

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 27/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE BINGHAM, JA. (Ag.)

REGINA

VS.

LLOYD ELLIOTT

Messrs. F. M. G. Phipps, Q.C., George Soutar
and E. Smith for the appellant

Mr. Winston Douglas for the Crown

April 29 and 30; and June 25, 1987

KERR, J.A.:

The appellant was convicted by His Honour Mr. Geoffrey Ramsay, Resident Magistrate, exercising his special statutory summary jurisdiction at Half-Way-Tree, St. Andrew on 27th January, 1986, for three breaches of the Opticians Act, namely, that the appellant, not being registered under the Opticians Act as required by Section 7 of the Act, on three occasions unlawfully held himself out to be so registered in contravention of Section 15(b) of the Act.

Optical Illusions Ltd. a registered Company, apparently by its sign, occupies certain premises on Melmac Avenue, St. Andrew. At these premises it was alleged that the appellant practised optometry for fees on (i) William Clarke on 2nd February, 1984 for \$45.00 and (ii) Helen McLean on 6th February, 1984 for \$600.00 and on (iii) Godfrey McAllister

on 11th May, 1984 for \$45.00.

That these services were performed as alleged and that they amounted to the practise of optometry were not challenged. Here, as in the Court below, the submission was to the effect that the burden of proving that the appellant was not registered rested on the prosecution, and that burden had not been discharged.

The learned Resident Magistrate in dealing with this question held:

"Section 7 of the Opticians Act prohibits the practice of optometry except in special circumstances, namely, the practitioner being registered under the provisions of the Act.

Consequently, the onus of proving falls upon the defence, not on the Crown to prove non-registration. In the Court's view, therefore, the Crown has made out a prima facie case against the accused. However, if this finding is wrong in law, then in view of the evidence of the Assistant Registrar that she perused the relevant Register and noted that the accused was not registered under the Act, is in this Court's view prima facie evidence that he is not so registered."

Now, at the trial the prosecution called as witness, Sadie Grey, the Assistant Registrar-General, in the Registrar-General's Department, Spanish Town.

As such, in 1983, she was Head of the Island Record Office which is a section in the Registrar-General's Department. On October 5, 1983, the appellant attended on her there, and enquired of her the requirement for registration under the Opticians Act. She gave him the necessary information orally and subsequently in a letter to him. She has never received any application from him, and he is not registered under the Act.

In cross-examination she said that although publication in the Gazette of the particulars of the Register is required this was not being done, and certainly there was no publication since 1971. The Register is up-to-date.

She is no longer in charge of the Island Record Office, but as Assistant Registrar she has access to the records. Her evidence is based upon a perusal of the records.

Kenneth Whitbourne, an Optometrist and President of the Jamaica Optometric Association and a member of the local Board of Examiners under the Act, said that in 1983 the appellant had discussed registration with him, and on 19th October, 1983 had submitted to him as a member of the Board an application with documents, including photo-copies of college diplomas of his qualification for transmission to the Ministry of Health. He was not admitted as a member of the Association. His documents, however, were submitted to the Chief Medical Officer as Convener of the Board. He had no further communication on the matter.

The Opticians Act provides that the office of the Registrar-General shall be the Registry of qualified opticians and the Registrar-General shall be the Registrar.

The following Sections of the Act are sufficiently relevant and for easy reference are quoted hereunder:

- "(1)
- (2)
- (3)
- (4)
- (5) A copy of the register as it stands at any such time, shall be published by the Registrar in the first Gazette issued after each first day of June and December in every year.

Any copy of the Gazette containing the most recent copy of the register, shall be prima facie evidence in all legal proceedings that the persons therein specified are registered under this Act; and the absence of the name of any person from such copy shall be prima facie evidence that such person is not registered under this Act

"(6) Every person registered under this Act shall be entitled to practise optometry in this Island and to demand and recover reasonable charges for professional services and/or optical aid rendered by such person, and the cost of merchandise supplied by him.

(7) No person, unless duly registered under the provisions of this Act, shall practise optometry in the Island either for or without reward nor carry on business under any title, name or description implying that he is registered under this Act. The use of test lenses, spectacles, trial frames, ophthalmoscope, retinoscope, or any apparatus that may be used to measure refraction, or visual acuity, or muscular equilibrium, shall be deemed conclusive evidence of the practice of optometry.

.....

(15) Any person -

(a)

(b) who, not being registered under this Act, shall hold himself out or pretend to be, or use or take the name or title of optometrist, optician, or doctor or professor of optometry or any name, title or addition implying such qualification or that he is a person specially qualified to practise optometry;

(c)

(d) shall be guilty of an offence under this Act, and shall on summary conviction before a Resident Magistrate be liable to a penalty not exceeding forty dollars, or to be imprisoned, with or without hard labour, for a term not exceeding six months:

Provided always, that a person shall not be guilty of any offence under clause (b) if he shows that he has been registered and continues to be entitled to be registered under this Act, but that his name has been erased on the ground only that he ceased to practise in the Island."

Mr. Phipps submitted that the Opticians Act when properly considered, imposes a duty on the prosecution to establish the state of the Register, in order to determine whether or not the appellant committed an offence, and the Act

(Sec. 5) provides a method of proof which will be prima facie evidence of registration and non-registration. The Gazette was not being published and the prosecution sought to establish the state of the Register by calling someone from the Registry. Such evidence was hearsay and inadmissible.

The Act, argued Mr. Phipps, had not created an offence for doing an act without special qualifications, licence or authority. What the Act spoke of was the condition of the Register. He endeavoured to draw a distinction between those cases in which the doing of an act without licence or authority is prohibited, and consequently a burden is on the doer to prove he has the qualification or authority, and the instant case in which it was not a question of expertise, but a question of the state of a public document of which prima facie evidence may be given by production of the Gazette. He sought support for his submission in statements in R. v. Hunt [1986] 3 W.L.R. 1115, and R. v. Edwards [1974] 2 All E.R. 1085.

In reply Mr. Douglas contended in effect that the prosecution had tendered prima facie evidence on non-registration from the witness Sadie Grey; that the Register being a public document, secondary evidence of its contents may be given, and Miss Grey as Assistant to the Registrar-General was competent to give that evidence. Further, her evidence was as to the state of the Register and was not hearsay - see R. v. Winston Lincoln, R.M. Criminal Appeal No. 69/80 (unreported) dated April 3, 1981.

In any event, argued Mr. Douglas the Crown need not have called any witness. Having regard to the scheme of the Act, being on the Register was a qualification, and the instant case was within the category of cases as defined in R. v. Edwards and in which a persuasive burden rests upon a defendant to prove that he holds the necessary qualification to practise the particular profession.

In R. v. Edwards [1974] 2 All E.R. 1085 in giving the judgment of the Court, Lawton L.J. with scholarly industry reviewed a number of cases in which there is what for short term may be called a "negative averment", placing upon a defendant a persuasive onus and concluded thus (p. 1095):

"In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception.

In our judgment its application does not depend on either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wignore pointed out in his great treatise on evidence this concept of peculiar knowledge furnishes no working rule. If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation on an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden."

This judgment in R. v. Edwards was considered in the H.L. (E) case of R. v. Hunt [1986] 3 W.L.R. 1115 and in approving of the decision the principle was restated by Lord Griffiths thus (pp. 1128-9):

"In Reg. v. Edwards [1975] Q.B. 27, 39-40 the Court of Appeal expressed their conclusion in the form of an exception to what they said was the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. They said that the exception

'is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.'

I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare. But I find it difficult to fit Nimmo v. Alexander Cowan & Sons Ltd. [1968] A.C. 107 into this formula, and I would prefer to adopt the formula as an excellent guide to construction rather than as an exception to a rule. In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception within the meaning of section 101 of the Act of 1980 which the Court of Appeal rightly decided reflects the rule for trials on indictment. With this one qualification I regard Reg. v. Edwards as rightly decided."

Here the comparable statutory provisions for trials of summary offences reflecting the rule for trials on indictment are contained in the proviso to Section 13 of the Justices of the Peace Jurisdiction Act which reads:

"Provided always, that if the information or complaint in any such case shall negative any exemption, exception, proviso or condition in the enactment on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same."

In applying the approach advocated in R. v. Hunt to the instant case, we considered the scheme and express

provisions of the Act to ascertain whether or not the legislative intent brought this case within the exceptional category of cases in which a persuasive onus lies on the defence. In addition to the Sections quoted ante, we considered the following amongst other sections:

"8. The following persons, upon satisfying the Registrar by documentary or other evidence that they are of good moral character and of their right to be registered, and upon payment of the registration fee of two dollars and ten cents, shall be entitled to be registered under this Act -

- (a) Any person qualified or entitled to practise in the United Kingdom under any Act for the time being in force or who holds the sight-testing diploma of the Worshipful Company of Spectacle Makers or the British Optical Association both of London, England.
- (b) Any person who, at the passing of this Act, has been domiciled in Jamaica for not less than two years and also is and has been for not less than two years, bona fide engaged in the practice of optometry in this Island, and who holds a diploma, licence or certificate granted to him by any university, college or institution recognized by the Minister, after and in consequence of his having passed through the course of study and examination in optometry, prescribed by such university, college or institution.
- (c) Any person who, at the passing of this Act, has been domiciled in Jamaica for not less than five years and also is and has been for not less than five years bona fide engaged in practice of optometry in this Island, and whom the Minister for special cause shown, permits to be registered without examination."

Section 9, which makes provisions for persons, whose qualifications do not put them within the ambit of Section 8, to apply in writing to the Minister to appoint a Board of Examiners.

Sections 10, 11, 12 and 13 which provide for the Constitution of the Board and for the setting of examinations

with a view to granting a certificate entitling the applicant to be registered.

In our view, these provisions of the Act indicate indubitably that entry in the Register is based upon the person holding the necessary qualification to practise optometry. Mr. Phipps's submission that the authority to practise which rests upon entry in the Register is distinct from the qualification as to expertise, ignores the realities and is but subtle sophistry.

The clear intent of the Act is to prohibit persons from practising optometry unless they are duly qualified. Entry in the Register is indicative that the persons whose names appeared therein have met the qualifications defined in the Act.

There, therefore, remains to be considered whether the provisions of Section 5 take offences of practising optometry or holding out to be an optometrist, outside the exceptional category as described in R. v. Edwards.

We unhesitatingly deprecate the laxity in not having the copy of the Register published in the Gazette as required by the Act. The publication is for general information and the public's benefit; the omission is inexcusable.

Now, the Act makes such publication prima facie evidence of registration and non-registration. It is not being contended that the production of the Gazette is the only method of proof, but rather, that it is a factor in determining whether, in prosecution for breaches under the Act, the prosecution must prove non-registration. In that regard we are of the opinion that the provisions of Section 5 were merely designed to facilitate proof, and was not intended to take this offence outside the "exceptional category" of cases in which proof of qualification to perform certain professional services rests

on the person holding himself out to be so qualified.

Turning to the specific question as to whether the prosecution has tendered sufficient prima facie evidence of non-registration we note that there was no challenge to the evidence that the appellant was advised by Sadie Grey on the procedure to obtain registration and that no application was received in the office.

Indeed, from Kenneth Whitbourne's evidence the appellant's papers were submitted to the Minister with a view to the appointment of a Board of Examiners to test him in the manner contemplated by the Act. On that evidence the inference could be drawn that the procedural steps for registration had not been taken by the appellant and therefore the ultimate conclusion that he was unregistered would not be unreasonable.

As to the admissibility of Sadie Grey's evidence, it is beyond argument that the Register is a public document. As such its contents may be proved by secondary evidence usually a certified copy of the relevant record. In the instant case a competent officer, the Assistant Registrar-General gave sworn and unchallenged testimony to the effect that the Register was perused by her and the appellant's name did not appear therein.

It was evidence not positively of an entry but negatively of the state of the record, namely the omission of a particular entry. As secondary evidence it was in no way inferior to a certificate.

In the circumstances the learned trial judge was correct in holding that the evidence tendered by the Crown as to non-registration was sufficient to establish a prima facie case.

For these reasons we dismissed the appeal and affirmed the convictions.