19/71

SUPREME COURT OF VICTORIA

DUDLEY v MUSUMUCI

Adam J

4 October 1971

CRIMINAL LAW – PRACTISING HYPNOTISM – DEFENDANT TREATED ONE PERSON WITH HYPNOTISM ON NUMEROUS OCCASIONS – NO FEE CHARGED – DEFENDANT DID NOT TREAT ANY OTHER PERSON WITH HYPNOTISM – WHETHER DEFENDANT PRACTISED HYPNOTISM WITHOUT CONSENT OF THE COUNCIL – MEANING OF "TO PRACTISE" – NO CASE' SUBMISSION UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *PSYCHOLOGICAL PRACTICES ACT* 1965, SS26, 27, 28.

HELD: Order nisi discharged.

1. According to its ordinary and natural meaning, "to practise" does not refer to an isolated act or transaction but to a course of action, and when used in association with a calling or profession or indeed with the subject matter of any calling or profession, it denotes a course of conduct characterised by its being habitual, continuous or customary and in the course of the carrying on of a profession or business or the like.

2. Whatever "to practise hypnotism" meant, it was not satisfied merely by an exhibition, demonstration or performance of the process of hypnotism; something more was required to satisfy the test of "practising hypnotism".

3. It was a question of fact whether there was evidence in this case that the acts complained of were done in the carrying on of a profession or business by the defendant.

4. On the evidence as it stood this was a case of someone sympathetic, yielding to importunity, desiring to help, not desiring to make a profit, having given up a former practice in another country giving someone here the benefit of his skill. It was one transaction, although it involved a number of treatments and had not got any business aspect in it at all.

5. Accordingly, the magistrate was right in not being satisfied, that the defendant, in the circumstances of this case was practising hypnotism within the meaning of s28 – although undoubtedly and admittedly he did perform acts of hypnotism in connection with this one patient.

ADAM J: This is the return of an order nisi to review an order of the Magistrates' Court on 15 April 1971 dismissing an information for an offence under s28 of the *Psychological Practices Act* 1965. That section reads: "A person shall not practise hypnotism without the consent of the Council", and a penalty of $250 is provided.

As appears from the evidence before the magistrate, part given orally and in part by way of record of interview of the defendant, the defendant had treated one Mrs Aiello for a nervous complaint of long-standing by hypnotism, described by the defendant and accepted by the magistrate as being "light" hypnotism. This treatment had taken place at his private residence on a number of occasions in the course of some two or three months commencing in August 1970. It appears that the treatment had a beneficial effect upon her. The circumstances of the giving of this treatment had unusual aspects. On the defendant's own admission he had, while a resident in Italy, practised hypnotism in relation to the curing of people there, but it does not appear from the evidence that save for the treatment given here to Mrs Aiello he had applied the process of hypnotism for curative purposes or otherwise in this State. Mrs Aielio, who had apparently heard of his skill from a relation, made the approach to him for treatment of her nervous condition. Before he consented to treat her she had beseeched him over the telephone on perhaps four or five occasions. When ultimately he did agree to see her, he found her, as he said, in a trembling condition, unbalanced in her movements and continuously speaking of her nervous condition, for which it would appear she had derived no lasting benefit from normal medical treatments. The defendant said he agreed to treat her because she had rung so many times and he felt sorry for her. He neither sought nor received any payment from her for his services.

Save insofar as the treatment given by the defendant to Mrs Aiello by way of hypnotism amounted to the carrying on of a business by him, there was, I find, no evidence of his engaging in hypnotism as a profession, occupation or business. He did not seek custom; he did not advertise or in any other way hold himself out as available to treat persons by hypnotism, and as already stated except in what would appear to gave been the isolated transaction of his treating Mrs Aiello without fee, albeit it over a period and on a number of separate occasions, he does not appear to have used his skill in inducing sleep by hypnotism.

The short question raised in these proceedings is whether on such evidence the defendant has <u>practised</u> hypnotism within the meaning of s28. For the informant, Mr Charles, in a helpful argument, contended as his primary submission that for the purposes of s28 a person practises hypnotism if he performs hypnotism even on one occasion and regardless of whether or not such performance is in the course of carrying on any profession or business or occupation.

For this interpretation of the word "practise" he relied on a dictionary meaning to be found in the *Shorter Oxford Dictionary* (1959) p1560, where "to practise" has a definition "to perform or execute" a process. He admitted candidly, as one might expect from him that this meaning was there characterised as rare.

Mr Buckner, for the defendant, challenged this definition of the word for the purposes of s28. He relied particularly on the cases of *Apothecaries Co v Jones* [1893] 1 QB 89, and *Knott v Physiotherapists Registration Board* [1961] WAR 70 as demonstrating that according to its ordinary and natural meaning "to practise" has not the meaning suggested by Mr Charles, that it does not refer to an isolated act or transaction but to a course of action, and when used in association with a calling or profession or indeed with the subject matter of any calling or profession, it denotes a course of conduct characterised by its being habitual, continuous or customary and in the course of the carrying on of a profession or business or the like.

In the *Apothecaries case* Baron Pollock, in approving of what had been said in the court below, quoted from that judgment below:

> "The words of the Act appear to me to point rather to an habitual, or at all events a continuous course of conduct than to an isolated act as constituting the offence. I have pointed out in my observations in the first case that in my opinion there was evidence that the treatment of Newman was a part and a particular instance of an habitual or at all events continued course of conduct on the part of the defendant, and consequently that an offence within the meaning of the Act was proved."

The Act there, the *Apothecaries Act*, used the expression "Any person who shall act or practise as an apothecary without a certificate is liable to a penalty for every such offence". The actual question was whether, where there were a number of acts, the defendant was guilty of an offence in respect of the commission of each act, or whether the offence described a course of conduct so that only one conviction was possible for the number of acts which constituted part of the practising as an apothecary.

The Court upheld the latter view, that the word "practise" did involve a course of action rather than separate acts. Pollock B concluded his judgment by saying:

> "It appears to me therefore to be clear that, however the subject matter and character of the offences created by the two statutes may differ, they are both directed against an habitual or continuous course of conduct and not against an individual act, and therefore they ought both to receive the same construction."

And Hawkins J at p93 said:

> "To practise a calling does not mean to exercise it upon an isolated occasion but to exercise it frequently, customarily or habitually."

He says at the end in words well deserving of attention:

> "Each case must depend upon the particular circumstances attending it. In the present case I have already said, I think, one offence only was committed, and I agree with the very sensible and sound judgment of the County Court Judge."

In that case it is to be noted that unlike the present the word "to practise" is used in association with a particular profession or calling, "to practise as an apothecary", and one might think that as we are here dealing with the expression not "to practise as a hypnotist" but "to practise hypnotism", that that might merit some different conclusion as to the meaning of the word "practise". But the next case which Mr Buckner relied on was *Knott v The Physiotherapists Registration Board*. In that case the relevant legislation had provided that "a person shall not practise physiotherapy nor use the title a 'physiotherapist' unless he is registered as such and holds a licence to do so issued by the Board." The headnote says: "Held that the word 'practise' in the section must be given its normal and natural waning of 'frequent, habitual or customary practise'". The judge purported to follow Hawkins J in the *Apothecaries Co case*. At p71 Virtue J said:

> "The appellant admittedly was not so registered and held no such licence, and the real question on the appeal is, in the first place, as to the meaning of 'practise' in the section, and secondly, and depending on the meaning to be ascribed to the word, whether there was evidence to support the drawing of inference by the magistrate that the appellant was in fact practising physiotherapy on the relevant occasion. For the appellant it is contended that in accordance with the normal meaning of the word, and also in accordance with authority and in the words of Hawkins J, in the *Apothecaries Case*, to practise a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily or habitually."

It is to be noted that no distinction was drawn in *Knott's Case* between the case of the word "to practise" not with a calling as such, but with the subject matter of a calling. As the prohibition was against a person practising physiotherapy, that makes it closer to the present Act, which speaks of "not practising hypnotism".

I agree with Mr Buckner's submission as to the natural or ordinary meaning of the expression "to practise" and I agree with him that it is reinforced by the references he gave to me to *Joske v Lubrano* [1906] HCA 55; (1906) 4 CLR 71; *Stiggants v Joske* [1911] HCA 54; 12 CLR 549; 17 ALR 526; *O'Connell v Culley* [1927] VicLawRp 73; [1927] VLR 502; 33 ALR 423; 49 ALT 92; *Woodbridge & Sons v Bellamy* (1911) 1 Ch 326; *Butchers v Barnes* [1921] VicLawRp 25; [1921] VLR 148; 27 ALR 128; 42 ALT 167.

I agree, however, with Mr Charles that the expression "to practise" is not so inflexible in meaning that from its context one may not be driven to give to it the meaning that he contends for. As he said, if it were made an offence "to practise sodomy" or some other act which is evil in its own nature, though performed but once, one might readily enough read the word as "performing the act" even only once, and particularly if it could have no connection with a course of conduct involving a business, profession or occupation or the like. One might add, perhaps as an example if it were made an offence to practise sorcery, one would hardly expect the requirement that there should be a business of sorcery before an offence was committed. But these are strong cases where one is almost driven to give a secondary or rarer meaning to the word "practise" and treat it a draftsman's device, perhaps to achieve elegance where it might be difficult to frame the legislative intent otherwise.

As some aid to the interpretation of the expression "to practise" in s28, both counsel sought comfort from the neighbouring sections ss26 and 27. Section 26 provides: "A person shall not without the consent of the Council give any exhibitions demonstration or performance of hypnotism on any person at or in connection with an entertainment to which the public are admitted, whether on payment or otherwise", and a penalty of $250 is provided. There one would think it clear that a single performance of hypnotism would amount to an offence, provided that the condition that it was performed at or in connection with an entertainment to which the public are admitted was satisfied.

In s27 again you find the expression "exhibition, demonstration or performance" in this context: "A person shall not without the consent of the Council give any exhibition, demonstration or performance of hypnotism on any person who has not attained the age of 21 years". This of course differs from s26, because it is not confined to the circumstance of giving the exhibition in connection with an entertainment to the public but it is an absolute ban on any exhibition, demonstration or it includes a single act of performing hypnotism on an infant. There again there is a penalty of $250.

Then in subsection (2) of s27 another offence is created: "A person who is under the age of 21 years shall not practise hypnotism". That immediately raises the point, although not calling for immediate decision, as to what "practise hypnotism" means there – the very expression used in the critical s28 later. One thing that strikes me is the change of language from "giving an exhibition, demonstration or performance of hypnotism", which is satisfied by one act; Why the change, did the legislature mean the same thing in (2)?, why did it not say that – "a person under the age of 21 years shall not give any exhibition, demonstration or performance of hypnotism."? It rather suggests applying the general rule of construction that where the different words are used they probably mean different things. Mr Charles says I must construe "practise" in subsection (2) as satisfied by a single act, as it is unlikely that one under the age of 21 would indulge in the occupation or profession of hypnotist.

Plausible as that is, I myself would have thought it was countered by the fact that the language had changed and it may well have a meaning to prevent young people embarking on this as an occupation or profession. Be that as it may, I think that in itself s27(2) does not throw much light on the meaning of the word in s28. "A person shall not practise hypnotism without the consent of the Council."

Mr Charles contends that s28 should be construed as is s27(2), according to his construction by giving to "practise" a meaning satisfied by a single act of performance of hypnotism. Mr Buckner has relied on ss26 and 27 as contrasted with s28 as supporting what he says is the natural and ordinary meaning of "to practise hypnotism". If the Legislature meant it to be an offence to have performed a single act of hypnotism there was nothing easier than for it to have adopted the language of ss26 and 27, "giving any exhibition, demonstration or performance" instead of "to practise".

But in addition to that he says that if s28 means the same thing, then it is duplicating the offences created earlier which are created in narrower terms. Thus, "any person who gave an exhibition, demonstration or performance of hypnotism without the consent of the Council" would, on Mr Charles' construction of s28 be guilty of an offence, whereas under s26 he is only guilty of an offence if he gives such an exhibition, demonstration or performance at or in connection with an entertainment, and it does seem odd that one should have a general offence created by s28 which involves an offence already created under s26. In other words, there would be two offences committed, and while that is possible one strives to give meaning to legislation so as to give operation to the whole of it. Section 26 would be quite unnecessary if s28 treated the words "practise hypnotism" as satisfied by the performance of a single act of hypnotism without the consent of the Council.

Mr Charles' submission that there was a compelling reason for reading the word "practise" in s28 as satisfied by performance of a single act of hypnotism because of the nature and character of hypnotism as recognised by the legislature, I must say does not appeal to me. I do not think there is any true analogy with sorcery or sodomy or the other instances he gave because there is nothing, I find, from this legislation to indicate that hypnotism is considered an evil in itself. All the legislature is concerned with is to prevent its being abused by controlling it, and it has been content to control it under ss26 and 27 by dealing with public performances and by dealing with hypnotism being performed on children under 21.

Otherwise there is nothing unlawful in merely performing hypnotism in private and on adults. If the legislation meant that in itself to be an offence, one would have expected it to have expressed itself in different terms than by using the expression "practising hypnotism". And indeed, as I pointed out, in the English legislation we find that hypnotism is inhibited in a much narrower field than it is even in Victoria because it is only there controlled in connection with public performances. So it seems to me at least highly speculative to construe this Act on the basis that hypnotism as such is something evil in itself which must be suppressed and forbidden.

What I have said at least satisfies me that whatever "to practise hypnotism" means, it is not satisfied merely by an exhibition, demonstration or performance of the process of hypnotism; something more is required to satisfy the test of "practising hypnotism". The question is what more is required? I have not found, although I have looked at all the other sections of the Act, very much help from such a context in either enlarging or narrowing the meaning of "to practise hypnotism."

Mr Charles, as a subsidiary argument, on the basis that s28 is dealing with a course of conduct, not an isolated act, said here we have the defendant performing the process of hypnotism on quite a number of occasions although only in relation to Mrs Aiello. It may be, according to the evidence on between 30 and 40 times she came to the home to be treated and he hypnotised her apparently on each occasion as part of the curative treatment that he was giving to her. The contention is as understood by Mr Charles, that even though it was the same lady who was being treated on each occasion, there is such a repetition over this period of the application of hypnotism as to amount to a course of conduct justifying the conclusion that he did practise hypnotism, although in relation only to Mrs Aiello.

I must say I at first felt considerable force in that, but I consider that something more is involved in practising hypnotism than merely to repeat the act of hypnotism without regard to further circumstances. It would be rather odd, once it is conceded that it is a course of conduct which is struck at by s29 and not an isolated act, if one were forced to the conclusion that while on the first occasion that the defendant treated Mrs Aiello there was no offence committed because he was not practising hypnotism, from the mere repetition of the act of offence emerged at some stage because the defendant is then said to practise hypnotism. There would be a multiplication, in a sense, of innocent acts, each of them having nothing to with the carrying-on of a business.

A rather anomalous position arises unless one gives the word "practise" what is the more common meaning, by involving a course of conduct in connection with the carrying on of a profession or business. It is not vital that the expression here is not "practise as a hypnotist" but "shall not practise hypnotism". These in substance come to the same thing. It is a question of fact whether there is evidence in this case that the acts complained of were done in the carrying on of a profession or business by the defendant.

It is, I think, quite impossible to formulate any kind of fixed or rigid test as to what amounts to the carrying on of a profession or business. There have been cited to me a number indicia which may help to an ultimate conclusion, but I think, as indicated the *Apothecaries case* it is a question of fact in each case whether the circumstances lead one to the conclusion that the defendant is carrying on a business in the course of which he is performing an act of hypnotism.

I agree that there are a number of matters that are helpful in arriving at a conclusion; for instance I would consider it important in a particular case that there is something in the nature of a holding out to the public that one is available to render services in the particular profession or calling as perhaps strongly indicative that that person, particularly if he performs any acts, is carrying on a business. Likewise, I would have thought that one might infer from the frequency of the rendering of the services in question that in truth and reality that person was carrying on a business as distinct from, as Virtue J says in *Knotts case*, – some casual, isolated acts, unconnected with a business.

Also I think the circumstance whether a fee is charged or not by a person may stamp it in the character of a business of professional activity as distinct from some other activity. I do not exhaustively enumerate all the matters which I would consider of relevance, because ultimately it is a question whether, almost applying common-sense and common usage to the evidence in question, you can say that the defendant was carrying on a business or a calling in regard to such matters.

In this case the impression, and the strong impression, left on my mind, on the evidence as it stands is that the present is a case of someone sympathetic, yielding to importunity, desiring to help, not desiring to make a profit, having given up a former practice in another country giving someone here the benefit of his skill. It is one transaction, although it involves a number of treatments and has not got any business aspect in it at all. That is the impression I get on the evidence as it stands, and I am not satisfied, and I think the magistrate was right in not being satisfied, that the defendant, in the circumstances of this case was practising hypnotism within the meaning of s28 – although undoubtedly and admittedly he did perform acts of hypnotism in connection with this one patient.

I am confirmed in the conclusion that I have reached because we are here dealing with a penal statute. It is an offence to practise hypnotism: it is subject to penalty and it is a well-

established rule of construction of penal statutes that unless the language is sufficiently clear the defendant gets the benefit of the doubt. I would, without resort to any such rule of construction, have thought that there was not here a case of practising hypnotism within the meaning of s28 but if there is some doubt about it, at least you get to the stage where it is proper to apply this rule of construction and give the defendant the benefit of the doubt. It is up to the legislature to make its meaning clearer than it has if it intended to catch what, although not an isolated performance, is of the same character as an isolated performance, because it is related to the one person and it is a continuation of the one treatment, and in that sense one transaction only.

That, I think enables me perhaps to answer the grounds of this order nisi, except perhaps just to say this. Mr Charles did say that there was some evidence on which a court might find that the defendant did engage in a practice in the sense contended for by Mr Buckner – that there is some evidence that he did attend other people and treat them similarly. This depended entirely on the record of interview. I read that through more than once. I make allowance for the admitted fact that his English is indifferent, and I am quite unable to extract from it any admissible evidence against him that he has treated any person other than Mrs Aiello in this State and so I think the question of guilt or innocence depends entirely on the evidence of his treatment of Mrs Aiello, and any inferences that can be drawn from that particular treatment.

There are explanations given by him which are, in my opinion, quite consistent with his not carrying on any business, and in that sense practising hypnotism. No point arises about "without the consent of a Council", because it is common ground that in treating Mrs Aiello he did not have any such consent. He made some admission that he knows now he should have been registered, whatever that means, but I am quite unable to assume that he correctly interpreted this Act for himself. I do not think from that and particularly as he is not a lawyer and his English is indifferent, that one can really deduce anything adverse to him in the way of evidence of a relevant admission.

The end result is that the order nisi must be discharged. As to the grounds of the order nisi, the first ground taken was that in the circumstances of this case the stipendiary magistrate should have held that there was a *prima facie* case to answer that the defendant practised hypnotism without the consent of the Victorian Psychological Council. Well, consistently with the views I have taken, there was not a *prima facie* case to answer once s28 is interpreted in the way that I have suggested.

I may say the magistrate, in giving his decision, founded, I think, on the view ultimately which I have taken of the section, because he did say: "I think 'practise' relates to a course of action and not one incident alone. There is not evidence that the defendant treated any other person with hypnotism, and as there is only evidence that the defendant performed hypnotism on one individual, in my opinion this does not amount to 'practise' and for this reason, the case will be dismissed." Well, I agree that in the circumstances of the case that the magistrate did reach the right conclusion on the evidence before him and was entitled to dismiss the case as he did at the close of the informant's case without calling upon the defendant to give evidence.

As to the second ground that the magistrate was wrong in holding that there was no or no sufficient evidence that the defendant practised hypnotism either because there was no evidence that the defendant treated any person other than Mrs Aiello or the evidence related to only one incident of hypnotism in the course of what I have said it will be seen that I reject that ground also. I think the magistrate was in substance correct.

As to the ground that the magistrate was wrong in holding that there was no evidence that the defendant treated any person other than the witness Mrs Aiello with hypnotism – as I have just said, it depends really on the reading of that record of interview, and it would be quite unsafe, in my opinion, to infer from that any admission that he had treated any other person than Mrs Aiello. So I reject that ground also. That means that the order nisi be discharged with costs fixed at $200.

APPEARANCES: for the informant/applicant Dudley: Mr S Charles, counsel. State Crown Solicitor. For the defendant/respondent Musumuci: Mr G Buckner, counsel. Robertson, Ramsay & Allan solicitors.