1938

Present : **De Kretser A.J.**

PERKINS *v.* DEWADASAN.

813—P. C. Kurunegala, 53,499.

Medical Ordinance—Unregistered medical practitioner—Charge of practising for gain—Burden of proof—Ordinance No. 26 of 1927, s. 41 (b).

Where a person is charged under section 41 (b) of the Medical Ordinance with practising for gain, not being a registered medical practitioner, the burden of proving that he is a registered medical practitioner is on the accused.

THE charge against the accused respondent was that he did "not being a medical practitioner practise for gain in that he did give an injection to one C. D. Horatala and recover a sum of rupees four for same in breach of section 41 (*b*) of Ordinance No. 26 of 1927".

The prosecution proved that the accused had a dispensary and that on December 12, 1936, Horatala went to the dispensary suffering from fever. An injection was given on the arm and a fee of four rupees was charged by the accused. A *Gazette* of April, 1937, was also produced to prove that the accused's name did not appear in the List of Registered Medical Practitioners, but that his name appeared among the Pharmacists.

At the close of the case for the prosecution the learned Magistrate discharged the accused without calling for a defence. From this order the complainant appealed with the sanction of the Attorney-General.

E. H. T. Gunasekera, C.C., for complainant, appellant.—Section 42 and 43 of the Medical Ordinance, 1927, relate to vedaralas and dispensers. Sections 2 and 37 of the same Ordinance defines a medical practitioner. The burden of proving that he is not a medical practitioner does not lie on the prosecution. The words "not being a medical practitioner" create an exception and hence section 105 of the Evidence Ordinance applies. Section 106 of the Evidence Ordinance deals with facts which are especially within the knowledge of the accused. It is impracticable and impossible to prove the negative in this case (*Rex v. Turner* [1], *The Apothecaries Company v. Bentley* [2], *Roche v. Wills* [3], and *Williams v. Russell* [4]).

Even if the burden is on the prosecution the production of the *Gazette* under section 114 (*e*) and (*f*) of the Evidence Ordinance is a sufficient discharge of it.

N. Nadarajah (with him *G. E. Chitty*), for the accused, respondent.—A similar proposition came before the Court under section 80 (3) (*b*) of the Motor Car Ordinance, 1927 (*Nair v. Saundias Appu* [5]).

Section 33 of the Medical Ordinance, 1927, provides a mode of proof. The onus shifts on to the accused when a certified extract of the register is produced. The prosecution must adduce *prima facie* evidence. That the accused "is not a medical practitioner" is an element to be proved.

[1] *(1816) 5 M. & S. 206 ; 105 E. R. 1026.*
[2] *(1824) I. C. & P 538 ; 171 E. R. 978.*
[3] *(1934) 151 L. T. 154.*
[4] *(1933) 149 L. T. 190.*
[5] *(1936) 6 C. L. W. 1.*

The exceptions in the Penal Code deal with an entirely different position where all the necessary elements for the offence are present. Then the exception must be proved as a defence.

[DE KRETSER A.J.—What is the purpose of section 32 ?]

Publication under that section is merely to give information to the public.

[DE KRETSER A.J.—Is there any provision for the rectification of the *Gazette* ?]

There is no provision, except that it must be published every year. There may be omissions sometimes.

If the Crown's position is correct, then the Ordinance would have been worded differently (*The King v. Attygalle* [1], *Woolmington v. Director of Public Prosecutions* [2]). In this case the prosecution did not give any assistance to the learned trial Judge when he pointed out the defect.

Cur. adv. vult.

February 9, 1938. DE KRETSER A.J.—

The charge against the respondent was that he did "not being a medical practitioner practise for gain in that he did give an injection to one C. D. Horatala and recover a sum of rupees four for same in breach of section 41 (*b*) of Ordinance No. 26 of 1927."

The prosecution led evidence after which Counsel for the defence argued that no offence had been proved. The learned Magistrate reserved his judgment and eventually acquitted the respondent holding that the prosecution had failed to prove that the respondent's name was not on the register.

The complainant appeals with the sanction of the Attorney-General.

At the hearing of the appeal it was urged for the appellant that the burden of proof was not on the appellant to prove a negative, viz., that accused was not a registered medical practitioner, and, if it was that the burden had been discharged.

For the respondent it was urged that it was for the complainant to prove all the essentials set out in the charge, that the Ordinance provided the method of proof and this method had not been adopted. The case of *Nair v. Saundias Appu* [3] was relied upon.

That case arose on the wording of another Ordinance and is only indirectly of assistance. We are here concerned with Ordinance No. 26 of 1927, and more particularly with the wording of section 41 of it. Learned Crown Counsel contends that the words "not being a medical practitioner" are an exception or proviso and that it is for the person charged to prove that he comes within the exception ; it is a matter peculiarly within his knowledge whether he is registered and it is almost impossible for the prosecution to prove a negative. He also argued that section 33 did not exhaust all the modes of proof available. He relied upon certain English cases to which I shall refer later.

Section 33 provides a very convenient form of proof and why it was not followed has not been explained. The prosecuting Inspector contented himself with producing a copy of the *Gazette* which contains a copy of the register as it stood on January 1, 1937—*vide* section 32.

[1] *(1936) 37 N. L. R. 337 at p. 338.*

[2] *(1935) 104 L. J. K. B. 433.*

[3] *6 C. L. W. 1.*

Nothing like the difficulty which exists in section 80 of the Motor Car Ordinance, 1927, which was the Ordinance under consideration in *Nair v. Saundias Appu* (*supra*) is to be found in section 41 of the Medical Ordinance, 1927, which deals with a different class of persons, persons of a professional class.

What is the scheme of the Ordinance and what evil is it designed to prevent? It provides for the registration of qualified medical men who prove before the Registrar, an officer appointed under its provisions, their claim to be registered; it establishes a Council empowered to supervise and direct the Registrar and to order the erasure of the name of any person from the register or otherwise deal with him.

Section 31 requires the Registrar to keep correctly the registers provided by section 25 and not only to keep them correctly but up to date. Section 32 requires him to publish annually in the *Gazette* a copy of each register. Section 33 provides for two modes of giving *primâ facie* evidence of a register. Section 41 prohibits any person from using any title likely to give the impression that he was qualified to practise by modern scientific methods or implying that he was registered; and it also prohibits any person from practising medicine or surgery, if he is not a medical practitioner, *i.e.*, a registered medical practitioner. Exceptions are made in sections 42 and 43 for vedaralas, apothecaries, and estate dispensers.

Now, does the section contain a general prohibition with an exception in favour of the registered medical practitioner and similar exceptions in favour of vedaralas and apothecaries and estate dispensers? It seems to me that it does.

The Ordinance was enacted, I should say, as much in the interests of the medical profession as of the public. An easy and effective method of control was aimed at, and it must not be lost sight of that an educated and professional class were concerned. Section 41 created two classes of offences. The first was the use of a misleading title and this would not apply to vedaralas or apothecaries or estate dispensers since their very designations indicated what they were. The second offence created primarily was practising for gain, and here vedaralas, apothecaries, and estate dispensers were affected and an exception was made in their favour. The section in simple language means, as far as on the present case is concerned, that no one shall practise medicine or surgery for gain unless he is a registered medical practitioner or one of the other excepted classes.

If the respondent's contention is correct it would be necessary for the prosecution to prove not only that the appellant is not a registered medical practitioner but also that he is not a vedarala or one of the persons referred to in section 43. Obviously that would be a stupendous task and would render a conviction practically impossible. It is difficult to believe that the Ordinance contemplated any such thing. Notwithstanding the form of the words used by the draftsman, who tried to compress too much into one section, there is a general prohibition followed by exceptions and the ordinary rule prevails that a person claiming the benefit of an exception must bring himself within the exception. The only argument to the contrary is that the Police may

abuse their powers and prosecute a reputable registered medical practitioner and it would be a hardship for him to have to establish his innocence. That argument applies to every case in which an offence is created and exceptions provided, and one cannot legislate for the exceptional case of the Police abusing their powers. They would do so at their risk and in the face of a *Gazette* publishing a copy of the register and of other means of information at their disposal.

The Ordinance contemplates publication in the *Gazette* as a means of information, *vide* section 43 (3).

Having considered the Ordinance let us come to the question of the burden of proof.

Section 101 of the Evidence Ordinance does not help very much, for it merely explains the term "burden of proof" and it states that whoever desires a Court to give judgment as to a legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is the existence of facts which constitutes the liability and not their non-existence. It must be remembered that the section applies to civil cases as well as to prosecutions, and the definition of "proved" given in the Ordinance must not be lost sight of when dealing with the illustrations. A crime is not always the same as an offence, and while a person who asserts that a person committed a crime must prove it, what exactly he has to prove depends on the definition of the crime.

While section 101 explains what "burden of proof" means in general terms the following sections define tests for ascertaining on whom the burden lies.

Section 102 enables one to ascertain who has to begin and when the burden shifts.

Section 103 gives another test and that is, the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence.

It is section 105 which applies most closely to the present case, for when section 41 defines the offence there is a special exemption of proviso regarding registered medical practitioners. There is no provision in the Ordinance as to the burden of proof. Applying then the above provisions and guided by the English Law on which they are founded we get these conclusions, viz., that a person is not called upon to prove a negative and that a person claiming the benefit of any exception must prove that he comes within the exception so provided.

The form of the charge does not conclusively settle the question of the burden of proof for it may give the person accused notice of a number of particulars and the prosecution may not be obliged to prove all of them, *e.g.*, A may be charged with practising medicine for gain, and to understand the charge properly he may be told that he is charged because he is not a registered practitioner. It does not follow that the prosecution is therefore obliged to prove a negative.

In *The King v. Turner*[1] it was held that it was sufficient if the information and the adjudication negatived the qualifications, in the

[1] *105 English Reports 1026.*

particular section then being considered, without negativing them in the evidence. Lord Ellenborough C.J. said—

"The question is, upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification, to prove the negative . . . . The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information . . . . And does not, then, common sense show the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? . . . . I am, therefore, of opinion that this conviction, which specifies negatively in the information several qualifications mentioned in the statute, is sufficient without going on to negative, by the evidence, those qualifications."

Bayley J. said —

"I am of the same opinion. I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative . . . . I cannot help thinking, therefore that the onus must lie on the defendant, and that when the prosecutor has proved everything, which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough; and the proof of qualification is to come in as a matter of defence."

Holroyd J. expressed his agreement in similar terms.

The Apothecaries Company v. Bentley[1] was an action for a penalty for practising as an apothecary without having the certificate required by a certain statute and bears a close resemblance to the present case.

The counts in the declaration contained the allegation that the defendant did act and practise as an apothecary &c., "without having obtained such certificate as by the said act is required". No evidence was led by the plaintiffs to show that the defendant had not obtained his certificate. It was urged, as in the present case, that where an exception was created by a distinct clause, the burden of showing that he was within it lay upon the defendant; but that where the exception was introduced to qualify the penal clause in its very body, the negative thereof must be both stated and proved by the plaintiff. It was admitted by the plaintiffs that the exception ought to be negatived in the pleading but it was contended that the plaintiffs were not under an obligation to prove it. Abbott Ld. C.J. said—"I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative, the plaintiffs are not bound to prove it; but that it rests with the defendant to establish his certificate."

In *Roche v. Willis*[2] Lord Hewart C.J. follows with approval the case of *The King v. Turner*, Avory and Humphreys JJ. agreeing with him.

In *Williams v. Russell*[3] Talbot J. quotes *The King v. Turner* with approval.

[1] *171 English Reports 978.* [2] *151 Law Times Reports 154.*

[3] *149 Law Times Reports 190.*

In my opinion, therefore, the onus was on the respondent to prove that he was a registered medical practitioner.

It is unnecessary to express an opinion on the alternative line of argument, viz., that the prosecution had proved all it could reasonably be expected to prove. I need only add that section 33 (1) merely puts the copy of the register on the same footing as a copy of a public document and section 33 (2) by its very terms implies that the certificate may be produced by either party.

The acquittal is set aside and the case will go back for trial.

Set aside.