years) reflects policy seen generally in juvenile justice legislation that young people are to be dealt with in a manner that recognises and reflects their age and lack of maturity and permits and promotes their rehabilitation into adult life.

19. Consideration of all of the provisions of the *Private Security Act* suggests that if spent convictions are received for the purpose of identifying disqualifying offences that would produce a curious and inconsistent result. Section 15(7) of the *Private Security Act* provides that disqualifying offences are those which are prescribed **and of which the person has been convicted within ten years of applying for a licence**. A spent conviction of an adult, which is one of the prescribed offences, will never be a disqualifying offence because to become spent an adult conviction must be more than ten years old and will therefore be outside the time frame for a disqualifying offence within the terms of section 15(7). There could be no purpose in the Police Commissioner providing adult spent convictions for the purpose of section 15(7). On the other hand information on a juvenile conviction, because it can become spent after a period of five years, could be received as a disqualifying offence because it will be able to fall within the ten year period set by section 15(7). If that were the intent of the Legislature, that is, that the Licensing Authority receive spent convictions for the limited purpose only of considering whether there are any juvenile convictions that are disqualifying offences it might be expected that that would be made clear.
20. There are further provisions of the *Private Security Act* which deal with spent convictions. Section 11 requires the Licensing Authority to keep a register of persons who either hold licences under the Act or who are disqualified from holding licences under the Act. The only circumstance where a person can be disqualified from holding a licence under the Act is where he or she has been convicted of a disqualifying offence within the terms of section 15(7). The register of disqualified persons may therefore be understood as a register of persons with disqualifying offences. There can be no other reason for inclusion on the register. Section 11(3) provides that the Licensing Authority shall ensure that spent convictions within the meaning of the *Criminal Records (Spent Convictions) Act* are not recorded

on a part of the register to which the public has access. Consequently, if the appellant's name were to be placed on the public access part of the register as a person disqualified from holding a licence, none of the offences by which he is said to be disqualified in terms of section 15(7) could appear on that register. This leads to a strange practical result. The public may inspect the register, they might see the appellant's name as a person disqualified and therefore will know that he has committed a disqualifying offence but the offence itself may not be provided. Such a result appears inconsistent with section 12 of the *Criminal Records (Spent Convictions) Act* which provides that "a person with access to records kept by or on behalf of a public authority which include spent records who, other than in accordance with this Part, discloses a spent record or **information relating to a spent record** to a person without the consent of the person to whom the record relates, is guilty of an offence" (my emphasis). Section 11(3) of the *Private Security Act* appears to reflect the policy that spent convictions should not be disclosed but if spent convictions are received for the purpose of identifying juvenile spent convictions as disqualifying offences then the highlighted portion of section 12 of the *Criminal Records (Spent Convictions) Act* may not to be complied with because recording the appellant's name on the register of disqualified persons appears to be disclosure of "information relating to a spent record" in that it would of itself disclose that the appellant is a person with a disqualifying offence.

21. Section 11(3) make sense however where the purpose for which spent convictions are received is limited to section 15(6), in other words, when they are received and specifically for the purpose of s15(6)(e), of whether an applicant, taking into account that he or she has been found guilty of an offence, is an appropriate person. Where spent convictions have been considered for that purpose and the applicant nevertheless found to be an appropriate person, the person's name will appear on the register as a person who holds a licence and the spent record will be recorded but the public part

of the register will not reveal the spent conviction only the fact of the licence.

22. Each of these matters leads me to the conclusion that the use to which spent convictions may be put, when received in a report from the Commissioner, is in relation to section 15(6) only and not in relation to identifying disqualifying offences under section 15(7).
23. In relation to the appellant then I find that he does not have a disqualifying offence within the terms of section 15(7).

Is the applicant an appropriate person to hold a licence?

24. In my view his convictions although spent may be considered for purpose of section 15(6)(e) in determining his appropriateness to hold a licence. This is the purpose for which they are received in the report from the Commissioner of Police. Section 15(5) provides that in determining whether a person is an appropriate person the licensing authority is limited to considering the matters specified in subsections (6) and (7). Subsection(7) deals with disqualifying offences. Subsection (6) provides the following matters:
 - (a) that in dealings in which the person has been involved, the person has –
 - (i) shown dishonesty or lack of integrity; or
 - (ii) used harassing tactics;
 - (b) that the person habitually consorts with reputed criminals;
 - (c) that the person has taken advantage, as a debtor, of the laws of bankruptcy;
 - (d) that the person is suffering from an illness that makes them unfit to work in the security industry;

- (e) that the person has been found guilty of an offence;
- (f) information provided by a person or body responsible for the issue of licences under an Act of the Territory, the Commonwealth or a State or another Territory of the Commonwealth;
- (g) evidence given in a court of the Territory, the Commonwealth or a State or another Territory of the Commonwealth or a commission of inquiry.

25. Mr Lye submitted that this was a matter to which section 15(6)(a) of the *Private Security Act* had application. Section 15(6)(a) provides that dealings in which the person has been involved, in which the person has shown dishonesty or lack of integrity or has used harassing tactics may be considered as indicating that he is not an appropriate person to hold a licence. Mr Lye submitted that the dishonesty offences for which the appellant was convicted as a juvenile might be and were considered by the Licensing Authority in terms of the decision as to whether he was an appropriate person to hold the licences.
26. In my view, section 15(6)(a) is aimed at matters other than convictions for offences. This is particularly so because section 15(6)(e) specifically refers to the fact that a person has been found guilty of an offence as being a matter which is relevant to determine whether that person may not be an appropriate person. Section 15(6)(a) appears rather to address issues of truthfulness in dealings rather than dishonesty offences. An example might be not providing truthful information in the application. The appellant's application for a licence was not tendered by either party. I am therefore not in a position to make or draw any conclusions as to issues of this nature. There was suggestion in submissions from Mr Lye that the appellant had improperly obtained licences in South Australia by failing to disclose his convictions as a juvenile. As I have said there is no evidence of this before me and in any event I think the appellant gave a satisfactory account that he

had obtained the National Police Certificate in South Australia prior to undergoing training to obtain the licences in that jurisdiction and when that certificate did not reveal his previous juvenile convictions he drew the not unreasonable conclusion that juvenile records were not relevant and therefore not a bar to his proceeding with training and obtaining licences.

27. In terms of section 15(6) the primary question is whether the convictions that the appellant had as a juvenile are such that he should not be considered to be an appropriate person to hold licence under the Act. They do not automatically disqualify him and need to be considered against a background of other matters.
28. The first consideration is of course that these were convictions as a juvenile and under the terms of the *Criminal Records (Spent Convictions) Act* have become spent convictions with the intent that his prospects as an adult not be hindered by activities engaged in as a juvenile. In order to assess whether they make him unsuitable they should be considered against the background of other evidence as to his present character. Relevant to this is that he held similar licences in South Australia for a period of two and a half years and worked in the security industry for that period without any apparent problems. He presented to the Court references that dealt with his character. The first reference was from his former coach of the Darwin Football Club under 18s who knows the appellant both as a coach and mentor but predominantly as a close family friend for a period of ten years. This reference attested that the appellant is a young man of great integrity, extremely dedicated to his family, friends and work.
29. A second reference was from the Second in Charge, Security Officer of Casuarina Shopping Centre who stated that the appellant had always been courteous, polite and helpful in any situation and that he would be taken back to work at Casuarina Shopping Centre if he were to receive his licence back. There was also a reference from the Security Supervisor from

Newtech Property Services stating that the appellant had shown significant integrity and had proved to be very honest, reliable and compassionate. Finally the Security Manager of the same company provided a reference which stated that the appellant was very professional in all areas, that his performance towards public interactions is extremely high and he can communicate positively in all aspects. Although the latter three persons had known him only from the time that he came back to the Northern Territory and commenced worked in the Security Industry clearly their references are directly relevant to his performance of duties under the licences and are directly relevant to the issue of integrity in section 15(6)(a).

30. The appellant's juvenile offending may be categorised as predominately dishonesty offences of a type not uncommonly associated with juvenile offenders. The last recorded conviction was in January 2000 for an offence that occurred in July 1999. In other words no further offences have been committed by the appellant for over 7 years. His record confirms what he submitted – that he has proved himself to have been rehabilitated from the days of his youthful offending. His references confirm his present positive good character.
31. In my view notwithstanding those offences, he may be considered to be an appropriate person and therefore entitled to the grant of the licences he held. It was for that reason that I set aside the decision of the Licensing Authority cancelling his licences so that they be restored to him.
32. I note also that even if I were not correct regarding the limited use of spent convictions that section 34(4) of the *Private Security Act* provides that “notwithstanding that an appellant is not, by virtue of section 15(7), entitled to the grant of a particular licence, the Local Court may, in substituting another decision, decide to grant such a licence to the appellant, if it is satisfied that, notwithstanding the offence, the appellant is, on the balance of probabilities, a suitable person to be granted such a licence”. Had I

found that the conviction for stealing recorded in September 1999 for an offence committed in November 1998 was a disqualifying offence I would nevertheless have been satisfied on the balance of probabilities for the same reasons given above that the appellant is a suitable person to be granted a licence.

Dated this 2nd day of January 2007.

Ms Sue Oliver
STIPENDIARY MAGISTRATE