

THE SUPREME COURT)
OF NEW SOUTH WALES)

COURT OF APPEAL)

CA 40049/91
CA 40054/91

SAMUELS JA
PRIESTLEY JA
HOPE AJA

Tuesday 23 April 1991

GAMAL IBRAHIM v MERRILYN WALTON DIRECTOR COMPLAINTS UNIT
DEPARTMENT OF HEALTH AND ANOTHER

JUDGMENT

Medical Practitioners - complaints of misconduct -
concurrent criminal proceedings relating to subject matter of
complaints - application for adjournment of hearing of
complaints refused, by Medical Tribunal - appeal and summons to
quash decision - Medical Practitioners Act s32W
Held no error of law in decision and no ground to quash - appeal
and summons dismissed.

Edelsten v Richmond & Ors (1987) 11 NSWLR 51 referred to.

ORDERS

Appeal and summons dismissed with costs.

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HOPE AJA: The Court has before it two matters arising out of the refusal by the Medical Tribunal to adjourn the hearing of a complaint which had been made to it. The formal Notice of Complaint before it referred to two sets of matters, the first of which was

"1. On 23 February 1989 at Blacktown in the State of New South Wales, in the course of your treatment of female patient 'A' you inappropriately administered an intravenous injection of a sedative drug, namely 10 mg Valium."

2. That whilst female patient 'A' was under the effects of the said sedative you undressed female patient 'A' without clinical justification.

3. That whilst female patient 'A' was under the effects of the said sedative drug you inappropriately touched her."

The other set of particulars was in similar terms but referred to an occasion on 25 September 1990 at Rooty Hill and to another patient.

The basis of the application for the adjournment was that criminal proceedings had been taken against the respondent under ss38 and 61E(1) of the Crimes Act. Section 38 makes it an offence unlawfully to administer to a person any stupefying or overpowering drug or thing with intent in any such case to enable himself to commit an indictable offence. The seriousness of this offence is to be found in the maximum penalty which may be imposed, which is penal servitude for twenty-five years. Section 61E(1) provides for the offence of indecent assault or act of indecency. In that case, the maximum penalty is imprisonment for four years.

The complaint came on for hearing before the Tribunal, which was presided over by Cooper DCJ as Deputy Chairman of the Tribunal, on 30 January 1991. When it came on, counsel for the respondent made the application for adjournment which, in the first instance, appears to have been only until after the committal proceedings, which were set down for 13 and 16 May 1991, had concluded. No doubt the intention was then to make a further application to the Tribunal in the light of what happened in the committal proceedings. If the proceedings were dismissed there would be no cause for any further adjournment. If on the other hand, the respondent was committed for trial then no doubt there would be an application for a further adjournment until the trial had concluded. It was common ground that if the proceedings had to be adjourned until the trial was concluded, the adjournment would be a very lengthy one indeed.

The existence of criminal proceedings at the time of the complaint coming before the Tribunal obviously posed

problems for the respondent. If he did not give evidence before the Tribunal, an inference might be drawn as to his inability to give an explanation for what had been established. If he did.. give evidence he might make admissions which would embarrass him in the subsequent trial. This position had arisen in the past and apart from legislation the tendency of the Courts was to protect what is commonly called the right of silence of a person charged with a criminal offence and to have the proceedings adjourned.

However, in relation to complaints against a medical practitioner, there are matters other than his interest or the public interest in the right of silence to be considered, and those include the interest of the public in the proper performance by medical practitioners of the undoubted privileges and powers which they have in relation to their patients, and in the protection of members of the public who are patients from any abuse of those powers or privileges. In some cases it is obvious that the public interest in protecting patients should be given priority to that of the person complained about who is also subject to the criminal proceedings.

However, the matter is not at large. The position in due course was regulated by s32W which was inserted in the Medical Practitioners' Act. This section provides:

"Section 32W. A complaint may be referred to a committee or the Tribunal and dealt with by the committee or Tribunal even though the registered medical practitioner about whom the complaint is made is the subject of proposed or current criminal or civil proceedings relating to the subject matter of the complaint."

The section. has been considered by this court on, I think, a number of occasions, but in particular it. was dealt with in Edelsten v Richmond & Ors (1987) 11 NSWLR 51. It was there decided that what the Tribunal has to do., among other things, is to balance the interest of the public in the two respects to which I have referred to and also to take into account the important interest of the respondent in his right of silence, as well as the other circumstances of the case, and as a matter of discretion to decide whether or not to proceed with the complaint before the criminal proceedings are heard. It is clear that the matter lies in discretion, and it was not submitted otherwise either to the Tribunal or to this Court.

When the application for adjournment was made to the Tribunal, submissions were made by counsel for the complainant and for the respondent and evidence was given as to conditions which had been imposed by the Medical Board, to which I shall refer later. The Tribunal then considered the matter and refused to grant the adjournment.

The respondent brought the proceedings in this Court first as an appellant pursuant to s32U of the Medical Practitioners' Act under which, in these circumstances, there is an appeal on a question of law. He has also instituted proceedings by way of summons for an order seeking to quash the order of the Tribunal refusing to grant the adjournment and seeking a stay of the proceedings before the Tribunal.

In putting the case for the person whom I will now call the applicant in this Court his counsel relied essentially on two matters: first, it was submitted that the public interest in the protection of patients had been dealt with by the Medical Board by the imposition of its orders; and secondly, it was submitted. that having regard to the seriousness of the offence and taking into account what the Medical Board had done, the Tribunal could not reasonably have arrived at a conclusion that it should not adjourn the proceedings.

The Medical Practitioners' Act provides for the making of complaints to the Medical Board or the making by the Board itself of complaints. When complaints have been made the Board, pursuant to s32B of the Act may, among other things, suspend the registered medical practitioner from practising medicine for such period not exceeding thirty days as is specified in the order, or impose on him such conditions, including conditions relating to his practising medicine, as are considered appropriate, if it is satisfied that the action is necessary for the purposes of protecting a life or the physical or mental health of any person. The Board may from time to time extend the period of suspension.

In the present case, on 26 October 1990 the Board imposed these conditions:

"(1) As from 12 November 1990, except in the case of an emergency, Dr Ibrahim shall not in the course of his practice, see or treat any female unless in the continuous company of a person who

has been approved by the New South Wales Medical Board.

(2) He shall furnish each week to the New South Wales Medical Board a Schedule setting out the names of each female patient whom he has seen in the course of his practice during that week, specifying the time and place at which he saw her and bearing the signatures of such approved person and patient beside each entry."

It appeared from the evidence given at the hearing before the Tribunal that there was difficulty in complying with the condition that a person approved by the Medical Board should be present at any time when the applicant was seeing or treating any female. However, although the terms of the orders made by the Board did not appear to have been carried out, the Board had taken no further action by the time the matter came on before the Tribunal on 30 January of this year.

The case for the applicant is essentially that the action taken by the Medical Board satisfied the requirement of the public in its interest in the proper conduct of the applicant in relation to his patients and that that circumstance, coupled with the seriousness of the criminal charge against the applicant, constrained the Tribunal in such a way that it could not reasonably refuse the adjournment. In my opinion these submissions cannot be accepted.

The Tribunal has a discretion to proceed with the hearing of the complaint, even though there are current criminal proceedings relating to the same subject matter and even though, if it does proceed, the respondent to the complaint will be put in the somewhat invidious position which I have described. The

fact that he will be put in that position is obviously a matter which has to be considered by the Tribunal in deciding whether or not to grant an adjournment. However, I cannot agree that the public interest in the Tribunal proceeding to hear the complaint, despite the existence of criminal proceedings against the respondent to the complaint, precludes the Tribunal reasonably from concluding that it should still proceed, even if the Medical Board has taken some action to protect the public.

What the Tribunal has to do relevantly in relation to the nature of the criminal charge and of the complaint is to make up its own mind as to their seriousness. In a case such as the present, it can only make up its own mind in this regard from the nature of the charges and the complaints themselves which, in my opinion, can speak for themselves. Indeed, it is not contested for the applicant in this court that the complaints and the charges are serious. Indeed that seriousness is essential to the making of the application to quash the order and to submit that there is a question of law to be decided.

In my opinion, although the Tribunal must have regard to any action of the Medical Board, and in particular any action taken by it to protect the members of the public, and also, if it be the case, its failure to take any action if orders made to protect the public have not been carried out, the Tribunal is in no way constrained from arriving at a different conclusion as to the seriousness of the offence and complaint and from deciding that that seriousness is such that notwithstanding the public interest in the right to silence and the invidious

position in which the respondent to the complaint is put, and the prejudice to his right to silence, it should nevertheless proceed to hear the, complaint without delay.

The learned judge presiding at the complaint considered these matters in the reasons that he gave, and they had all been canvassed before the Tribunal.

The Court has been referred to a decision of the Tribunal in the matter of Dr V D Patel given on 11 May 1982. In that matter Staunton CJDC said:

"If a doctor in the position of the respondent is not prepared to give evidence in explanation of conduct, such as that evidenced in the close of this case and the material upon which they are based, he cannot complain if the Tribunal concludes that this is because he can in fact give no satisfactory explanation."

However, the circumstances of this case are different from the circumstances which existed in Dr Patel's case. In that case the criminal proceedings had been concluded by a plea of guilty and no question of a right to silence arose. One can well understand the statement that Staunton CJDC made. However, in the present case the criminal proceedings have not yet been heard and the right to silence is still very relevant to the applicant and to his position in the criminal proceedings. An explanation of his failure to given evidence in such a case in the hearing of the complaint may obviously be his desire to preserve his right of silence in the criminal proceedings.

I can see no basis at all for any submission that the Medical Tribunal erred in law in refusing the adjournment and I would dismiss the appeal with costs.

The considerations which are applicable to the summons to quash the order refusing the adjournment are, in my opinion. the same, and I would dismiss that summons with costs.

SAMUELS JA: I agree and I add only this: since s32W was inserted into the Act it cannot be contended that a medical practitioner is denied natural justice or exposed to procedural unfairness by reason only of the fact that he or she is required to answer a complaint before the Medical Tribunal while criminal proceedings based upon the subject matter of that complaint are pending.

I was not a party to the decision of this Court in *Edelsten v Richmond & Ors* (1987) 11 NSWLR 51 but I would wish to say that I do not consider that Mr Justice Hope when using the phrase "in a particular case" (at 61) was contemplating only a case which presented special or exceptional circumstances. I agree with the orders which have been proposed.

PRIESTLEY JA: I agree with what has been said both by Mr Justice Hope and Mr Justice Samuels.

SAMUELS JA: The orders of the court therefore are: the appeal and the summons are dismissed each with costs.