

DR. RANJIT FERNANDO

v

SRI LANKA MEDICAL COUNCIL

COURT OF APPEAL

UDALAGAMA, J.

CA 1365/2001

JUNE 3, 2003

JULY 29, 30, 2003

Medical Ordinance – Section 21 (f), 25, 33, 41 (3), 45, 52, 57, 64, 72 – Charges based on negligence – Can the name of the Doctor be erased from the Register? What is infamous conduct? – Is negligence an ingredient for a charge of infamous conduct?

One "A" was admitted to the Karapitiya Teaching Hospital suffering from Malignant lesion necessitating a fatal masectomy. Subsequent to surgery the aforesaid "A" died. The elder son of the deceased complained to the Medical Council which referred the matter to the Professional Conduct Committee (P.C.C.), which body issued notice containing 2 charges which included one for negligence in addition to another charge – for not acting with due care required of a Medical Practitioner.

It was contended that the two charges were based on negligence, and neither of the charges referred to grounds authorised by the provisions contained in the Ordinance which enabled the Medical Council to order, the name of the petitioner to be erased from the Register – Section 21 (f) and that negligence is not an ingredient for a charge of infamous conduct.

Held:

- (i) The P.C.C. of the Medical Council is competent to determine whether or not the petitioner was guilty of infamous conduct on the basis of negligence or failure to act with due care.

Per Udalagama

If it is shown that a Medical man on the pursuit of his profession had done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by his professional bretheren of good repute and competence then it is open to the Medical Council to say that he has been guilty of infamous conduct in a professional respect."

- (ii) The P.C.C. is capable of determining whether or not the conduct of the petitioner had been in fact infamous and the function of the P.C.C. is to regulate the standard of the profession rather than professional standards, negligence could not be of direct concern to the P.C.C. unless it brings the profession of medicine into disrepute.
- (iii) In any event this application is premature.

APPLICATION for a *writ of certiorari*.

Cases referred to:

1. *Allison v G.M.C.* – QB 1894 – 750
2. *R v Department of Health & Social Security* – 1986 293 BMJ 322 (unreported)

L.C. Senaratne, PC., with *J.A.J. Udawatte* and *Upul Gunaratne* for petitioner.
Shibly Aziz, PC., with *Ms. Priyanthi Gunaratne* for the respondents.

September 12, 2003

UDALAGAMA, J.

The petitioner, admittedly the then Senior Lecturer in Surgery of the University of Ruhuna and the Consultant Surgeon at the Karapitiya Teaching Hospital, by his petition dated 30.08.2001 prayed *inter alia* for a grant of a mandate in the nature of *writ of certiorari* to quash the 2 charges made against the petitioner in the course of an inquiry held by the Sri Lanka Medical Council consequent to a complaint made also admittedly by one Indrajeewa the elder son of the deceased Chandrawathie Abeysinghe. 01

The facts briefly appear to be as follows:-

The aforesaid Chandrawathie Abeysinghe was admitted to the Karapitiya Teaching Hospital suffering from a malignant lesion necessitating a total Mastectomy. Subsequent to surgery on 30.11.98 the aforesaid patient Chandrawathie Abeysinghe died. On 26.07.99 the aforesaid Indrajeewa by his affidavit marked P1A and filed of record complained to the Sri Lanka Medical Council which referred the matter to the Professional Conduct Committee which Body issued notice dated 15.12.2000 (P26) containing 2 charges which included one of negligence in addition to another which charged the petitioner for not acting with due care required of a medical practitioner. Counsel who represented the petitioner at the inquiry held on 07.09.2001 before the aforesaid Professional Conduct Committee raised a preliminary objection in respect of the charge drawing particular reference to section 15 (2) of the Regulations filed of record marked P2 (2) which Regulations apparently were made by the Minister of Health under the provisions of section 72 read with sections 25, 33, 41 (3) 45, 52, 57 and 64 of the Medical Ordinance, Chapter 105. 10 20

The provisions of section 15 (2) of the Regulation enabled the petitioner or his Attorney-at-Law to object to any charge on a point of law. 30

The basis of the objection appeared to be that the 2 charges framed against the petitioner were based on negligence and that neither of the charges referred to the grounds authorized by the provisions contained in the Ordinance which enabled the Medical Council to order where relevant, the name of the petitioner to be

erased from the Register as contemplated by the provisions of section 21 (1) (f) of the Medical Ordinance.

Although the learned Counsel for the petitioner in his written submissions had taken objection to the "notice of inquiry" sent to the petitioner as been bad in law, the petitioner by his due appearance at the inquiry, has in my view, waived his right to object to the notice of inquiry.

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Admittedly the petitioner appeared before the Sri Lanka Medical Council (1st respondent) comprising members of the Professional Conduct Committee who were made 2 -12 respondents.

The pivotal question for determination in this application is whether as stated by the learned Counsel for the petitioner, the Sri Lanka Medical Council represented by the Professional Conduct Committee, had jurisdiction to inquire into an instance of negligence of a medical practitioner and if found to be negligent whether the Professional Conduct Committee could have the name of such medical practitioner, erased from the Register as contemplated by the provisions of section 33 of the Medical Ordinance.

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Section 33 aforesaid unambiguously provides for the erasure of a name of a medical practitioner on the grounds of infamous conduct.

It is apparent to this court that when the aforesaid objection was raised before the Board of Inquiry on 20.07. 2001, the Chairman of the said Inquiry Board, the Professional Conduct Committee of the Sri Lanka Medical Council, consequent to considering the submissions of both Counsel appearing for the complainant and the petitioner decided to try the petitioner for medical negligence which amounted to infamous conduct on an amended charge (P4A).

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The basis of the objection to such amendment was the submission that negligence was not an ingredient for a charge of infamous conduct and that the Sri Lanka Medical Council was resorting to have a charge of negligence brought under the cover of infamous conduct and that the said action was in error.

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However, it is the view of this court that even though charge No. 1 contained the word "negligence" in actual fact the complaint made by Indrajeewa aforesaid did not refer to the negligence of the petitioner but instead to the negligence of the petitioner's assistant Dr. Gooneratne. It was also observed that apart from negligence the charge also contained another which read as follows:- "acting without due care". Importantly no submission is forthcoming on behalf of the petitioner to establish the fact that even acting without a duty of care is outside the concept of infamous conduct. Besides Regulation 13 referred to above in any event undisputedly allows for amendment of the notice containing the charges. 80

"Charges" were interpreted to be those specified in the notice of inquiry vide part VI of the Regulations.

Regulation 15 (3) also provides for preliminary objections to the charge.

Regulation 16 (5) (b) even enables a Professional Conduct Committee to uphold such objection and come to a finding that the petitioner is not guilty of infamous conduct.

Accordingly it is my view that this application is premature. The Professional Conduct Committee is not precluded from holding that negligence is not an ingredient for infamous conduct even though an amendment had been allowed. In an instance where the Professional Conduct Committee as aforesaid could come to a finding that the petitioner is not guilty of infamous conduct after further hearing, I would reiterate that this application is clearly premature due to the reason that, if the Professional Conduct Committee so decides the interference of this court would be redundant. 90

Undoubtedly the Professional Conduct Committee consists of a Body of eminent and experienced medical specialists who I am inclined to the view is competent to determine whether or not negligence and the failure on the part of the petitioner to act with due care comprise infamous conduct and make order accordingly. 100

Infamous conduct as described by Stephen, J. Hadfield in his work on "Law and Ethics for Doctors" contained a section on "the General Medical Council and Discipline in the profession" at page

33 where *inter alia* he states as follows:- "the use of the word "infamous" in the term "infamous conduct in a professional respect" has been criticized. By use however the term "infamous" has been established and it has been acknowledged that if it is shown that a medical man on the pursuit of his profession had done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by his professional bretheren of good repute and competence, then it is open to the General Medical Council to say that he has been guilty of "in famous conduct in a professional respect." *Allison v G.M.C.*⁽¹⁾ 110

The author further adds that there being no definition of the limits of infamous conduct it is open to the GMC through its Disciplinary Committee to find that the conduct of the member of the profession has in fact been infamous and as such renders him unfit to continue as a member of the profession even though the offence committed was not directly related to practice of medicine. 120

In the instant case too I would hold that the Professional Conduct Committee of the Sri Lanka Medical Council is competent to determine whether or not the petitioner was guilty of infamous conduct on the basis of negligence or the failure to act with due care. As stated above the Professional Conduct Committee is not precluded from even holding that the petitioner is not guilty of infamous conduct.

Of relevance is also the view held by J.K. Mason and R.A. McCall Smith in their work on "Law and Medical Ethics", 4th Edn., page 10 on the topic of "the control of medical practice" who state as follows:- "Its (GMC of U.K.) essential function is to regulate the standards of the profession rather than professional standards. As things stand, negligence is of no direct concern to the Council unless it brings the profession of medicine into disrepute." 130

In any event actions of disciplinary inquiries are subject to judicial review. *R v Department of Health and Social Security*⁽²⁾.

In all the circumstances, I am of the view that the Professional Conduct Committee of the Sri Lanka Medical Council comprising of eminent professional bretheren of the petitioner and of good repute and competency, that the said Committee is capable of determining whether or not the conduct of the petitioner had been in fact 140

infamous and that the function of the Professional Conduct Committee aforesaid is to regulate the standard of the profession rather than professional standards.

Negligence in the instant case too could not be of direct concern to the Professional Conduct Committee unless it brings the profession into disrepute, which matter is for the Committee to decide. Besides there is no allegation of *mala fides* on the part of the Professional Conduct Committee or one of the denial of natural justice, to warrant the intervention of this court. 150

In any event this been the initial stage of the inquiry the actions of a disciplinary inquiry being subject to judicial review I would dismiss this application of the petitioner thereby enabling the Professional Conduct Committee of the Sri Lanka Medical Council to proceed with the inquiry which commenced of 7th June, 2001.

Application dismissed.