Privy Council Appeal No. 30 of 1992

Rajendra Mistry *Appellant*

v.

The General Dental Council *Respondent*

FROM

THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL DENTAL COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD BROWNE-WILKINSON
LORD WOOLF

*[Delivered by **Lord Woolf**]*

After a three day hearing, on 18th May 1992, the Professional Conduct Committee of the General Dental Council found Rajendra Mistry, the appellant, guilty of serious professional misconduct and directed that his name be erased from the Dentists Register. He appealed against that determination under section 29 of the Dentists Act 1984. On the hearing of the appeal he appeared in person and conducted the appeal with commendable clarity, courtesy and ability.

The charges into which the Professional Conduct Committee enquired were as follows:-

"(1)(a) On or about 16th October 1990, in a telephone conversation with Mr. James Malcolm Beard, you misled him into believing that you were willing to provide him with dentures under the National Health Service.

(b) On 23rd October 1990, you:

(i) falsely stated to the said Mr. Beard that you did not provide National Health Service treatment whereas you did;

(ii) improperly demanded £35 from the said Mr. Beard whereas the fee which had been agreed was £10.

(c) Thereafter you improperly demanded from Mr. Beard a total of £45 in an account dated 5th December 1990, following which you instructed a debt collecting agency to recover that sum.

(2) Between about April and July 1991, you accepted Mrs. Joan Curtain of 6 Orford Avenue, Radcliffe on Trent, Nottingham for dental treatment in the course of which you:

(a) failed to explain the nature of the contract clearly to her and to provide an indication of the probable cost;

(b) improperly stated that none of the treatment provided to her could have been done under the National Health Service;

(c) failed to employ a proper degree of skill and attention in devising a treatment plan for her;

(d) failed to employ a proper degree of skill and attention in providing the treatment;

(e) on or about 9th May 1991, when she requested that further treatment should be undertaken under the National Health Service, failed to inform her that you were continuing to provide the treatment privately.

(3) Between about 11th August 1991 and 5th September 1991, you accepted Mr. and Mrs. Cooper of 41 Mornington Crescent, Nuthall, Nottingham for dental treatment in the course of which you:

(a) failed to explain the nature of the contract clearly to them and to provide an indication of the probable cost for each patient;

(b) on 4th September 1991, carried out dental treatment for Mr. Cooper without his consent;

(c) demanded fees from Mrs. Cooper for treatment which it was not intended to provide.

(4) On or about 8th January 1991, at your surgery at The Grange, Mansfield Road, Sherwood, Nottingham you aided and abetted the unlawful practice of dentistry by a person who was not a registered dental or medical practitioner or an enrolled dental auxiliary by permitting that person to carry out work amounting to the practice of dentistry on Mrs. L.E. Good.

(5) From about 1st January 1991, or before until about 14th October 1991, or later, notwithstanding the fact that the technique of intravenous sedation was used from time to time on patients at your practice, you failed to have sufficient resuscitation equipment readily available.

(6) Between about September 1991 or earlier and December 1991, you delegated the task of taking dental X-rays to persons who had not received adequate training in conformity with the Ionising Radiation (Protection of Persons Undergoing Medical Examination or Treatment) Regulations 1988.

(7) Between about 28th September 1991 and December 1991, you caused or permitted a member of your staff, namely, Miss J.R. Jarvis, to sign a number of National Health Service FP17 forms in the names of the patients to whom they related.

And that in relation to the facts alleged you have been guilty of serious professional misconduct."

It is to be noted that the alleged professional misconduct is based on the combined facts set out in the seven charges. The facts of the sixth charge were admitted at the outset of the hearing. Before the appellant had given evidence the seventh charge was withdrawn. At the same stage the Committee intimated that charge (2)(c) and (d) had not been made out. Having heard the evidence called on behalf of the appellant and the submissions made on his behalf, the Committee came to the conclusion that each of the heads of charge (1), charge (2)(a) and (e), charge (3)(a) and (b), charge (4) and charge (5) were proved. In relation to the facts alleged in heads (2)(b) and (3)(c) the Committee came to the conclusion that the charges were not proved to their satisfaction and that the appellant was not guilty of serious professional misconduct. However in relation to the facts set out in the charge which had been admitted and the charges which the Committee decided had been proved the appellant was found guilty of serious professional misconduct.

At the hearing of his appeal, the appellant advanced eight grounds with which their Lordships will deal in turn.

Ground 1. The refusal of an adjournment.

On 13th May 1992, a day before the hearing was due to commence, Miss Davies Q.C. who was then representing the appellant applied for an adjournment. She did so on the grounds of her ill-health which it was not disputed

would prevent her conducting what was expected to be a lengthy hearing involving the Council calling eleven witnesses. She explained that she had already spent two days in conference with the appellant and that the gravity of the charges meant that, if they were found proved, the appellant stood a very real risk of losing his registration. In the circumstances she stated she had reservations as to whether another counsel could be in a position to conduct the case the following day. On the other hand it was pointed out on behalf of the Council that arrangements had been made to enable witnesses to come from the Midlands, from Scotland and, in the case of one witness, from a hospital bed in Holland. Miss Davies recognised the problems an adjournment would cause for these witnesses and she indicated that there were two possible ways of dealing with the situation if the hearing was not to be adjourned. One was that another counsel from her Chambers should conduct the case and the other was that her instructing solicitor, who was very experienced in this type of proceedings, should act for the appellant, as she was more familiar than anyone else with the factual background. Miss Davies said that she would have every confidence in the ability of her solicitor to conduct the case but she expressed concern as to how the appellant would feel. Having considered the position, the Committee decided not to adjourn to a date which would enable Miss Davies to attend the hearing but they did adjourn the hearing from the morning of 14th May to 1.30 p.m. on that day in order "to give time for suitable alternative arrangements for representation to be made".

In the situation in which he found himself, the appellant decided that he should be represented by the solicitor, Mrs. Barber of Messrs. Hempsons. On 14th May and the two following days of the hearing Mrs. Barber represented the appellant, cross-examined the witnesses called on behalf of the Council, called the appellant as a witness and addressed the Committee. A full transcript was available at the hearing of the appeal. An examination of that transcript makes it clear that Miss Davies' confidence in Mrs. Barber was fully justified. She conducted the appellant's case in a perfectly satisfactory manner. There is no reason to think that the appellant was prejudiced in any way by his being represented by Mrs. Barber. She did not renew the application for an adjournment or indicate that she was embarrassed in any way in having to conduct the case. Nonetheless, as the appellant correctly points out, normally a person appearing before the Professional Conduct Committee is entitled to be represented by his chosen legal representative. (See rule 7 of the General Dental Council Professional Conduct Committee (Procedure) Rules, 1984). Further in view of the ruling made the previous day, Mrs. Barber could have felt there would be no purpose served in her making a further application for an adjournment.

However an appellant has not an unqualified right to be represented by the lawyer of his choice. The right must be

approached in a reasonable manner. A committee is not required to adjourn disciplinary proceedings to ensure that a particular legal representative who a defendant wishes to employ can appear on his behalf, if in all the circumstances it is not reasonable to do so. While, as was pointed out to the Committee, their own convenience or indeed the convenience of witnesses must yield to the need to ensure that justice is done, the Committee retain a discretion to refuse a request for adjournment as long as to do so accords with the paramount consideration of ensuring that justice is done in a particular case.

On the submissions which Miss Davies made to the Committee, in this case they retained a discretion to refuse an adjournment. While it was no doubt disappointing to the appellant that he could not be represented by Miss Davies, the Committee were acting within their discretion and perfectly reasonably in coming to the decision which they did. Their decision was justified by the manner in which Mrs. Barber conducted the case. Their decision not to adjourn is therefore not one with which their Lordships could properly interfere.

Ground 2. Serious professional misconduct.

The appellant's next argument was that the facts of the charges which were found proved were not capable of amounting to serious professional misconduct. He contends this is particularly true of the facts set out in heads (2)(a) and (e) and (3)(a). In support of this contention, the appellant referred their Lordships to other Committee findings in relation to similar charges. In considering this contention, it is to be remembered that while each of the charges had to be considered separately by the Committee, the way they were framed required the Committee to take into account the combined facts relating to each head of charge which was proved or admitted in deciding whether or not the appellant had been guilty of serious professional misconduct. On this approach, it is beyond argument that, on the totality of the facts which were proved or admitted, it was open to the Committee to find that the appellant was guilty of serious misconduct.

Ground 3. The knowledge required to establish aiding and abetting.

This arises in relation to charge 4. The legal assessor took the sensible course of giving directions upon the law in the presence of the parties before the Committee decided whether they found the disputed heads proved. The way the assessor approached the facts alleged in the fourth charge was to remind the Committee that it was admitted that the person who carried out that work was not qualified to carry out that work lawfully. He said that the appellant could not be found guilty unless they were satisfied he was aware of all the essential matters which made up the act which constituted the charge. If

the assessor had stopped there, there would be no question of any misdirection having been made. However the assessor gave the following additional directions:-

> "Now having reached that point, you are entitled to go one stage further because it is not the end of the matter. Mr. Rundell says that there is a duty on the dentist to find out, and you may feel that is a good point because after all Mr. Mistry did introduce [the technician] into the situation. It was not the patient who knew about the technician coming. The technician was, at it were, a fait accompli, and you may think the duty on the dentist who creates the fait accompli is the greater. Also you have your own code of practice as well.
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> But I do have to say this to you as the alternative approach. Deal with the first question, did he have knowledge. Then you can go on to the alternative. Mr. Mistry can be adjudged to have knowledge in law if he deliberately closed his eyes to the circumstances. That is the law on this particular area, and the question for you is did he deliberately close his eyes to the circumstances. Mr. Rundell submits that there were many signs, in other words in the circumstances, that he was not a dentist. Did he close his eyes to it? Dress, knew that he was a technician, been before. I think in evidence - but it is a matter for you - he admitted in cross-examination it was a fair inference that he was not practising. You may remember in examination-in-chief he said he gave no serious thought as to whether he was on the register. Those are areas for you to decide - that is the evidence. The question is he can be adjudged to have known if he deliberately closed his eyes to the circumstances."

The appellant contends that these paragraphs contain a misdirection. In their Lordships' opinion there is force in this contention. The first paragraph was not happily worded since it could have been interpreted by the Committee as suggesting that if the appellant had not done his duty and enquired into the technician's status, he could be treated as having the necessary knowledge of the facts because he had failed in his duty "to find out". Similarly the second paragraph is not worded happily because it suggests that the appellant can be treated as having the necessary knowledge to make him guilty of aiding and abetting if he deliberately closed his eyes to the obvious circumstances. This departs from the correct position: that the necessary knowledge of the material facts must always be established, but if it is established that the person alleged to be the aider and abettor was deliberately closing his eyes to circumstances which would make the material facts obvious, this would be strong evidence that he was actually aware of the material facts. The correct approach is set out in two cases involving appeals against convictions of handling stolen goods, *R. v. Griffiths* (1974) 60 Cr.App.R. 14 and *R. v. Moys* (1984) 79 Cr.App.R. 72.

(See also *Archibold* (1992) paragraph 21/243/4). A person can close his eyes to circumstances because he already perfectly well knows that the facts exist and he wants to avoid confirmation of what he really already knows; in the latter situation he has the required knowledge.

When read together these additional paragraphs of the assessor's direction amount to a substantial misdirection and their Lordships have come to the conclusion that as to the findings under charge 4 the appeal should succeed. Although their Lordships have come to this conclusion, it is only fair to the assessor to point out that he had clearly taken considerable care over the manner in which he should direct the Committee and in fact had adopted an approach which was more favourable to the appellant than that suggested by counsel who was appearing for the Council.

Grounds 4 and 6. The inadequacy of the evidence.

It is convenient to take these heads together which relate principally to charge 5. The appellant submits that the evidence relied upon in support of this charge was of insufficient weight to entitle the Committee to come to the conclusion that the necessary facts had been established. A similar contention is advanced in relation to other charges where there is a conflict in the evidence given by witnesses. However, having examined the evidence, their Lordships are satisfied that the Committee who heard the witnesses were entitled on the evidence, which was before them, to come to the conclusion that the charge was made out. There is also nothing in the points which are made about the medical certificate in relation to the witness who came from Holland and who was unable to give evidence in person and be cross-examined, nor the alleged lack of particularity in certain charges.

Grounds 5 and 7. The seriousness of the penalty imposed.

The appellant complained about the penalty of erasure. He contends justifiably that the consequences for him of erasure will be very serious. Starting from modest beginnings, he has built up a practice in both Nottingham and Loughborough. It is a real possibility that if the penalty stands he may have to close both practices. If this happens their Lordships have no reason to doubt his forecast that he will face financial ruin. Again the appellant refers to cases which he submits are comparable where a different and more lenient course was taken by the Committee. On examination each of these allegedly comparable cases can be distinguished from the present case and they therefore provide little assistance. If it had not been for the misdirection as to aiding and abetting their Lordships would not have differed from the view of the Committee who are in a much better position than their Lordships to judge the gravity of the

professional misconduct alleged. As it is not possible to know the conclusion to which the Committee would have come if they had not found the facts in charge 4 established, if this was practical, their Lordships would have advised that the question of sentence should be remitted back to the Committee so that the Committee could reconsider sentence in the light of their Lordships' conclusion as to the fourth charge. However to now remit the matter to the Committee would not be practical. It is doubtful whether the Committee could be reconstituted and, even if it could, whether they would have sufficient recollection of the case to be able appropriately to reassess the question of sentence. In these circumstances their Lordships feel that they have no alternative but to deal with the question of sentence themselves in a way which is in accord with the most lenient course which the Committee would have been likely to have adopted if they had found that the facts alleged in charge 4 had not been proved. On this basis, their Lordships are agreed that an appropriate sentence would be that the appellant's registration ought to be suspended for a period of six months.

Ground 8. Race discrimination.

There is absolutely no evidence to suggest that in coming to the conclusions which they did, the Committee were motivated, as the appellant alleges, by any form of racial discrimination. If it had been shown that the Committee were actually motivated or gave the impression that they could well have been motivated by racial discrimination then that would be a serious matter which could result in the Committee's findings being set aside. However while the appellant contends that there has been racial discrimination, his contention is not based specifically on the Committee's adjudication on his case but upon the Committee's approach in general to Asian or black practitioners as opposed to European and white practitioners. In support of this general contention, he refers to five different groups of cases and he suggests that the contrast between the decisions in those cases in respect of Asian and black practitioners and those in respect of European and white practitioners establishes discrimination. Here there is the question as to whether this is the appropriate forum in which to raise this issue. This is an appeal under section 29 of the Dentists Act 1984 as to a specific determination of the Committee in respect of an individual practitioner. Such an appeal is an inappropriate vehicle in which to conduct an investigation into general racial discrimination. However having said that, it is only right to add that having allowed the appellant to develop his argument and having considered his alleged comparable cases, their Lordships are quite satisfied that they do not establish a case of racial discrimination. The differences between the results are readily explicable by the difference in the facts of the cases. Their Lordships are satisfied that even if general allegations of this sort were appropriate for investigation before their Lordships on this appeal, the allegation of racial discrimination would not have been established.

In these circumstances their Lordships will humbly advise Her Majesty that this appeal should be allowed to the extent of setting aside the finding of the Committee that the appellant was guilty of the facts alleged in the fourth charge and substituting for the determination that his name should be erased from the Register a determination that the appellant's registration shall be suspended for a period of six months. There will be no order as to costs.