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Privy Council Appeal No. 2 of 1984

Brian Ronald Harris — *Appellant*

v.

The General Optical Council — *Respondent*

FROM

THE DISCIPLINARY COMMITTEE OF THE GENERAL OPTICAL COUNCIL

ORAL JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MAY 1984

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD TEMPLEMAN

*[Delivered by **Lord Bridge of Harwich**]*

This is an appeal to Her Majesty in Council pursuant to the provisions of section 14 of the Opticians Act 1958 against a direction of the Disciplinary Committee of the General Optical Council directing that the name of the appellant be erased from the Register of Ophthalmic Opticians.

Section 11(1) of the Opticians Act gives the Disciplinary Committee power to take that action where an optician "(a) is convicted by any court in the United Kingdom of any criminal offence, not being an offence which, owing to its trivial nature or the circumstances under which it was committed, does not render him unfit to have his name on the register".

This appellant, on 18th April 1983 at [illegible] Crown Court, pleaded guilty to five offences, one of administering a drug to facilitate sexual intercourse contrary to section 4 of the Sexual Offences Act 1956, two of supplying a controlled drug contrary to section 4 of the Misuse of Drugs Act 1971, one of incitement to supply a controlled drug contrary to section 19 of the Misuse of Drugs Act and one of possessing a controlled drug contrary to section 5 of the same Act. He was sentenced to 18 months' imprisonment, suspended for two years, on the first count, fined £500 on each of counts two, three and

four, and fined £100 on the fifth count. He was ordered to pay the prosecution costs up to the sum of £1000.

The background of fact which led to this prosecution was that the appellant, a man aged 47 years, had been deserted by his wife and was living alone in very comfortable premises. He put an advertisement in the local newspaper advertising for a young lady to come and act as his residential housekeeper. There was a number of responses to that advertisement. It is said on his behalf that he proposed to each of the young women who applied, at the outset of the interview which he had with them, that the post of residential housekeeper, if accepted, would involve the applicant in becoming his mistress. Ten of the young women declined, but two were willing to consider that proposition.

In the event, it was what happened between the appellant and one of the young women applicants for the advertised post which led to the first two counts in the indictment to which the appellant pleaded guilty. It is unnecessary to name the young woman in question, but she presented herself at his house as an applicant for employment at ten o'clock one morning, accompanied by her 2½ year old child. On his version of the facts he indicated that he wanted more than a housekeeper; he wanted a sexual companion, and she did not demur. Whether that was so or not, she had not been in the house for very long before they were in his bedroom. He, it should be said, had administered to himself in the form of cigarettes - "reefers", to use the slang expression - a quantity of the drug cannabis before the young woman's arrival. He persuaded the young woman to smoke a cannabis cigarette and it was when she was under the influence of that drug that he stripped her, undressed himself, and either had sexual intercourse in the ordinary sense of that expression or had oral intercourse with her. Remarkably all this took place in the presence of the young woman's 2½ year old daughter. It is said on the appellant's behalf that the young woman in question was at all times a willing party. Their Lordships find that difficult to accept, at all events without a substantial measure of qualification.

When the matter came before Mr. Justice McNeill in the Preston Crown Court there were more counts on the indictment than the five already mentioned in this judgment. There were indeed two counts of rape against two of the young women who had been applicants for the post of housekeeper to the appellant. In the event the appellant offered, and the Crown indicated that they were prepared to accept, a plea of guilty to the first offence mentioned at the outset, namely, administering a drug to facilitate

intercourse. The particulars of that offence, and indeed the ingredients necessary to be proved in order to establish the offence which must be taken to be accepted by the appellant's plea of guilty to it, were that he caused the young woman in question to take the drug cannabis with intent to stupefy or overpower her so as thereby to enable him to have unlawful intercourse with her.

Their Lordships have the utmost difficulty in accepting that that plea, behind which it is not for their Lordships to go and which must be taken at its face value, is consistent with the proposition that the young woman, though she might have indicated that in due course as his housekeeper there might be sexual relations between them, would have been, without the drug, a willing party there and then to submit to what happened, and indeed to do so in the presence of her 2½ year old child. Ignoring the other four offences, one of which covered the supply of the drug to the young woman in question, by no stretch of the imagination could the first offence to which the appellant pleaded guilty and for which he was sentenced to 18 months' imprisonment, albeit suspended for two years, be regarded as in any way trivial.

The powers of the Disciplinary Committee under the Opticians Act are limited. On the face of the statute, if they are satisfied that a criminal offence has been committed by a registered optician which was not so trivial or committed under such circumstances that it did not render him unfit to have his name on the Register, they have a discretion either to order that his name be erased or not to take that action. There is no halfway house. There is no provision, as is to be found in the legislative disciplinary codes under which some other professions are governed, for suspension, reprimand or some other lesser penalty.

Mr. Sumner, who presented the appellant's plea persuasively and said everything that could possibly be said on the appellant's behalf, does not dispute that there was ample material for the Disciplinary Committee to take the view that this first offence at all events was neither so trivial nor committed in such circumstances that the Disciplinary Committee could not consider it an offence rendering the appellant unfit to have his name on the Register.

The basis of the submission is that this penalty was too severe and was disproportionate to the circumstances, especially as these offences, and in particular the Sexual Offences Act offence, were not committed in any way in a professional context. Indeed it is right to mention that, as a practising ophthalmic optician in the area where he practises,

the appellant enjoys the highest reputation for both efficiency and propriety in the conduct of his profession. Their Lordships have had the advantage of seeing a number of testimonials from his patients and others. What is suggested on the appellant's behalf in those circumstances is that the appropriate course for the Disciplinary Committee to have taken would have been a course for which provision is made under rule 7 of The General Optical Council (Disciplinary Committee)(Procedure) Order of Council 1969 (S.I.1969/1826). This provides that in a case where the Disciplinary Committee find the charge, either a conviction under section 11(1)(a) or infamous conduct in a professional respect under section 11(1)(b), to have been proved, they may, under rule 7(3), "...then deliberate and decide whether they can properly reach a decision forthwith not to erase the name of the respondent from the register....". If they do not reach that decision, sub-rule (4) gives them power to decide whether to postpone judgment and, if they decide to postpone judgment, then under sub-rule (5) they are to specify a period for which judgment is postponed or name a date for a further meeting of the committee at which they will further consider the judgment. That appears to their Lordships to be the equivalent of deferring sentence in a criminal court. It is not of course equivalent to a suspension such as is provided for in the professional codes applying to doctors and solicitors because, during the period for which judgment is postponed by the Disciplinary Committee under this code, the optician continues to be at liberty to practise.

It is important to point out that, if this Board were to advise Her Majesty to allow this appeal and to say that immediate erasure of the appellant's name is a disproportionate penalty having regard to the circumstances in which he was convicted of committing the criminal offences to which he pleaded guilty, in practice inevitably, in their Lordships' judgment, whatever period was specified for postponement, although it might be regarded as a period of probation in a sense, would result in the Disciplinary Committee feeling, in the light of what this Board had said, that they had no option but to take no further action. In the result, so far as his professional status was concerned, the appellant would go unpenalised.

Their Lordships' attention has been drawn by Mr. Sumner to a decision in *Re A Solicitor* [1956] 3 All E.R. 516, where a solicitor had been ordered to be struck off the roll, having been convicted of two indecent assaults on male persons. The judgment shows that, while travelling in a train, the solicitor in question had indecently assaulted two young soldiers. Lord Goddard said (at page 517) "....that so far as this class of case can be regarded as not

serious, this was not a serious case....". He then went on to say:-

> "This court is always, and always has been, very loth to interfere with the findings of the Disciplinary Committee either on a matter of fact, because they understand these matters so well, or with regard to penalty. If a matter were one of professional misconduct, it would take a very strong case to induce this court to interfere with the sentence passed by the Disciplinary Committee, because obviously the Disciplinary Committee are the best possible people for weighing the seriousness of professional misconduct. There is no suggestion of professional misconduct in this case. That being so, this court is bound to consider, as the Court of Criminal Appeal would have to do, whether or not in its opinion the sentence is in proportion or out of proportion to the misconduct which has been proved. No one doubts it is serious misconduct."

Mr. Sumner urges the Board to say that erasure of the appellant's name from the Ophthalmic Opticians' Register is, in all the circumstances, out of proportion to the misconduct proved, the misconduct having been in his private life and not in a professional context.

Two observations are to be made about that submission. Although these offences, particularly the most serious one on which this judgment has concentrated, were committed in the appellant's private life at a time when he was no doubt under strain because his wife had left him, nevertheless they were offences against the person committed by a professional man whose profession must necessarily bring him into close contact with his patients. The offence against the young woman who was overpowered or stupefied by being given cannabis in order to induce her to have sexual intercourse was unquestionably a serious offence against the person.

It is to be observed that, in the case on which Mr. Sumner relies, *Re A Solicitor*, the Divisional Court reached the conclusion that, although striking the solicitor's name off the roll was excessive in the circumstances, the matter was not one which the court could overlook. Lord Goddard concluded the substance of his judgment by saying:-

> "Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking the solicitor's name off the roll and shall substitute therefor a sentence of suspension for two years."

As already pointed out, a sentence of suspension was not open to the Disciplinary Committee under the Opticians Act. The alternatives open to them when the appellant appeared before them were erasure or postponement of judgment. The latter would have meant in due course, if after postponement of judgment they decided not to erase his name, that he would, as a professional man, have been subject to no penalty at all. Their Lordships think that, if the Disciplinary Committee had had a power of suspension instead of a power of erasure here, they might very probably and properly have exercised it. But what is available and may offer, in practice, an alternative which in the event would have the effect of converting an erasure into a suspension is the procedure for which provision is made in section 12 of the Act, which entitles an optician whose name has been erased pursuant to section 11 to apply for restoration of his name to the appropriate Register as early as ten months after the date when his name has been erased. It is not for this Board to prejudge what would happen if ten months from erasure the appellant applied for reinstatement, but it does appear to their Lordships that a relatively early application under that provision might well be favourably received.

However, for all the reasons which this judgment has attempted to explain, their Lordships are of the opinion that, albeit these offences were not committed in a professional context, they were not offences which could be overlooked. They are certainly not offences for which, in the circumstances, given the limitation imposed on their powers by the statutory provisions, the order of erasure made by the Disciplinary Committee could be said to be disproportionate or in any way to err in principle.

Accordingly, their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. There will be no order as to costs.