WESSELS, MASON and CURLEWIS, JJ. September 23rd, 1912.

R. *vs.* MEINTJES.

Criminal Law.—Liquor.—Unlicensed Sale.—Indictment.—Essential Allegations.—Possession of Liquor.—Unreasonable Quantity.—Presumption.—Ordinance 32 *of* 1902, *secs.* 57 *and* 61.

An indictment under sec. 57 *read with sec.* 61 *of Ordinance* 32 *of* 1902 *alleged that the section had been contravened by the accused selling or disposing of liquor without a licence by having more liquor on his premises than was reasonably required for persons residing thereon*:—Held, *that sec.* 61 *of the Ordinance did not make it an offence for an unlicensed person to be in possession of an unreasonable quantity of liquor, but merely makes such fact* prima facie *evidence of an unlawful sale of liquor*:—Held, *further, that the indictment was bad, inasmuch as it contained no allegation of a specific sale to persons known or unknown.*

Argument on review.

1912. Sept. 23. R. *vs.* Meintjes.

Accused was charged before the A.R.M., Johannesburg, with contravening sec. 57 read with sec. 61 of Ordinance 32 of 1902 and sec. 6 of Act 23 of 1909. The charge sheet alleged that accused did "wrongfully and unlawfully, contrary to the provisions of Ordinance 32 of 1902, sell, deal in or dispose of intoxicating liquor without a licence, by having more liquor on the premises

Ord. 32 of 1902 sec. 57 reads: "Any person who shall contrary to the provisions of this Ordinance sell, deal in or dispose of intoxicating liquor without a licence, or sell or offer or expose for sale any such liquors at any place where he is not authorised by his licence to sell shall upon conviction be liable," etc.

Sec. 61 reads: "In any proceeding against any person for selling or allowing to be sold any liquor without a licence, such person shall be deemed to be unlicensed unless he shall produce his licence or give other satisfactory proof of his being licensed. The fact of any person not holding a licence having any signboard or notice importing that he is licensed upon or near his premises or having a house or premises fitted up with a bar or other place containing bottles, casks or vessels so displayed as to induce a reasonable belief that liquor is sold or served therein or having liquor concealed or more liquor than is reasonably required for the persons residing on such premises shall be deemed *prima facie* evidence of the unlawful sale of liquor by such person."

1912.
Sept. 23.
R. vs Meintjes

than is reasonably required for the persons residing thereon." At the trial in the lower court, the indictment was excepted to on the ground that it disclosed no offence, as it did not state the name of the person to whom the liquor was sold. The magistrate upheld the exception and discharged the accused.

At the instance of the Attorney-General the decision was then brought in review before the Supreme Court, under sec. 43 of Proclamation 21 of 1902.

F. W. Beyers K.C., Attorney-General (with him *I. J. van Heerden*), for the Crown: The case of *Fiore* vs. *Rex* (1904, T.S. 40) can be distinguished from the present case. If certain facts are alleged in the indictment, those facts are *prima facie* proof of a sale under sec. 61, and such sale would then fall under sec. 57.

[WESSELS, J.: Did the legislature ever intend that because a man has a certain amount of liquor on his premises that he shall be guilty of a sale of liquor?]

The language of the statute is quite clear.

[MASON, J.: What possible evidence can an accused bring?]

It is not my duty to defend the policy of the law. In the nature of the case it is impossible under the last part of sec. 61 to allege an actual transaction. The section must be read for the purpose of this case as if the last part stood alone.

[MASON, J.: According to your construction of the section then every day that a person has a certain amount of liquor will be proof of a sale, and if he had it for 12 months, he would be guilty of 365 sales and liable to be convicted 365 times?]

That may be so, but it does not affect the construction of the section. Here the fact is alleged that the accused has more liquor than is reasonably required and that distinguishes it from *Fiore's* case (*supra.*).

[MASON, J.: Suppose the accused says that she has not sold liquor, but admits that she had more liquor than reasonably required, would she be guilty or not?]

That depends upon the circumstances of the case and the evidence. The presumption under sec. 61 can be

rebutted; the magistrate must take into consideration the social standing, etc., of the accused. If he finds that the liquor is there for a lawful purpose he will not convict. The Crown cannot in the present case specify any transaction except the facts stated in the charge. It does not follow that where you cannot allege specific transactions, that therefore sec. 61 does not apply. The sale need not necessarily have taken place on the date that the liquor was found; it may be impossible to prove a sale. What is the value of adding the words "to a person unknown"? The possession of a stolen article is *prima facie* evidence of theft, and in the same manner a magistrate can convict if he comes to the conclusion that a person is in possession of an unreasonable quantity of liquor.

[MASON, J.: Is it an absolute offence to have an unreasonable quantity of liquor in your possession?]

No; it is only *prima facie* evidence, which may be rebutted. The indictment does allege that the accused sold, and goes on to throw the onus on the accused. It is quite possible that natives who frequented this place might have been brought under this indictment to give evidence, but is it therefore necessary to set it out in the indictment? Under sec. 61 the legislature intended to suppress cases quite apart from selling. Sec. 61 would aid the Court in interpreting the evidence, but it is not confined to that object only.

R. Gregorowski, for the respondent and *O'Reilly* also for the respondent, at the request of the Crown, were not called upon.

WESSELS, J.: In this case one Cornelia Meintjes was charged with "contravening sec. 57, read with sec. 61, of Ordinance 32 of 1902, and sec. 6 of Act 23 of 1909, in that, upon or about the 13th June, 1912, and at No. 13, Tenth Street, Vrededorp, Johannesburg, the said accused did wrongfully and unlawfully, contrary to the provisions of Ordinance 32 of 1902, sell, deal in or dispose of intoxicating liquor without a licence, by having more liquor on the premises than is reasonably required

1912. Sept. 23. R. vs. Meintjes.

for the persons residing thereon, to wit, twenty bottles of dop brandy, seven bottles of whisky, one jar of sherry and one bottle of beer." In this charge the accused is charged with a specific crime—the crime of selling, dealing in, or disposing of intoxicating liquor without a licence. How? By having more liquor on her premises than she reasonably required. In other words, she is charged with the specific crime of having more liquor on her premises than is reasonably required for herself. Now, was that the intention of the legislature? Was it the intention of the legislature to enable a magistrate to punish a person for having more liquor on his or her premises than the magistrate thinks he or she requires? That is the whole question to be decided in the present case. Sec. 57 of Ordinance 32 of 1902 creates a crime. It says, "Any person who shall, contrary to the provisions of this Ordinance, sell, deal in, or dispose of intoxicating liquor without a licence, or sell or offer or expose for sale any such liquor in any place where he is not authorised by his licence to sell," shall, upon conviction, be liable to certain penalties. There a specific crime is created—namely, selling, dealing in, or disposing of, intoxicating liquors without a licence. Then sec. 61 states, first, when a person will be presumed to have a licence, and when not. It says: "In any proceedings against any person for selling or allowing to be sold any liquor without a licence, such person shall be deemed to be unlicensed unless he shall produce his licence or give other satisfactory proof of his being licensed." That is a mere matter of proof. The section instructs the Court under what circumstances it is to deem the accused to be licensed, and in what cases it is to deem him to be unlicensed. The section proceeds: "The fact of any person not holding a licence having any signboard or notice importing that he is licensed upon or near his premises, or having a house or premises fitted up as a bar or other place containing bottles, casks, or vessels so displayed as to induce a reasonable belief that liquor is sold or served therein"—these facts are to be deemed *prima facie* evidence of the unlawful sale of liquor by such person. Then the section

says—" or having liquor concealed, or more liquor than is reasonably required for the person " shall also be *prima facie* evidence of the unlawful sale of liquor by such person. The whole of sec. 61, therefore, deals with what shall be proof of whether a person is licensed or not, and what shall be proof of whether there has or has not been a sale of liquor. One of the ordinary rules of interpretation of Statutes is that the Court will not presume that the legislature intended to establish a crime. The language of the legislature must be clear; it must define the crime in such terms that there can be no doubt when the law has been transgressed. If the language constituting the crime is not clear, the Court is not, by a subtle interpretation of various parts of the statute, to constitute a crime. Now the whole of the *Attorney-General's* argument amounts to this—that it is a crime for a person to be in possession of more liquor than he reasonably requires. This means that it is to be supposed that the legislature intended that a magistrate should have the power to imprison a person because, in his opinion, the person has more liquor than he requires. If this is correct, a form of prohibition is introduced, of which the legislature makes no specific mention. Such an interpretation would be wholly unjustifiable and improper. Therefore we must conclude that the legislature did not intend to create as a substantive crime the fact that a person has more liquor in his possession than a magistrate thinks he should have. An indictment, therefore, which charges a person with committing the substantive crime of having more liquor on his premises than he reasonably requires is wholly void.

But, apart from that, in the case of *Rex* vs. *Fiore* (1904, T.S. 40) it was decided that if an accused is charged with contravening sec. 57 of Ordinance 32 of 1902, in that he dealt in intoxicating liquors without a licence, the summons must state the names of the persons to whom the liquor has been illicitly sold. I quite agree with what was said by my brother, MASON in his judgment in that case; he said (p. 41): " Now, there have been a series of decisions in South Africa, and possibly

1912. Sept. 23. R vs. Meintjes.

they are common to all the Courts in South Africa, that where a person is charged with an offence of this nature the names of the persons to whom the alleged sale was made shall be given; and of course those decisions have proceeded on the basis that it is essential in the summons to specify the particular transaction which is alleged to constitute an offence." In other words, the accused must be given an opportunity of being able to lay his defence before the Court. He must know exactly what was the occasion upon which he is alleged to have sold or dealt in or disposed of liquor. If you do not tell him what the particular transaction is with which he is charged, or if you allege that he has been in the habit of dealing in liquor and do not inform him what the occasions were, how is he able to put his defence before the Court? How is he able to bring witnesses to show that on the occasions when he is alleged to have sold liquor he was not there and could not have sold it? It is quite impossible for him to do so. In the case of *Fiore* the sole question was whether the names of the persons to whom the liquor was alleged to have been sold ought to be given. I do not go so far as to say that a charge will not be good in which it is alleged that the accused sold liquor to a person unknown. If the whole transaction is set out, and all that the prosecutor is ignorant of is the name of the person to whom the liquor was sold, he is entitled, after setting out all the particulars of the sale, to omit the name of the purchaser, and to say that he is not prepared to give the name of the purchaser because it is unknown to him. Then when the case comes before the Court, the fact that the accused is in possession of more liquor than he requires will be considered as part of the evidence, and such evidence, when brought in conjunction with the fact that liquor has been sold, will be *prima facie* proof of an unlicensed sale. Under these circumstances it will be shown that that particular sale was unlawful, and that is all that I think the legislature intended by sec. 61. The magistrate's decision was therefore correct.

MASON, J.: I concur in thinking that the magistrate's judgment was correct. The offence in this case is either

the illicit sale of liquor, or the unreasonable possession of liquor. For the reasons which my brother WESSELS has given, I think it is clear that the legislature did not intend, by sec. 61, to constitute possession of liquor, or the concealment of liquor, or any of the various other acts referred to in the section, in themselves an offence. The offence, then, is the illicit sale of liquor. There is no question that in an ordinary charge under the Liquor Ordinance the indictment must contain the ordinary details which every indictment must contain—namely, such details as will enable the accused to know what particular illegal transaction he is alleged to have engaged in. Is there anything in sec. 61 which would lead us to suppose that the legislature intended that indictments of the nature of the present one could be substituted for an ordinary indictment? There is nothing which says that you can, in indictments under this law, dispense with the ordinary provisions requisite for indictments, under the circumstances referred to in sec. 61. It seems to me the section can be quite easily and fairly construed by saying that it applies in ordinary prosecutions for the illicit sale of liquor—namely, that where there is an ordinary prosecution on an ordinary indictment, evidence of the facts mentioned in the section can be offered, and those facts will be *prima facie* evidence of the alleged crime. That seems to me to dispose of the objections which have been taken by the *Attorney-General* to the construction which has been suggested during argument and which has commended itself to the Court. In this particular instance it is clear that the indictment, instead of alleging a specific sale of liquor, alleges the offence to be the unreasonable possession of liquor. If it is not necessary in such an indictment to refer to any particular transaction, it is of course almost impossible for the accused to be able to offer a proper defence. I do not know what kind of proof he is to offer. Is he to offer proof that he was ill during the whole of the day in question and did not sell, or what case is he to make? Then it seems to me that if the construction contended for by the *Attorney-General* is correct there would be nothing to prevent the Crown

1912. Sept. 23. R. vs. Meintje-.

from attempting to show that during the whole of a month the accused had an unreasonable amount of liquor in his possession, and that unless he could show that he did not sell liquor to anybody throughout the whole of the month he would be bound to be convicted. I think such a construction is not necessary under the section, indeed it would be a most harsh construction to put on the section, and we should not do so unless it is clear that the legislature intended in this section to dispense with the ordinary provision swith reference to indictment, the section can be given full effect to by giving it the more reasonable and, as I think, more equitable, construction which the Court has put upon it.

CURLEWIS, J.: I concur. There might be force in the *Attorney-General's* contention if sec. 61 were differently worded. But in my view sec. 61 only provides for what shall be considered proof of a contravention of sec. 57. Sec. 61 provides that in any proceeding against any person for selling or allowing to be sold any liquor, the concealment or having on his premises more than the supply of liquor reasonably required for his use shall be deemed *prima facie* evidence, not of *a* sale of liquor, but of "*the* unlawful sale," that is, the unlawful sale with which he is charged. The wording of the Ordinance seems to me to convey that the person must be charged with some specific act of sale, and then the finding on his premises of an unusual quantity of liquor will be *prima facie* evidence of that particular unlawful sale with which he is charged.

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[Reported by GEY VAN PITTIUS, Esq., Advocate.]