STERLING GILBERT VAIL ....APPELLANT;

1960
*Oct. 11, 12
Nov. 21

AND

HER MAJESTY THE QUEEN, ON THE INFORMATION AND COMPLAINT OF RONALD G. DICKSON .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Further appeal in summary conviction matter—Application for leave to appeal—Question of law—The Summary Convictions Act, R.S.A. 1955, c. 325, s. 15.

Professions and trades—Dental mechanic fitting set of false teeth—Unlawful practice of dentistry—The Dental Association Act, R.S.A. 1955, c. 82, s. 37(a).

The accused, who did not hold a valid certificate to practise dentistry, fitted a complete set of false teeth for one H, for which he was paid $90. According to his uncontradicted evidence this payment was simply for the manufacture of the dentures, and no charge was made for any part of the other dental work. On a charge of practising dentistry for hire, contrary to s. 37(*a*) of *The Dental Association Act,* R.S.A. 1955, c. 82, the accused was acquitted in magistrate's court, and an appeal from this acquittal was dismissed by the District Court judge.

On an *ex parte* application to a Supreme Court judge, made under s. 15 of *The Summary Convictions Act,* R.S.A. 1955, c. 325, leave to appeal to the Appellate Division was granted as a question of law was involved of sufficient importance to justify a further appeal. The Appellate Division allowed the appeal and from this decision the accused appealed to this Court. The appellant contended that s. 15(1) makes no provision for an appeal by the informant from an acquittal, and is confined to applications made by "the Attorney General or counsel instructed by him".

Held: The appeal should be dismissed.

Sections 581 to 592 inclusive of the *Criminal Code,* as adopted by s. 15(2) of *The Summary Convictions Act* of Alberta, are limited in their effect to matters of procedure and are in no way related to the right of appeal itself which is fully stated in s. 15(1). As the informant is a "person affected by the conviction or order" to which the Act applies, it follows that he is accorded a right to apply to a Supreme Court judge under s. 15(1).

The contention that because of the omission of the term "order of dismissal" from s. 15 of *The Summary Convictions Act,* the right of appeal to the Appellate Division does not apply where there has been an acquittal by the District Court, failed in view of the provisions of s. 692(1) of the *Criminal Code.*

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*PRESENT: Kerwin C.J. and Taschereau, Martland, Judson and Ritchie JJ.

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The argument that the Appellate Division exceeded its jurisdiction which was limited to a question of law alone also failed. As the facts were not in dispute, the only question at issue was as to the true construction to be placed upon ss. 30 and 37(*a*) of *The Dental Association Act*. This is a question of law and was so dealt with in the majority judgment.

As the appellant's "skill and experience" in doing dental work were part of the value or price he was able to obtain for the finished dentures, it followed that the appellant's conduct constituted "practising the profession of dentistry . . . for hire" within the meaning of the statute.

Furthermore the words "for hire" as used in s. 37(*a*) do not necessarily import the payment of money and should be construed as including any kind of compensation or reward. At least part of the compensation which the appellant received for doing the dental work was that he thereby obtained an order to manufacture the dentures.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Edwards D.C.J. Appeal dismissed.

E. M. Woolliams, for the appellant.

S. J. Helman, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] allowing an appeal by the private prosecutor from a judgment of His Honour Judge M. J. Edwards and entering a conviction against the appellant for practising the profession of dentistry within the Province of Alberta "for hire" contrary to the provisions of s. 37(*a*) of *The Dental Association Act,* R.S.A. 1955, c. 82.

At all times relevant to these proceedings, the appellant, who did not hold a valid certificate of registration from the Alberta Dental Association, resided at Drumheller in the Province of Alberta where he carried on the business of a dental mechanic in an office, over the door of which there was a sign reading "Valley Dental Lab". In the Autumn of 1958 a man by the name of Hill came to this office by

[1] (1959-60), 30 W.W.R. 101, 125 C.C.C. 349.

appointment to be fitted for a complete set of false teeth. On his first visit a preliminary impression was taken of his jaws and he paid $42.33. On his second visit a "final impression" was taken. On his third visit "bite blocks" were placed in his mouth to determine the relation of the upper and lower jaws, and at the fourth appointment the teeth were set up in wax and placed in his mouth and a further appointment was then made for the "finished date" at which time the plates were put in his mouth and he paid the appellant a further sum of $47.63, making a total of $90. All this work was done by the appellant.

The above facts are not in dispute, but the appellant's uncontradicted evidence was that the $90 charge was "simply for the manufacture of those dentures" and that no charge whatever was made for obtaining "the bite", making the impression or any of the other dental work. The sole question before the Appellate Division was whether or not, under these circumstances, the appellant was practising dentistry within the meaning of *The Dental Association Act*.

Section 37 of *The Dental Association Act* reads as follows:

> 37. A person not holding a valid certificate of registration and a subsisting annual certificate who
>
> (*a*) practises the profession of dentistry within the Province either publicly or privately for hire, gain or hope of reward,
>
> * * *
>
> is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars and not less than fifty dollars for the first offence, and to a fine of four hundred dollars for each and every subsequent offence.

The practice of dentistry is described in the following words in s. 30 of the same statute:

> 30. A person who, for a fee, salary, reward or commission, paid or to be paid by an employer to him, or for fee, money or compensation, paid or to be paid either to himself or an employer or any other person
>
> (*a*) examines, diagnoses or advises on any condition or the tooth or teeth in the jaw or jaws of any person,
>
> (*b*) directly in the oral cavity of any person takes, makes, performs or administers any impression, operation or treatment or any part of any impression, operation or treatment of any kind of or

upon the tooth or teeth or jaw or jaws, or of, for or upon any disease or lesion of the tooth or teeth or jaw or jaws, or the mal-position thereof, in the mouth of any person,

(*c*) fits any artificial denture, tooth or teeth in, to or upon the jaw or jaws of a person, or

(*d*) advertises or holds himself out as being qualified or entitled to do all or any of the above things,

shall be deemed to be practising the profession of dentistry within the meaning of this Act.

On October 30, 1958, the appellant was arraigned before Magistrate Hardcastle and pleaded not guilty to an Information sworn against him by Dr. Ronald G. Dickson, a dentist of Drumheller, it being submitted on his behalf that as he had charged nothing for doing any of the work described in s. 30 but only for his work as a dental mechanic in manufacturing the dentures he could not be found guilty of practising dentistry "for hire" within the meaning of s. 37(*a*), and that he was, in fact, guilty of no offence under that section. In dismissing the charge, the learned magistrate said:

> According to the evidence as I see it, I cannot see where there was a charge made for dentistry. The witness distinctly stated he paid $90.00 for the making of the teeth.

An appeal from this acquittal was duly asserted to the Divisional Court of the District of Southern Alberta by the informant's solicitor pursuant to the provisions of Part XXIV of the *Criminal Code* which, except as otherwise specifically provided, are made to apply "to all convictions and all orders and the proceedings relating thereto made by a justice" by s. 5 of *The Summary Convictions Act* of Alberta.

At the trial *de novo* held before His Honour Judge Edwards the informant's solicitor was expressly authorized to act on behalf of the Crown by the Department of the Attorney General of Alberta, and the above facts, including the fact that the money was paid simply for manufacturing the teeth were sworn to both by the appellant and by Mr. Hill.

In dismissing this appeal, the learned District Court judge said:

> The evidence before me, and uncontradicted, is that the $90.00 was paid to the accused for making a set of dentures, and not for doing any of the things specifically itemized in Section 30, of the Dental Association Act.

The relevant section of *The Summary Convictions Act* of Alberta governing an appeal from a judgment or a decision of a District Court judge in such circumstances as these reads as follows:

> 15. (1) Where it is made to appear to a judge of the Supreme Court, on the application of the Attorney General or any person affected by a conviction or order to which this Act applies, that a judgment or decision of a judge of the district court made on appeal from any such conviction or order involves a question of law of sufficient importance to justify a further appeal, the judge of the Supreme Court may so certify, and thereupon an appeal lies to the Appellate Division of the Supreme Court from the judgment or decision of the judge of the district court.
>
> (2) The procedure on the appeal shall be the same as that provided by sections 581 to 592 of the *Criminal Code* and the rules relating thereto in so far as they are applicable where the ground of appeal involves a question of law.

In purported compliance with this section, the informant's solicitor, who, for this purpose, does not appear to have been instructed by the Attorney General, made an *ex parte* application to Mr. Justice W. G. Egbert of the Supreme Court who duly certified that a question of law was involved of sufficient importance to justify a further appeal, and Notice of Appeal having been served the appeal came on for hearing before the Appellate Division.

It was urged before the Appellate Division that Mr. Justice Egbert lacked jurisdiction to make the order embodying the aforesaid certificate because the accused had been given no notice of the application. Although this ground of appeal was included in the notice pursuant to which leave to appeal to this Court was granted, it was specifically abandoned at the hearing of this appeal.

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It was, however, contended before the Appellate Division and before this Court that Mr. Justice Egbert lacked jurisdiction on another ground, viz., that s. 15(1) of *The Summary Convictions Act* of Alberta makes no provision for an appeal by the informant from an acquittal, and is confined to applications made by "the Attorney General or counsel instructed by him".

In this regard the argument was advanced that because the procedure provided by s. 584 of the *Criminal Code,* for appealing from a verdict of acquittal in proceedings by indictment, is adopted by s. 15(2) "in so far as . . . applicable" and because that section of the Code only refers specifically to appeals by "the Attorney General or counsel instructed by him", it, therefore, follows that there can be no appeal by an informant under s. 15 of *The Summary Convictions Act* of Alberta.

In my opinion ss. 581 to 592 inclusive of the *Criminal Code,* as adopted by the said s. 15(2), are limited in their effect to matters of procedure and are in no way related to the right of appeal itself which is fully stated in s. 15(1) (see *Scullion v. Canadian Breweries Transport Limited*[1], *per* Fauteux J.) and as I take the view that the informant is a "person affected by the conviction or order" to which *The Summary Convictions Act* applies, it follows that I am of opinion that the informant is accorded a right to apply to a Supreme Court judge under s. 15(1).

The application "of the Attorney General or any person affected by a conviction or order to which this Act applies" for which provision is made in s. 15(1) of *The Summary Convictions Act* is only to be granted when it has been made to appear to a Supreme Court judge

> . . . that a judgment or decision of a judge of the district court *made on appeal from any such conviction or order* involves a question of law of sufficient importance to justify a further appeal . . . (The italics are mine.)

[1] [1956] S.C.R 512 at 514

It was, however, contended on behalf of the appellant that

> the legislature, having omitted the term "order of dismissal" from s. 15 of the Summary Convictions Act, the right of appeal to the Appellate Division does not apply where there has been an acquittal by the district court. (The quotation is from the factum of the appellant.)

As the "conviction or order" from which an appeal lies to a District Court judge is the "conviction or order" of the justice, I am of opinion that those words as used in s. 15(1) can only refer to such a "conviction or order", and as the summary conviction provisions of the *Criminal Code* apply "to all orders and the proceedings relating thereto made or to be made by a justice", it follows that the word "order" as used in s. 15(1) is to be given the meaning assigned to it by s. 692(1) of the *Criminal Code* which provides that: " 'Order' means any order, including an order for payment of money." These words are, in my opinion, sufficiently wide to include an "order of dismissal". If it were otherwise it would mean that there could be no appeal to the Appellate Division under *The Summary Convictions Act* of Alberta in any case in which an order of dismissal had been made by a justice even if that order had later been reversed and the accused had been convicted by a District Court judge. That the legislature should have intended such a result is, in my opinion, so unlikely that I would have been inclined to attach the wider meaning to the word "order" as used in s. 15(1) even if it had not been for the provisions of s. 692(1) of the Code.

I am, accordingly, of opinion that Egbert J. had jurisdiction to grant the order which he did and that the Appellate Division was clothed with jurisdiction to hear and determine this appeal, but it is said on behalf of the appellant that that Court exceeded its jurisdiction which was limited to a question of law alone because the reasons of Chief Justice Ford and Mr. Justice Porter

> . . . are based on facts found by them and inferences drawn by them and not on facts found by the trial judge and inferences drawn by him.

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As the facts are not in dispute, the only question at issue is as to the true construction to be placed upon ss. 30 and 37(*a*) of *The Dental Association Act*. This is a question of law and was so dealt with by Ford C.J. in rendering the decision on behalf of the majority of the Appellate Division, in which he held that as the appellant's "skill and experience" in doing dental work were part of the value or price he was able to obtain for the finished dentures, it followed that the appellant's conduct constituted "practising the profession of dentistry . . . for hire" within the meaning of the statute.

I am in full agreement with the reasoning and conclusion of the Appellate Division, but I am of opinion that the dental work was also done "for hire" in another sense. The words "for hire" as used in s. 37(*a*) do not necessarily import the payment of money and should, in my view, be construed as including any kind of compensation or reward. In the present case, at least a part of the compensation which the appellant received for doing the dental work was that he thereby obtained Mr. Hill's order to manufacture the dentures and incidentally received it for a better price than the dentists had been in the habit of paying for such work so that even if it could be said that the appellant was paid no money for doing the work of a professional dentist it would, nevertheless, be apparent that he was compensated for such work by receiving a profitable order for his work as a dental mechanic, and this, in my opinion, was one measure of his hire. I am, accordingly, of opinion that the transaction between the appellant and Mr. Hill, as the appellant himself described it, constituted practising dentistry "for hire" within the meaning of ss. 37(*a*) and 30 of *The Dental Association Act*.

I would dismiss the appeal, but in view of the circumstances of this case there should be no costs.

Appeal dismissed without costs.

Solicitors for the appellant: Woolliams & Kerr, Calgary.

Solicitors for the respondent: Helman, Fleming & Neve, Calgary.