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ENGLAND AND WALES COURT OF APPEAL (CIVIL DIVISION)

Decided On: 05.02.1953

The Pharmaceutical Society of Great Britain **Vs.** Boots Cash Chemists (Southern) Ltd.

Hon'ble Judges/Coram:

Lord Justice Somervell, Lord Justice Birkett and Lord Justice Romer

Counsel:

MR H.V. LLOYD-JONES, Q.C. and MR H. THOMAS DEWAR (instructed by Mr A.C. Cast appeared as Counsel on behalf of the Appellants (Plaintiffs)., MR G.G. BAKER, Q.C. and MR G.D. EVERINGTON (instructed by Messrs Masons) appeared as Counsel on behalf of the Respondents (Defendants)

JUDGMENT

LORD JUSTICE SOMERVELL: We need not trouble you, Mr Baker.

LORD JUSTICE SOMERVELL: This is an appeal from the Lord Chief Justice on a Case Stated on an agreed statement of facts raising a question under section 18(1)(a)(iii) of the Pharmacy and Poisons Act, 1933. The Plaintiffs are the Pharmaceutical Society who were incorporated by Royal Charter. One of their duties is to take all reasonable steps to enforce the provisions of the Act. The provision in question is: "Subject to the provisions of this part of this Act it shall not be lawful for a person to sell any poison included in Part I of the Poisons List, unless (iii) the sale is effected by, or under the supervision of, a registered pharmacist".

The Defendants, Messrs Boots Cash Chemists (Southern) Limited have recently introduced into one or more of their premises what is called a self-service system. We have a number of photographs and one can see a number of articles such as toilet articles, laxatives, ointments and tonics, the kind of articles which one normally finds in one of Messrs Boots' shops, laid out on shelves. The customer when he comes in is invited to take a receptacle and goes round and can choose the articles which he wants. He then goes to one of two desks at the end of the room, and there, admittedly, there is a registered pharmacist, able to carry out, subject to the point which I will mention in a moment, such duties as are involved in his position. It is not disputed that in a chemist's shop where this system does not prevail a man may go in and ask a young lady, who will not herself be a registered pharmacist, for one of these articles on the List and the transaction may be completed and the article paid for, although the registered pharmacist, who will no doubt be on the premises, will not know anything himself of the transaction unless the assistant serving the customer, or the customer, requires to put a question to him.

It is right that I should emphasise, as the Lord Chief Justice did, that these are not dangerous drugs. They are things which contain very small proportions of poison and I imagine many of them are the type of drug which has a warning as to what doses are to be taken. They are drugs which can be obtained under the law without a doctor's prescription.

The point which is taken by the Plaintiffs is this: It is said that the purchase is complete

if and when a customer going round the shelves takes an article and puts it in the receptacle which he or she is carrying, and therefore if that is right when the customer comes to the pay desk, having completed the tour of the premises, the registered pharmacist, if so minded, has no power to say: "This drug ought not to be sold to this customer". Whether and in what circumstances he would have that power we need not enquire, but one can, of course, see that there is a difference if supervision can only be exercised at a time when the contract is completed.

I agree with the Lord Chief Justice in everything he says, but I will put it shortly in my own words. Whether that is a right view depends on what are the legal implications of this layout, the invitation to the customer. Is it to be regarded as an offer which is completed and both sides bound when the article is put into the receptacle, or is it to be regarded as a more organised way of doing what is done already in many types of shops – and a bookseller is perhaps the best example – namely, enabling customers to have free access to what is in the shop to look at the different articles and then, ultimately, having got the ones which they wish to buy, coming up to the assistant and saying "I want this"? The assistant in 999 times out of 1,000 says "That is all right", and the money passes and the transaction is completed. I agree entirely with what the Lord Chief Justice says and the reasons he gives for his conclusion that in the case of the ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper or someone on his behalf accepts that offer. Then the contract is completed. I can see no reason at all, that being I think clearly the normal position, for drawing any different implication as a result of this layout. The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the suggestion when he pointed out that, if the Plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and he would have no right without paying for the first article to substitute an article which he saw later of the same kind and which he perhaps preferred. I can see no reason for implying from this arrangement which the Defendants have referred to any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose and possibly put back and substitute articles which they wish to have and then go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that then there was supervision in the sense required by the Act and at the appropriate moment of time. For these reasons, in my opinion, the appeal should be dismissed.

LORD JUSTICE BIRKETT: I am of the same opinion. The facts with which we have to deal are very clearly stated in the agreed statement of facts. The argument upon those facts has been very clearly stated by Mr Lloyd-Jones. I think clearest of all was the Judgment of the Lord Chief Justice, with which I agree. In view of something which I said while the argument was proceeding, I should like to add that under section 25 of the Pharmacy and Poisons Act, 1933, it is the duty of the Pharmaceutical Society of Great Britain, by means of inspection and otherwise, "to take all reasonable steps to enforce the provisions of Part I of this Act" – that really deals with the status of the registered pharmacist – "and to secure compliance by registered pharmacists and authorised sellers of poisons with the provisions of Part II of this Act". Part II of the Act, which is headed "Poisons" in section 18(1)(a)(iii), says "it shall not be lawful for a person to sell any poison included in Part I of the Poisons List, unless (i) he is an authorised seller of poisons; and (ii) the sale is effected by, or under the supervision of, a registered pharmacist".

This action has been brought by the Pharmaceutical Society in pursuance of that duty which is laid upon them by statute, and the precise point is set out in the subsection which I have read. The short point of the matter was, at what point of time did the sale in this particular shop at Edgware take place? My Lord has explained the system which has been introduced into that shop (and possibly other shops since) in March of 1951. The two ladies in this case, Miss Mainwaring and Miss Marrable, who went into that shop, each took a particular package containing poison from the particular shelf, put it into their basket, came to the exit and there paid. It is said upon the one hand that when the customer takes the package from the poison section and puts it into her basket the sale there and then takes place. On the other hand, it is said the sale does not take place until that customer who has placed that package in the basket comes to the exit.

The Lord Chief Justice dealt with the matter in this way, and I would like to adopt these words: "It seems to me therefore, applying commonsense to this class of transaction, there is no difference merely because a self-service is advertised. It is no different really from the normal transaction in a shop. I am quite satisfied it would be wrong to say the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that he can insist by saying 'I accept your offer'". Then he goes on to deal with the illustration of the bookshop and continues: "Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy. I daresay this case is one of great importance, it is quite a proper case for the Pharmaceutical Society to bring, but I think I am bound to say in this case the sale was made under the supervision of a pharmacist. By using the words 'The sale is effected by, or under the supervision of, a registered pharmacist', it seems to me the sale might be effected by somebody not a pharmacist. If it be under the supervision of a pharmacist, the pharmacist can say 'You cannot have that. That contains poison'. In this case I decide, first that there is no sale effected merely by the purchaser taking up the article. There is no sale until the buyer's offer to buy is accepted by the acceptance of the money, and that takes place under the supervision of a pharmacist. And in any case, I think, even if I am wrong in the view I have taken of when the offer is accepted, the sale is by or under the supervision of a pharmacist". I agree with that and I agree that this appeal ought to be dismissed.

LORD JUSTICE ROMER: I also agree. The Lord Chief Justice observed that, on the footing of the Plaintiff Society's contention, if a person picked up an article, once having picked it up, he would never be able to put it back and say he had changed his mind. The shopkeeper would say: "No, the property has passed and you will have to pay". If that were the position in this shop and similar shops, and that position was known to the general public, I should imagine the popularity of those shops would wane a good deal. In fact, I am satisfied that that is not the position and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I quite agree with the reasons on which the Lord Chief Justice arrived at that conclusion and which my brother Birkett has just referred to, and to those observations I can add nothing of my own. I agree that the appeal fails.

(Appeal dismissed with costs: leave to appeal refused).

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