

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COURT OF APPEAL) C.A. 282 of 1980

CORAM: HOPE, J.A.

SAMUELS, J.A.

MAHONEY, J. A.

Wednesday, 29th July, 1981

DESAI V RODGERS

Medical practitioners - Conviction of offences for presenting medical assignment forms false in material particulars - Order by Disciplinary Tribunal that appellants name be removed from Register - Failure of investigating committee to appoint person to be nominal complainant - Leave granted to members of investigating committee to appear by counsel before Tribunal - Nature of onus of proof - Decision of Tribunal referring to matters alleged not to have been put adequately to appellant - Whether order removing name of appellant from Register justified - Appeal dismissed.

JUDGMENT

THE COURT: This is an appeal from the order of the Medical disciplinary Tribunal established under the Medical Practitioners Act, 1938, as amended, directing that the appellant's name be removed from the register of medical practitioners of New South Wales.

The proceedings before the Tribunal arose in this way. Section 27A establishes an investigating committee comprising a stipendiary magistrate and two medical practitioners. The Act authorises the committee to cause all complaints and charges, including deemed complaints and charges, received by it in accordance with the Act to be investigated, and, after that investigation has been completed, to dismiss the complaint or charge, to caution or reprimand the registered person, or to refer the

complaint or charge to the disciplinary Tribunal. Section 27(1) prescribes the complaints or charges that may be made to the investigating committee, one of which is that the registered person has been convicted in New South Wales or elsewhere by any court of any offence.

This subsection also provides that the court before which a registered person is convicted in New South Wales of an offence shall, except in certain cases, forward particulars of the conviction to the investigating committee. Subsection (1A) provides that the investigating committee may consider the particulars of the conviction that have been forwarded to it and, if it so directs, those particulars shall be deemed to be a complaint or charge made to it and received by it in accordance with, this section.

On 12th April, 1979, the appellant was convicted at the Central Court of Petty Sessions, Sydney, of twenty-seven charges, each of presenting a medical assignment form in respect to a patient which form was false in a material particular and capable being used in support of an application for payment of an amount under the Health Insurance Act, 1973. She was fined and ordered to pay costs in respect of each conviction. The court forwarded particulars of these convictions to the investigating committee, which having considered them, referred them to the Disciplinary Tribunal.

Section 27A (5) of the Act provides:-

“The investigating committee may, when referring a charge or complaint to the disciplinary tribunal, appoint a member of the Public Service to be nominal complainant, who shall, for the purposes of section 28, be deemed to be the person who made the complaint or charge.”

The investigating committee did not appoint a person to be the nominal complainant in accordance with this provision, and upon the hearing before the Tribunal Mr. Letcher of counsel applied for and was given leave to appear for the investigating committee. No objection to this course was taken by counsel for the appellant. It would seem likely that the leave was granted pursuant to s. 7(2) of the Royal

Commissions Act) 1923) this and other provisions of that Act being made applicable to the inquiry before the Tribunal by s. 28(8) of the Medical Practitioners Act. Documentary evidence was tendered by Mr. Letcher of the registration of the appellant as a medical practitioner in New South Wales on 6th January, 1971, of the twenty-seven convictions and of the whole of the record of the proceedings, including the exhibits, before the Court of Petty Sessions. The appellant and other witnesses were then called in her case and were cross-examined by Mr. Letcher.

The Tribunal found, and indeed it was not contested, that the convictions the subject of the complaint were proved. As stated in the decision of the Tribunal, the appellant sought by evidence to explain her conduct in terms of either ignorance of the Medical Benefits Schedule or by mistakes of a kind which a doctor in a busy practice might make, there being in any event no intention on her part to make false claims in respect of her medical attendances. However, the Tribunal found:-

"..... upon close examination of all the instances of infringement of the Medibank Scheme, statements by Dr. Desai.....(it is)... quite satisfied that her explanations are completely unsatisfactory rendering it highly probable that her various offences were committed not by reason of mistake or ignorance of the appropriate benefits, but rather because she intended to defraud the Commonwealth by her false claims."

It concluded that the seriousness of the matters proved against the appellant required that her name be removed from the register of medical practitioner of New South Wales.

When the appeal was originally filed no respondents were named. The three members of the investigating committee thereupon applied to this Court to be joined as respondents pursuant to Order 51, r, 6 (2), and on 10th November, 1980, the Court ordered that they be so joined.

The appellant's first submissions were described as being concerned with jurisdictional matters. The first point was that the investigating committee had not in terms of s27 (1A) directed that the particulars of the convictions which had been

forwarded to it should be deemed to be a complaint or charge made to it against the appellant pursuant to s. 27(1)(a) and received by it in accordance with the provisions of s27. This point was not taken before the Tribunal and there was no evidence before it on the matter. By consent each party tendered evidence concerning it to the Court. It is sufficient to say that the Court is satisfied that the investigating Committee did give the relevant directions at a meeting held on 20th November 1979.

The second point concerns the failure of the investigating committee to appoint a person to be nominal complainant pursuant to s27A (5) when it referred the complaint to the Tribunal. It is submitted that it is mandatory for the investigating committee to make such an appointment when it refers a deemed complaint under s27 (1A) to the Tribunal, and that if it fails to do so the Tribunal has no jurisdiction to inquire into the complaint.

Section 27A (5) applies to cases where there is an actual complaint, and thus an actual complainant, as well as to cases where the complaint is a deemed one. If there is an actual complainant, the committee may appoint a nominal complainant pursuant to s. 27A (5) when it referred the complaint to the Tribunal. It is submitted that it is mandatory for the investigating committee to make such an appointment when it refers a deemed complaint under s27A (1A) to the Tribunal, and that if it fails to do so the Tribunal has no jurisdiction to inquire into the complaint.

Section 27A(5) applies to cases where there is an actual complaint, and thus an actual complainant, as well as to cases where the complaint is a deemed one. It is therefore not possible to read “may” as “shall”. If there is an actual complainant, the committee may appoint a nominal complainant, but clearly enough it need not do so. The provisions of s.28(6) contemplate that an actual complainant will generally be present at the inquiry and may be represented by solicitor or counsel. The provisions of s27A, and indeed of the adjoining sections, show a careful use of the words “may” and “shall”, using each word in its primary sense. We can see no justification for regarding the failure of the investigating committee to appoint a nominal complainant in a case such as the present as depriving the Tribunal of jurisdiction to conduct an inquiry into a referred complaint.

There is associated with this jurisdictional point a submission that the Tribunal had no power to give Mr. Letcher leave to appear before the investigating committee. This submission must be considered in the light of the somewhat obscure provisions of the Act as to complainants and their role. Complaints may be actual or deemed. They may be made by a member of the Police Force or of the Public Service, or by any other person (s. 27A(4)), and the investigating committee itself may in certain circumstances make a complaint (s. 27A(2A)). If it does so there may be two complainants in respect of the matters referred by the investigating committee to the Tribunal, and indeed there may be more than one actual complainant in any inquiry. The actual complainants, other than the investigating committee, are required to be present at inquiries and may be legally represented, but where is no such provision in the Medical Practitioners Act in respect of nominal complainants. The role of the complainant before the Tribunal is not spelt out in the Act save for the description of what the Tribunal does as (for relevant purposes) the making of an inquiry, and for the conferring on the Tribunal and its chairman of powers referred to in the Royal Commissions Act. Section 7(2) of that Act provides that where it is shown to the satisfaction of the chairman that any person is substantially and directly interested in any subject-matter of the inquiry, he may authorise that person to appear at the inquiry, and may allow him to be represented by counsel or solicitor. It would seem clear that where the investigating committee itself makes clear that where the investigating committee itself makes a complaint under s. 27A(2A) but does not appoint a person to be nominal complainant, its members, who have no right of appearance pursuant to s. 28(6) because this provision expressly does not apply in such a case, could be given leave to appear under s. 7(2) of the Royal Commissions Act. It is submitted in the present case, where the investigating committee was not the actual complainant, it was functus officio after it had referred the complaint to the Tribunal, and did not have the necessary substantial and direct interest in the subject matter of the inquiry. There seem to be a number of answers to this submission. The facts that the investigating committee can be an actual complainant and its members may be given leave to appear before the Tribunal show that there is no necessary conflict between its primary investigatory role and its appearing or being represented before the Tribunal. Nextly, it is at least arguable that it was open to the Tribunal to conclude that the members of the committee did have the necessary substantial and direct interest. And most importantly, the matter does not go to the Tribunal's

jurisdiction to conduct any inquiry. If there was any error, it was a procedural irregularity to which no objection was taken at any time before the Tribunal. No prejudice has been pointed to as a result of Mr Letcher's appearance. It must be remembered that what the Tribunal does is to conduct an inquiry. The proceedings before it are not -criminal proceedings. No doubt issues of this kind can be avoided by the appointment of a nominal complainant. But the course which was taken, if erroneous, does not justify this Court in setting aside the Tribunal's decision.

The next submissions concern what was said to be a miscarriage. They concern matters which it is submitted the Tribunal had regard to but which in the circumstances should not have been considered by it. The first matter was mentioned in the Tribunal's decision in the course of discussion of matters concerning a patient called Jennifer White.

The decision states:-

".....Dr Desai's evidence concerning this matter reveals an extraordinary ignorance of the difference between cysts and styes. Parenthetically it may be said that her evidence concert the possibility of refractive error arising is not in accord at all with that degree of medical knowledge any general practitioner is expected to have."

Then, having made the finding as to intention to defraud which has been described, it said:-

"Actually such ignorance as appears relates to her ignorance of medical treatment and practice which the Tribunal found existed to an extraordinary extent in one claiming specialist status. For example, the 'anal tumour' of Debbit Wright was found to be a squamous papilloma; the 'tumour' of Anne Beech, described as a 'wart', in whose case reference is made by Dr Desai to 'an important branch of the facial nerve' in a position where the nerve does not go; the treatment of Desley Doyle for a fracture of the foot which almost certainly did not exist; the matter of Debbie Anne White who attempted the doctor for treatment of a rash on her hand, denying she had any pain or had

been involved in an accident, and was treated for a green stick fracture, without Dr Desai having x-ray evidence of an such fracture.”

It is submitted that none of these matters, nor professional ignorance generally, was the subject of any complaint or charge, that no or insufficient questions were asked of the appellant concerning them, that the appellant had no or no adequate opportunity to answer them, and that the Tribunal should not have taken them into account.

It is necessary to place these matters in their context. The only matters the subject of complaint against the appellant were the convictions, and there was no contested issue before the Tribunal that they had occurred and had been established. Consequently, for all practical purposes, everything that was put to the Tribunal by way of evidence otherwise was directed to what order it should make. The matters now under discussion did not go to establish the complaint, but if they were anything other than mere parenthetical observations they were probably directed to credit. We have been directed to evidence in the transcript of proceedings before the Magistrate and before the Tribunal. There was certainly some investigation of these matters. However, without traversing that evidence, it can be arguably said that the matters were not sufficiently brought to the appellant's attention to enable her to answer them or to warn her that she should. Since before this Court no finding of fact, other than the matters now under discussion, has been challenged, any consideration given by the Tribunal to these matters in relation to credit would not seem now to be relevant. Nonetheless, in all the circumstances, since this appeal is by way of rehearing and since it may be thought that the Tribunal considered the matters in relation to what order it should make, the safest course to adopt would seem to be for this Court to come to its own conclusion as to what order is appropriate, disregarding the matters to which the appellant has taken exception.

The next submission concerned the question of onus. Since there was no issue as to the proof of the complaint, this could in the circumstances only go to the Tribunals' decision as to the appellant's intention to defraud the Commonwealth. As will appear, this finding is not challenged. However, even if it were, it does not appear that the Tribunal was in error as to the standard of proof that was required. It

reached its conclusion on the basis of high probability. The proceedings are not criminal proceedings and the onus is not the criminal onus. If it is not, satisfaction to the extent of high probability cannot be challenged as too low a standard to be adopted.

The appellant's final submission, other than that the Tribunal's order was not in the public interest and was, not justified, concerned what was alleged to be the failure of the Tribunal to take into account, either adequately or at all, the evidence of some patients and medical practitioners in support of her character, qualities and professional skill, care and concern, and the evidence of the appellant herself, support by an employee, of the practice she has adopted over the last few years to ensure that any forms which she completes, or has completed for her, are correct. We are not satisfied that the Tribunal did not have sufficient regard to those matters, but since we propose to consider ourselves the question of what order should be made, it is not necessary to discuss these submissions further.

The offences of which the appellant was convicted took place between 6th July, 1977, and 22nd March, 1978. They did not involve a very large sum. The total amount improperly claimed was \$634.45. The charges fell into various categories. Eleven concerned charging as a specialist to whom the patient had been referred by another doctor, contrary to the fact. Others related to claims for fictitious consultations, claims for fictitious additional services, claims for items of greater value than those applicable, and claims for consultation when repeat prescriptions had been given without any consultation with the patient being present having occurred. The appellant sought to explain her actions in ways which did not involve any fraudulent intent. However, before this Court the Tribunal's rejection of these explanations has not been challenged, nor has its conclusion that she intended to defraud the Commonwealth by her false claims. It must be said at once that the adoption of this position was wholly justified, for putting out of mind, as we do, the matters of alleged professional ignorance referred to in the Tribunal's decision, we are satisfied that the Tribunal's finding was correct and that there was no adequate basis for submitting here to the contrary.

There are a number of matters in favour of the appellant. She and her husband are both medical practitioners. Her husband commenced to practise in Victoria in 1971, and the appellant did some locum work there too. Both commenced to practise in New South Wales, 1973. The appellant has taken steps since March, 1978, to ensure that what she does is properly recorded and that the patient has written record of what she is charging for. There is no suggestion that she has repeated her previous conduct. She ceased to do major operations, so that one class of matter upon which she was making claims, that is, on the basis that she was acting as a specialist, is not likely to be repeated. There is some quite impressive evidence from patients as to their high regard for her and for her professional work, her concern for them and as to her not charging fees on occasions when she might properly have done so. There is also evidence by two medical practitioners as to their regard for her and for her skill. All these matters and other material in the evidence are to be weighed in the balance in her favour. It is submitted that she is good and dedicated medical practitioner, and that it is not in the public interest that her name should be removed from the register.

However, giving the appellant full credit for the matters favourable to her, it is difficult to come to any conclusion other than that to which the Tribunal came. The appellant's fraudulent abuse of the system was limited in time and extent, but it stopped only upon discovery, and was quite inconsistent with and involved a repudiation of her responsibility as a medical practitioner. Medical benefits schemes depend upon the integrity of medical practitioners. Without that integrity, the schemes must fail or become a burden upon the community. Moreover it is critical that members of the medical profession should be aware of the need for and importance of that integrity. The conviction of the appellant for twenty-seven offences involving fraudulent intent necessarily involved her having adopted a fraudulent course which contradicted this most basic and obvious requirement.

We have therefore concluded that the proper order is that her name should be removed from the register. We have also concluded that this is not a proper case in which pursuant to s29(6) a time should be fixed after which she may apply to have her name restored to the register.

The orders of the Court are that the appeal be dismissed; that the appellant's name be removed from the Register; and that the appellant pay the respondent's costs of the appeal.
