Privy Council Appeal No. 46 of 1983

Kewal Krishan Abrol *Appellant*

v.

The General Dental Council *Respondent*

FROM

THE DISCIPLINARY COMMITTEE OF THE GENERAL DENTAL COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH APRIL 1984

Present at the Hearing:

LORD DIPLOCK
LORD KEITH OF KINKEL
LORD BRIGHTMAN

*[Delivered by **Lord Keith of Kinkel**]*

This is an appeal from a determination of the Disciplinary Committee of the respondent Council dated 10th November 1983, whereby it was found that the appellant had been guilty of infamous or disgraceful conduct in a professional respect, and it was directed that his name be erased from the register of dental practitioners.

The charge against the appellant arose out of events which occurred on 7th January 1981, when a patient of the appellant, Mrs. Joyce Margaret Foundling, died shortly after the appellant had carried out upon her the extraction of the lower left second premolar tooth. The extraction was performed under a general anaesthetic administered by the appellant himself, no other person being present at the time.

Mrs. Foundling's death led to a charge of manslaughter being preferred against the appellant, which in due course came to trial at Stafford Crown Court before Talbot J., and a jury. The prosecution case was that the cause of death was anoxic cardiac arrest due to inhalation of vomit, that the appellant had carried out his duties as dental surgeon with gross and criminal negligence and that this gross
[14] negligence had caused the patient's death. The

appellant was convicted and sentenced to eighteen months imprisonment suspended for two years and fined £1,000. The appellant applied for leave to appeal against conviction and sentence. Leave was granted but the appeal was dismissed by the Court of Appeal (Criminal Division) on 13th July 1982.

Subsequently, the appellant's legal advisers applied to the Secretary of State for Home Affairs for a reference under section 17(1) of the Criminal Appeal Act 1968, on the ground that forensic medical evidence had become available which cast doubt upon the cause of death which had been alleged by the prosecution. The Secretary of State obtained independent forensic medical advice, and as a result made a reference, the outcome of which was that on 11th July 1983 the appellant's conviction was quashed by the Court of Appeal (Criminal Division). The grounds of this decision were related solely to the matter of cause of death.

Prior to that event the respondent's Disciplinary Committee had commenced proceedings against the appellant, under section 25(1)(a) of the Dentists Act 1957, on the basis of his conviction. A hearing began on 10th November 1982, but was adjourned on the application of the appellant's counsel by reason of the dependence of the application to the Secretary of State for a reference. On 9th June 1983 the respondent wrote to the appellant stating their understanding that the Secretary of State had decided to make a reference, and that the case would be heard by the Court of Appeal on 11th July 1983. The letter concluded:-

> "If your appeal is upheld the Council will have to reconsider its position in the matter. If, however, your appeal is dismissed, the Disciplinary Committee will wish to resume its inquiry into your conviction as soon as posssible and will do so on 27th July 1983 at 10.30 a.m. at 37 Wimpole Street, London W.1."

On 12th July 1983, the day after the conviction was quashed, the respondent wrote to the appellant as follows:-

> "Further to my letter of 9th June 1983, I am writing to inform you that in view of the decision taken by the Court of Appeal to quash your conviction, the meeting of the Disciplinary Committee arranged for the resumption of its inquiry into your conviction on 27th July 1983 will not now be held."

The appellant complains that this letter had the effect of misleading him into the belief that no further disciplinary action was to be taken, which, as will be seen, was far from the case. Such a

belief would have been by no means unreasonable. The letter of 9th June 1983 had said that the Council would have to reconsider its position if the appeal were upheld. The letter of 12th July 1983 could reasonably be taken to be intended to convey the result, and the whole result, of that re-consideration. Nothing was said about there being any question of fresh disciplinary proceedings on a misconduct charge, and it is most unfortunate, to say the least of it, that the Council did not expressly state that its position in relation to any such proceedings was reserved, so as to avoid the distress to the appellant of later finding that a matter which he believed to be closed was in fact to be proceeded with. At the same time, it is to be observed that at the hearing of the Disciplinary Committee which gave rise to this appeal no point was made on the appellant's behalf in regard to this matter. If it had been, some other material facts might have emerged.

In the event, following a complaint and statutory declaration from Mr. Robert Foundling, a son of the deceased, the respondent instituted proceedings against the appellant, under section 25(1)(b) of the 1957 Act, upon the following charge:-

> "That being a registered dentist:
> On the 7th January 1981, in the course of giving dental treatment to Mrs. Joyce Margaret Foundling, now deceased, he administered a general anaesthetic to her when he:
>
> (a) failed to have a second appropriately qualified and experienced person present with him;
>
> (b) failed to have any member of staff present with him;
>
> (c) left the said patient unattended before she had recovered from the said anaesthetic;
>
> (d) failed to take any adequate steps to resuscitate the said patient;
>
> (e) failed to have sufficient resuscitation equipment available.
>
> And that in relation to the facts alleged he had been guilty of infamous or disgraceful conduct in a professional respect."

Before the Disciplinary Committee, not only were the facts set out in paragraphs (a) to (e) not the subject of serious dispute, but at one stage the appellant's counsel stated that he was prepared to make an unqualified admission of them, being content to argue that they did not constitute infamous or disgraceful conduct in a professional respect.

The appellant, who appeared on his own behalf before the Board, suggested that this admission should not have been made, and endeavoured to present some of the alleged failures in not too unfavourable a light.

Those alleged in paragraphs (a) and (b) are undoubtedly the most serious. It is indisputable that the appellant did not have a second qualified person with him. Dr. Kumble, an anaesthetist who regularly attended once a week for extractions, was not available that day, though the appellant did endeavour to obtain his services. It is not disputed that the appellant had no member of staff with him during the operation. His nurse/receptionist had unfortunately departed feeling ill just at the time when Mrs. Foundling arrived at the surgery.

As regards paragraph (c), it is not disputed by the appellant that he did leave the patient during the period between the administration of the anaesthetic and her final collapse, in order to speak to her husband who was in the waiting room. The husband stated in evidence that he left three times. The appellant maintains that it was only once, and that the patient had by then recovered from the anaesthetic. But the appellant did not himself give evidence so that the husband's evidence was uncontradicted, and it is in any event plain that the time scale of the whole sequence of events was so short that Mrs. Foundling cannot have completely recovered from the anaesthetic when the appellant left her.

Paragraphs (d) and (e) may be taken together. There was a Brooke's airway (an apparatus capable of being used to facilitate mouth-to-mouth resuscitation) in another room in the premises, but it was not to hand and was not used by the appellant during the emergency. It was produced by him to, and unsuccessfully used by, an ambulance attendant who arrived later. The available anaesthetic machine, a Walton Five, was capable of being used to promote resuscitation if fitted with a breathing circuit.

The evidence indicated that there were two Magill breathing circuits in the surgery, one of them (which belonged to Dr. Kumble) not being adapted for fitting to the Walton Five. As to the other, which was so adapted, the evidence left it in doubt whether it was in fact fitted. It was accepted that a photograph of the Walton Five taken by the police the day after the accident showed this circuit fitted to it, but a statement by the appellant to Detective Inspector Evans, spoken to by the latter in evidence, indicated that the circuit was in a cupboard in the surgery at the time of the emergency, and that the only attempts by the appellant at resuscitation were by way of mouth-to-mouth breathing alternated with cardiac

massage. As has been mentioned, the appellant did not himself give evidence about this or any other matter.

In the result, the Committee had no alternative on the evidence but to find all the material facts proved, so the issue came to be whether they amounted to infamous or disgraceful conduct in a professional respect. The Committee had before it material indicating that in June 1975 all dental practitioners had been circulated by the Chief Dental Officer at the Department of Health and Social Security *inter alia* to this effect:-

> "I cannot emphasise too strongly the working party's recommendation that general anaesthesia for dental treatment should not be administered by the operator, apart from the exceptional case in an extreme emergency where a second dental or medical practitioner able to act as an anaesthetist cannot be found."

In May 1975 and again in November 1980 the President of the General Dental Council, in course of his address to it, had warned explicitly against the risks of acting both as operator and anaesthetist, and stated that any practitioner so acting, unless in an emergency, was in danger of being held guilty of infamous or disgraceful conduct in a professional respect. It was not suggested that the appellant was at the relevant time unaware of this material.

The appellant sought to maintain that the circumstances under which he acted in this instance constituted an emergency. Upon the evidence before the Committee it was clearly not open to it to accept this contention. One may have some sympathy with the appellant's difficulty in resisting the pleas of a patient who was undoubtedly suffering considerable distress through the abscess which was present, but, as the evidence made plain, there were various courses which he might have taken with a view to alleviating temporarily her distress until such time as an extraction could be carried out without hazard. In the circumstances the Committee was entitled to hold that the course upon which the appellant embarked was irresponsible and inexcusable.

The appellant drew the attention of the Board to certain National Health Service Statistics (which were not before the Committee) indicating that over a period of years up to and including 1982 there were many thousand instances annually of payments of a special fee applicable to the case where an anaesthetic is administered by the dentist carrying out an extraction. These instances, however, cover administration of general anaesthetic, intravenous sedation and relative analgesia, and no sub-division of

figures is available among these different techniques. Further, nothing in these statistics evidences any practice of operator/anaesthetist activity carried on in the absence of any other person whatever. The evidence before the Committee made it plain that in the event of the collapse of a patient under general anaesthetic the presence of two persons each having some degree of skill is essential, one to administer breathing methods of resuscitation and the other to administer cardiac massage.

In all the circumstances the Board are unable to find any valid grounds for interfering with the Committee's finding that the appellant's actions constituted infamous or disgraceful conduct in a professional respect. As their Lordships have affirmed on many occasions, where certain actions by a practitioner are capable of being regarded as amounting to such conduct, and have been held to do so by the professional body entrusted with the task of undertaking the relevant inquiry, the determination of that body is normally to be upheld. The appellant's actions in this case were undoubtedly so capable.

There remains the question of sentence. Here again, their Lordships are in use, in the absence of special factors, to refrain from interfering with the decision of a professional disciplinary body. The Committee in the present case did not have open to it the option of suspension as an alternative to erasure. A power to suspend is conferred by the Dentists Act 1983, but the relevant enactment will not come into force until October 1984. The Committee might have contented itself with an admonition or have adjourned the matter of sentence for some specific period, but chose not to do so. One of the matters which the Committee had to keep in mind was the safety of the public, and it is incumbent upon the Board to do the same.

Their Lordships note that the appellant's attitude to the whole of this tragic episode appears to be entirely one of self-justification, and that he continues to regard the case as having been one of emergency, such as to have made it entirely proper for him to proceed as he did. It is fair to record, however, that he expressed himself as willing to undertake never again personally to administer a general anaesthetic.

Their Lordships have given consideration to whether weight is to be attached to the matter of the appellant having been, as he says, misled by the respondent's letter to him dated 12th July 1983, already referred to. A circumstance of somewhat similar character resulted, in the case of a medical

practitioner *(Khan v. General Medical Council* Privy Council Appeal No. 43 of 1978), in a sentence of twelve months suspension being reduced on appeal to six months. In the present case no similar option is available, and the only alternative to erasure is no penalty whatsoever. Their Lordships do not consider that such a result, in all the circumstances, would be appropriate, nor can they perceive any valid ground for postponement, and they must therefore sustain the decision of the Committee.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. There will be no order as to costs.