1972 *Present :* **Alles, J., and Wijayatilake, J.**

A. T. S. PAUL, Petitioner, *and* E. M. WIJERAMA and 9 others, Respondents

S. C. 209/71—Application for Mandates in the nature of Writs of Prohibition, Certiorari and Mandamus under and in terms of Section 41 of the Courts Ordinance (Cap. 6)

Medical practitioner—Charge of infamous conduct in a professional respect—Inquiry by Medical Council sitting as a Disciplinary Committee—Judicial nature of the Committee's functions—Members of the Committee—Absence of some of them at material parts of the inquiry—Effect of disqualifying them from participating in the final decision—Invalidity of the decision of the Committee as a whole—Natural justice—Breach of it—Certiorari—*Availability notwithstanding right of appeal to Minister whose decision shall be final—Penal Committee—Members of it sitting subsequently as Judges in Disciplinary Committee— Impropriety—Medical Ordinance (Cap. 105), ss. 14, 18, 33 (e)—Medical Disciplinary (Procedure) Regulations, 1959, ss. 17, 21, 39, 44, Schedule I, Rules 1, 8, 9, 10.*

Section 18 of the Medical Ordinance which provides that a decision of the Medical Council under the Medical Ordinance shall be subject to appeal to the Minister whose decision shall be final is not a bar to *certiorari* proceedings to quash a purported decision of the Medical Council made without a due and proper inquiry and in breach of principles of natural justice.

When the question for decision is whether a medical practitioner is guilty of infamous conduct in any professional respect, it would not be proper for a Court of law to interfere with the decision of the Medical Council on the facts. There must, however, be a *due and proper inquiry* before the Medical Council, and it is in this field that the medical practitioner is entitled to seek the intervention of the Courts of law in an appropriate case if there has been a failure to follow the principles of natural justice.

A disciplinary inquiry held by the Medical Council in terms of the Medical Disciplinary (Procedure) Regulations published in the *Ceylon Government Gazette* No. 11,980 of 27th November 1959 has to be conducted in a judicial manner and is of a quasi-judicial nature. The inquiry must be conducted with a grave sense of responsibility and strictly in accordance with the procedure laid down in the Regulations.

The principle of natural justice, that those who decide must hear, is one that is applicable whenever the rights of parties are affected. It is necessary that a Judge should be present at all stages of the trial.

The petitioner in the present application for a writ of *certiorari* was a medical practitioner. The Medical Council, sitting as a Disciplinary Committee, found him guilty on a charge of infamous conduct in a professional respect. Although the quorum necessary to hold a Disciplinary Inquiry was five including the Chairman, the Council consisting of ten out of its eleven members decided to participate in the inquiry. One member was present on the dates when the case for the Council was led and when a portion of the petitioner's case was heard but was absent when the petitioner gave evidence and at the stage of the addresses. He did not participate in the final decision. Another member heard the evidence and participated in the decision but was not present when a material witness for the Council was being cross-examined in respect of a connected charge. Another member was present on all dates except one and participated in the decision, but was absent on the day on which the petitioner was being cross-examined.

Held, that the members of the Council constituted themselves Judges at the inquiry. The absence, therefore, of some of them at material parts of the inquiry resulted in prejudice to the petitioner and a failure to follow the fundamental principles of natural justice in that they had not heard all the oral evidence and the submissions. Accordingly, the final decision of the Disciplinary Committee as a whole was rendered null and void and was liable to be quashed by writ of *certiorari*.

Held further, that it is improper that prosecutors should subsequently adopt the role of Judges. It is anomalous that the Medical Disciplinary (Procedure) Regulations permit the members of the Penal Committee which holds the preliminary investigation to sit in judgment subsequently at the Disciplinary Inquiry.

APPLICATION for a mandate in the nature of Writs of *Certiorari* and Prohibition to quash the proceedings of a disciplinary inquiry held by the Ceylon Medical Council.

H. W. Jayewardene, Q.C., with *C. Ranganathan, Q.C.*, *George Candappa*, *Mark Fernando* and *Miss U. J. Kurukulasooriya*, for the petitioner.

S. Nadesan, Q.C., with *E. R. S. R. Coomaraswamy*, *C. Chakradaran*, *S. C. B. Walgampaya* and *Palitha Kohona*, for the respondents.

Cur. adv. vult.

April 24, 1972. ALLES, J.—

This is an application for a mandate in the nature of Writs of Certiorari and Prohibition seeking to quash the proceedings of a disciplinary inquiry held by the Ceylon Medical Council and to restrain them from conducting any further proceedings against the petitioner, who was found guilty by the Council on a charge of infamous conduct in a professional respect.

This is the first occasion, as far as I am aware, when it has been sought to canvass a decision of a professional body like the Ceylon Medical Council before a Court of law and it is therefore necessary at the outset to examine how far the Courts of law can interfere in a matter which pre-eminently comes within the purview of such a body. The findings of a professional body in regard to the conduct of a member of the same profession are matters that properly fall within the ambit of that body who are the best judges as to whether there has been a breach of professional ethics or not. Every profession maintains its own standards and is jealous of its own code of professional conduct. Indeed it is proper in the interests of public policy that such high standards of propriety should be encouraged. What may appear to be a venial lapse capable of condonation by a Court of law may be considered a very serious matter by members of a professional body.

I am doubtful whether the Courts in Ceylon can interfere with the decision of the Medical Council made after *due inquiry* in view of the provisions of the law. The Ceylon Medical Act provides for an appeal

to the Minister from a decision of the Council and the decision of the Minister is final (vide S. 18). In England up to 1950 the decisions of the General Medical Council could be reviewed by the Courts only by way of Certiorari. In 1950 a statutory right of appeal from a decision of the Council was given to the Privy Council and this right is now incorporated in Section 36 of the Medical Acts of 1956. But even though this right to interfere on questions of fact has been given to the Privy Council, the decisions of the Privy Council indicate that they have been slow to interfere with findings of the Medical Council in the interests of public policy and have adopted certain fundamental principles which existed even before the right of appeal to a Court of law was made available. The only occasion, as far as I have been able to ascertain, when the Privy Council reversed a finding of the Medical Council and held that the facts did not disclose infamous conduct in a professional respect by a medical man is the recent decision of the Board in *Faridian v. General Medical Council*[1] (1971) A. E. R. 144.

The cautious approach of the Courts to findings of the Medical Council is illustrated by decisions both prior to 1950 and after 1950 and indicates the reluctance of the Courts of law to interfere with the views of the Council on the question as to what amounts to infamous conduct by a medical man. In 1894 in *Allinson v. General Council of Medical Education and Registration*[2] (1894) Q. B. D. 750 at 763 there appears the oft quoted passage in the judgment of Lopes J.—

> " If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of ' infamous conduct in a professional respect '. "

and Lord Esher in the same case at p. 761 expressed himself in the following language :—

> "There may be some acts which, although they would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is with regard either to his patients or to his professional brethren, may be fairly considered ' infamous conduct in a professional respect '. "

and Davey L. J. concluded his judgment with the following succinct statement of the law at p. 766 :—

> " We have not to say whether the council were right or wrong in the inference which they drew. All we have to say is, whether there was evidence on which they might, as reasonable men, have come to their conclusion."

[1] *(1971) 1 A. E. R. 141.*

[2] *(1894) Q. B. D. 750 at 763.*

The views expressed by the learned Judges in *Allinson's case* have been followed by the Court of Appeal (Scrutton, Greer and Slesser, L. JJ.) in *Rex v. General Council of Medical Education and Registration Ex parte Kynaston* [1] *(1930) 142 Law Times 390.*

In *Fox v. General Medical Council* [2] *(1960) 3 A.E.R. 225 at 227* Lord Radcliffe drew attention to the distinction between an appeal from the Court of Appeal hearing an appeal from a judge sitting alone without a jury and an appeal from the decision of a Council.

> "A judge delivers a reasoned judgment; he puts on record his findings where there is material conflict of evidence and the conclusions that he has formed as to the credibility or reliability of the witnesses he has heard; he indicates his views on the law and the bearing of those views on the conclusion that he comes to. It is with this judgment before it that the appellate court proceeds to its hearing of the appeal. But, in the case of hearings before the Medical Council, no judgment is, of course, delivered. There is only a finding such as we have here that 'the committee have determined that the facts alleged . . . in the charge have been proved to their satisfaction'. It is not possible to tell, except by inference, what has been the weight given by the committee to various items or aspects of the evidence, or what considerations of fact or law have proved the determining ones that have led the members to arrive at the decision finally come to. Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence as a whole and endeavour to form its own conclusion whether a proper inquiry was held and a proper finding made on it, having regard to the rules of evidence under which the committee's proceedings are regulated.
>
> The validity of any determination by the committee is, certainly, dependent on the performance of its statutory duty to hold a 'due inquiry' into the matter, and the Board will need to be satisfied as to this if it is challenged on an appeal."

Lord Radcliffe, while appreciating the difficulties that faced the Board in dealing with a decision of the Council however, maintained that "it would be an undue limitation of their duty and powers in dealing with the statutory appeal to require no more for the upholding of a determination than observance of what are known as the principles of natural justice". Having dealt with the facts which he thought must have been accepted by the Council he then dismissed the appeal.

[1] *(1930) 142 Law Times 390.*

[2] *(1960) 3 A. E. R. 225 at 227.*

The observations of Lord Radcliffe have been followed by Lord Evershed in *Whitby v. General Medical Council* Privy Council Appeal No. 19 of 1963. Lord Evershed stated that—

> " the duty of the Board in such a case as the present will be, after an examination of all the evidence, to say whether the conclusion reached by the Disciplinary Committee is one that could properly and reasonably have been reached by a body of professional men."

and that—

> " the Disciplinary Committee should prima facie be regarded as well qualified to form a judgment, whether the conduct of the person charged is or is not in accordance with the ethical standards of the profession."

The criticism raised in *Whitby's* case was that there were substantial defects in the conduct of the case against the practitioner and though the Board held that there were some defects, they took the view that, in all the circumstances, they were not of so grave and substantial a nature as to warrant an interference by the Board and dismissed the appeal.

In *Sloan v. General Medical Council* [1] *(1970) 2 A.E.R. 686* Lord Guest again expressed concurrence with the observations of Lord Radcliffe aud held that although there were certain irregularities in regard to the framing of the charges which however, were insufficient to plead a failure of the principles of natural justice there were :—

> " no closed categories of infamous conduct and in every case it must be a question for the committee to decide first whether the facts alleged in the charge have been proved and second whether the appellant was in relation to those facts guilty of infamous conduct in a professional respect."

Similar views in regard to the powers of the Board have been expressed by Lord Hodson delivering the judgment of the Board in *Bhattacharya v. General Medical Council* [2] *(1967) 2 A.C. 259 at 265* :—

> " In their Lordships' view that jurisdiction on appeal is not confined to considering whether the alleged facts, if proved, are capable of amounting to infamous conduct in a professional respect, but extends to the consideration whether in the particular circumstances of the case these facts justify a finding of infamous conduct in a professional respect ; but in the latter case their Lordships' board would naturally be very slow to differ from the conclusion of the General Medical Council, to whom is entrusted the decision of these matters as representing the responsible body of opinion in the medical profession upon professional matters."

[1] *(1970) 2 A. E. R. 686.*

[2] *(1967) 2 A. C. 259 at 265.*

Even on the question whether the name of a practitioner should or should not be erased from the register, the Board is slow to interfere with the exercise of the discretion of the Council—*Vide* the observations of Lord Upjohn in *McCoan v. General Medical Council*[1] *(1964) 3 A. E. R. 143 at 147.*

Mr. Jayewardene for the petitioner has strongly urged that we should review the decision of the Council finding the petitioner guilty of infamous conduct in a professional respect because he submits that the evidence, even if accepted, does not establish infamous conduct on the part of his client. In *Faridian v. General Medical Council* (supra) Viscount Dilhorne who delivered the advice of the Board stated whether in relation to a given matter a doctor has been guilty of infamous conduct is a question of mixed fact and law, the question of law being whether on the facts proved or admitted by the doctor, the doctor had been guilty of infamous conduct—*Felix v. General Dental Council*[2] *(1960) 2 A.E.R. 397.* Thereafter the learned Law Lord stated that in the case under consideration two questions had to be considered—(*a*) whether the facts proved were capable of amounting to infamous conduct, and (*b*) whether in the particular circumstances of the case such a finding was justified. He then proceeded to examine the facts and held that in the absence of knowledge the facts did not disclose infamous conduct on the part of the practitioner. Our law does not grant this power to the Courts and in my opinion it would not be proper for a Court to express a view on the facts, whether the particular circumstances established, amounted to infamous conduct or not.

If I were to agree with Counsel's submission and thereby seek to interfere with the decision of the Council on the facts I am of opinion that such a course would amount to a trespass on the functions of a competent body who are the proper judges to decide this issue. I am fortified in this view by the reluctance of the Privy Council to disturb the findings of the General Medical Council in matters of this nature in England and the absence of any provision in the Ceylon Medical Act which confers jurisdiction on our Courts of law to interfere with a decision of the Council made after due and proper inquiry. I would in this connection commend to the Council the wise words of Lord Atkin in *General Medical Council v. Spackman* [3] *(1943) A.C. 627 at 637* :—

> " The conduct alleged against the respondent is conduct from which the public have every claim to be protected, and there would be none more ready to afford protection than the members of the medical profession itself, but it is obvious that the gravity of the charge does not diminish the weight of the evidence necessary to establish it. It increases it. The responsibility, therefore, thrown on the General Medical Council in such cases is grave. Now, it is plain that the statute throws on the council and on the council alone the duty of holding

[1] *(1964) 3 A. E. R. 143 at 147.* [2] *(1960) 2 A. E. R. 397.*
[3] *(1943) A. C. 627 at 637.*

due inquiry and of judging guilt . . . The practitioner charged is entitled to a judgment, the result of the considered deliberation of his fellow practitioners. They must, therefore, hear him and all relevant witnesses and other evidence that he may wish to adduce before them . . . the council are not obliged to hear evidence on oath, but the very conception of prima facie evidence involves the opportunity of controverting it, and I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the prima facie case made from the previous trial. If this is inconvenient it cannot be helped. It is much more inconvenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body. . . . I can imagine no tribunal better qualified to draw deductions from the proved conduct between a doctor and his female patient than the very experienced body of men for instance who sat on the present inquiry."

These observations of Lord Atkin have some bearing on the questions of procedure that were followed in the course of the present inquiry, to which reference will be made later in the course of this judgment.

The attitude of the Courts in England does not, and cannot mean that the Courts in Ceylon are not able to grant relief to the subject in an appropriate case when there has been a breach of the principles of natural justice. This is a fundamental rule of procedure which is always available to the subject when his individual rights have been affected. The Ceylon Medical Act (Ch. 105) provides for the framing of Regulations to hold disciplinary inquiries. The Medical Disciplinary (Procedure) Regulations 1959 published in the *Ceylon Government Gazette* No. 11,980 of November 27, 1959 provides for the procedure applicable in regard to complaints against practitioners, the proceedings at hearings, the manner in which the case against the practitioner is to be conducted, the procedure to be followed in cases of conviction, the procedure to be adopted where the decision of the council is postponed and a variety of connected matters which already indicates that the inquiry has to be conducted in a judicial manner and is of a quasi-judicial nature. The Council does not give reasons for its decision and only intimates to the practitioner whether he has been found guilty or not. When an allegation of misconduct is made against a practitioner—and this must be in the form of an affidavit from the complainant—the practitioner concerned is called for an explanation and the matter is referred to the Penal Cases Committee, which consists of the President and four other members of the Council, who decide whether the material is sufficient for the holding of a disciplinary inquiry. These same members are entitled to sit on the Tribunal which hears the case against the practitioner. In my view, this is an unsatisfactory procedure and likely to cause prejudice to the practitioner and may be the cause of a justifiable complaint, even though it may be permissible under the Regulations. The Medical Disciplinary (Procedure) Regulations make ample provision for an allegation against

a practitioner to be considered adequately by his professional brethren but in view of what Lord Wright described in *Spackman's* case at pp. 639, 640 as the "tremendous powers" given to the Council "which may close a man's professional career and ruin him financially and socially" it is absolutely necessary that a disciplinary inquiry should be conducted with a grave sense of responsibility and strictly in accordance with the procedure laid down in the Regulations. There must be a *due and proper inquiry* before the Council, and it is in this field that the practitioner is entitled to seek the intervention of the Courts of law in an appropriate case if there has been a failure to follow the principles of natural justice. In such a case the decision of the Council is reviewable by way of Certiorari. In *Spackman's* case Lord Wright after referring to the wide powers given to the Council under the Medical Act and the Regulations made thereunder observed at p. 640 that Parliament had not provided for any appeal from the decisions of the Council (this was prior to 1950) and then stated :—

> "The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power. Its use may nullify or discharge an order made by the council, but the grounds on which certiorari may be granted are strictly limited. They may, I think for purposes of this case, broadly be taken to be (i) the ground that the council's proceeding was *ultra vires*, (ii) the ground which without any very great precision has been described as a departure from 'natural justice'. The former ground is not likely to be invoked in connexion with the orders of the council. Their powers are so wide and undefined that the possibility of a case of *ultra vires* is theoretical and almost fantastic. It is not to be contemplated that the council would proceed without solid prima facie grounds or otherwise than in good faith. The question of a failure of 'natural justice' is what is to be considered in this appeal, but, before considering the meaning of these words, I must first observe that they can in this case be properly taken as a description of what the council has to do, namely, to make '*due inquiry*' *which under the statute is the governing criterion, that is, an independent inquiry by the council as the body responsible for its own decision.*
>
> 'Natural justice' seems to be used in contrast with any formal or technical rule of law or procedure."

Mr. Jayewardene has strongly urged that in this case there has been a denial of the principles of natural justice in the conduct of the inquiry against his client in that at material parts of the inquiry some of the members of the Council have been absent and consequently his client has been prejudiced in the final result. One member, Dr. Rajanayagam, was present on the dates when the case for the Council was led but was absent thereafter and did not participate in the decision. Another

member, Dr. C. L. A. de Silva, participated in the decision but was not present when a material witness for the Council was being cross-examined. Another member, Dr. M. O. R. Medonza, was present on all dates except one and participated in the decision. He was absent on the day on which the petitioner was being cross-examined. Another member, Dr. Wijeygoonewardene, was present only on one date and did not participate in the decision. It will be necessary to examine what transpired at the various meetings and arrive at a conclusion whether the absence of some or all of these members at various stages of the inquiry has resulted in prejudice to the petitioner and a failure to follow the principles of natural justice. The Earl of Selbourne in *Spackman v. Plumstead District Board of Works*[1] *10 A. C. 229* cited by Lord Wright in *General Medical Council v. Spackman* (supra) at p. 641 has put such a situation in very apposite language :—

> " this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him."

Before dealing with the evidence that was led at the various meetings it is necessary to consider certain provisions of the Ceylon Medical Act and the Regulations made thereunder and also draw attention to the circumstances which led to the charges being framed against the petitioner.

The Ceylon Medical Council consists of eleven members including a President and a Vice President and hold office for a period of five years. Very wide powers are given to them—mostly based on the corresponding provisions of the General Medical Council of England. An important function, if not the most important of all, is the right to hold a disciplinary inquiry into the conduct of a medical practitioner which entitles them to erase his name from the register of medical practitioners, if he is found guilty of having committed an act of infamous conduct in a professional capacity. For this purpose Regulations have been made under the Act providing for the disciplinary procedure to be followed. I have already indicated at the commencement of this judgment the precautionary measures and the procedure which the Council has prescribed for themselves to ensure that the disciplinary inquiries are properly conducted. Adequate notice is given to the practitioner concerned as to the nature of the complaint, charges are framed, lawyers may be retained and the proceedings are conducted in a judicial manner. The quorum for a meeting of the Council is five and after evidence is recorded and addresses are made, the Council determines whether a charge has been proved. Thereafter the Council may postpone its decision as to whether the name should be erased from the register, to a subsequent meeting. The Council does not give reasons for its decision and the decision is conveyed to the practitioner by the President.

[1] *10 A. C. 229.*

In order to appreciate Counsel's submission it is also necessary to examine the events which led to the charges being framed against the petitioner.

The petitioner, Mr. A. T. S. Paul (I choose to call him Mr. Paul because he preferred to be so addressed at the Disciplinary Inquiry) is an eminent thoracic surgeon and Mr. Nadesan for the Council does not challenge his skill and attainments as a Surgeon. Since 1950 he was attached to the General Hospital Thoracic Unit with Dr. T. D. H. Perera as his Registrar. After a year a second Thoracic Unit was established with Dr. T. D. H. Perera as its Head. There were two other Surgeons—Dr. Rasaratnam and Dr. Natcunam—under Mr. Paul and Dr. W. F. Perera was the Surgeon assisting Dr. T. D. H. Perera. There is ample evidence that since 1960 there has been professional jealousy between Mr. Paul and Dr. Perera, resulting in a bitter campaign between these two practitioners. In 1960 Mr. Paul faced a Public Service Commission Inquiry at which 39 charges were brought against him, at which Dr. Perera played a major part. According to the petitioner it was Dr. Perera who " instigated the Director of Health to make a false allegation that he had tremendous mortality and should be retired for inefficiency ". The petitioner was exonerated of all charges against him and the sequel was a series of charges against the Director of Health for making false allegations. In June 1969 the petitioner with the help of an engineer invented a Heart-lung machine which claimed to be more effective than the Hufnagel Machine used at the Hospital. A witness for the Council Dr. K. A. T. W. Perera admitted that the petitioner's machine was less costly than the Hufnagel machine, could be used without blood and had been successfully used for operations. On 13th June 1969, a photograph appeared in the newspaper called " Sun " which contained a photograph of the petitioner and a nurse with the machine. This photograph formed the subject matter of the first charge against the petitioner and the complaint to the Council was made by Dr. Perera in his affidavit P7 of 22nd April 1970. The second and third charges against the petitioner was the result of two publications in the " Ceylon Observer " marked P3 and P4. P3 appeared in the late edition of 9th February 1970 under the caption " Talking Point " and reads as follows:—

TALKING POINT

Four year old A. D. Nimaladasa was a " Blue blooded " boy from his birth. He was weak and feeble, when his father took him to Kurunegala Hospital. Doctors found that little Nimaladasa had a hole in his heart and they transferred him to the General Hospital, Colombo.

The doctors at the General Hospital were of the opinion that Nimaladasa should undergo surgical treatment.

He was taken up for an operation last Saturday by an eminent surgeon. The hole was patched up with Teflon patch and he was sent to the Intensive Care Unit with moderate blood pressure.

After two hours Nimaladasa started to bleed from his chest and his blood pressure went down.

The surgeon found that Nimaladasa was bleeding from the hole he patched up a few hours before.

The boy died.

The City Coroner, Mr. Egerton B. Weerakoon, who held an inquest into his death has returned a verdict of surgical misadventure.

The petitioner states that he read P3 when he was on leave in Jaffna and on his return to Colombo several persons, including his professional brethren and friends, inquired from him whether he was responsible for the operation described in P3. He has called Dr. D. J. Attygalle, Dr. Thanabalasunderam, a journalist Baron de Livera and a family friend Mrs. Udawatte in support. He therefore stated that he felt that his professional reputation was at stake and he wrote the letter P14 to the Editor of the newspaper dated 13th February 1970. P14 is in the following terms :—

Talking Point—9th February

Dear Sir,

Reference the lurid details of an operation for " hole in the heart " at the Colombo General Hospital, I would be grateful if you would publish that this case has no reference or connection with me, as the details as given in your article, has led to a misconception that the operation was performed by me.

Sgd. A. T. S. Paul,
Thoracic Surgeon,
General Hospital.

This letter resulted in the publication on 17th February 1970 of the following denial under the caption "NOT ME". P4 is in the following terms and was published on 17th February 1970 :—

NOT ME

Dr. A. T. S. Paul in a letter to the " Observer " states that the reference in the Talking Point of February 5 (should be February 9) to an unsuccessful hole in the heart operation at the Colombo General Hospital has no reference or connection to him.

There is no material which might suggest that the petitioner was actuated by any motive other than that of safeguarding his reputation when he wrote P 14.

It is not disputed that Dr. T. D. H. Perera performed an operation on one *A. D. Nimalaratne* and not *Nimaladasa* for a *patent ductus* and not a "*hole in the heart*" and that the operation was performed on 7th February 1970 (Vide P15—Certificate of Death).

On 12th March 1970 Dr. T. D. H. Perera made a complaint to the Permanent Secretary (P9) in which he alleged that the publication of P3 and P4 had resulted in damaging his reputation as a heart surgeon and inquiring from the Permanent Secretary what steps the Department contemplates taking to vindicate his reputation. It was thereafter that Dr. Perera submitted affidavits P7 and P8 to the Medical Council in consequence of which the disciplinary inquiry was commenced by the Council. Prior to P9 being written, the petitioner too had forwarded an affidavit to the Council on 26th February 1970 against Dr. Perera in regard to certain derogatory remarks which Dr. Perera is alleged to have made against a brother officer when he read a paper before the Clinical Association. That he did make certain derogatory remarks is supported by the evidence of Dr. Mirando, the then President of the Council and the Circular D1 which was sent thereafter to all medical officers warning them that they should not make derogatory references to their brother officers at public talks. It was suggested at the hearing of the appeal that the affidavits P7 and P8 were retaliatory in nature consequent on the petitioner's affidavit of 25th February 1970 against Dr. Perera.

On receipt of P7 and P8 the Medical Council wrote to the petitioner by P12 of 27th April 1970 forwarding the affidavits and calling for any explanation before 22nd May 1970 and stating that the complaint had been referred to the Penal Cases Committee. To P12 the petitioner sent the letter P13 of 2nd May 1970 in which he stated that it was necessary to dissociate himself with the operation referred to in P3 because "rumours were being circulated in Colombo that he was the surgeon concerned in the fatal operation". He then added that Dr. Perera had deliberately tried to mislead the Council in that he did not perform the operation on Nimaladasa as reported in "Talking Point" (certified copies of the Death Register attached) Dr. T. D. H. Perera did not perform a fatal operation on *Nimaladasa* which he denied in his sworn affidavit. The certified copy of the Death Register (P15) indicates that the name of the patient was *A. D. Nimalaratne.* P13 therefore does contain an incorrect statement in regard to the name of the patient. P16 was the petitioner's reply to the publication in the "Sun".

On 17th July 1970 the following Charge Sheet was presented against the petitioner. It is marked P1.

That being registered under the Medical Ordinance (Cap. 105 of the Legislative Enactments of Ceylon, 1956)—

(1) you did advertise for the purpose of obtaining patients or promoting your own professional advantage by procuring or sanctioning or knowingly acquiescing in the publication in the issue of "the Sun" dated 13th June 1969 of an article entitled "HEART-LUNG MACHINE MADE IN CEYLON", together with a photograph of, *inter alia*, yourself, an instrument purporting to be a heart-lung machine and a

person dressed as a nurse thereby commending or directing attention to your professional skill, knowledge, service or qualifications;

(2) (*a*) you did advertise for the purpose of obtaining patients or promoting your own professional advantage by procuring or sanctioning or knowingly acquiescing in the publication in the issue of the "Ceylon Observer" dated 17th February 1970 of an article entitled "NOT ME" with reference to an article entitled "TALKING POINT" published in the issue of the "Ceylon Observer" dated 9th February 1970 thereby commending or drawing attention to your professional skill, knowledge, service or qualifications;

(*b*) that in the course of the same transaction referred to in charge 2 (*a*) above by procuring or sanctioning or knowingly acquiescing in the publication of the said article entitled "NOT ME" with reference to the said article entitled "TALKING POINT", you did thereby depreciate the professional skill, knowledge, service or qualifications of another registered medical practitioner, viz., Mr. T. D. H. Perera, F. R. C. S.,

and that in relation to the facts alleged you are guilty of infamous conduct in a professional capacity.

On 15th February 1971 after inquiry, the President made the order P2 which he has conveyed by letter to the petitioner. P2 is in the following terms :—

Dr. Paul, the Council views with great concern matters concerned with the charges made against you :—

re the 1st charge the Council find that the article referred to, does not directly draw attention to your professional skill, knowledge or qualifications. Hence the Council is not satisfied that the charge has been proved. However the Council wishes to draw your attention to the fact that the Council expects a Senior Medical Practitioner of your standing to have acted with greater discretion than pose for a press photograph knowing that it would be published in the lay press.

re the charge 2 (*a*) the Council finds you guilty. On this charge the Council has decided to "postpone its decision" for a period of one year. The Council finds you not guilty of charge 2 (*b*).

In view of the findings of the Council on Charges (1) and 2 (*b*) the only matter that arises for consideration at present is how far the principles of natural justice have been violated in regard to the decision of the Council on Charge 2 (*a*) since some members of the Council were absent on certain dates of the inquiry. The quorum necessary to hold a Disciplinary Inquiry was five including the Chairman but in this case

the Council consisting of ten out of its eleven members decided to participate in the inquiry. In doing so the members of the Council constituted themselves Judges in the matter and as judges, it was their duty to listen to all the evidence, the submissions of Counsel and share their collective wisdom in deciding whether the practitioner was or was not guilty of any of the charges. This becomes all the more important when the Regulations do not require the Council to give reasons for their decision and the practitioner is unaware whether there has been a difference of opinion among the members of the Council. Regulation 39 which provides for the taking of votes indicates that the Chairman shall call upon the members to signify their votes by raising their hands and shall then declare that the question appears to have been determined in the affirmative or negative as the case may be. Regulation 39 (2) only applies when the result so declared is challenged by a member of the Council in which case the Chairman shall " *announce* the number of members of the Council who have voted each way and the result of the vote ".

Although provision is made in the Regulations for a quorum of five persons including the Chairman to constitute a Disciplinary Tribunal there is nothing to prevent the entire Council from sitting at the proceedings of a Disciplinary Inquiry. In this connection it is pertinent to note that under the rules of the Penal Cases Committee the validity of any proceedings of the Committee shall not be affected by any vacancy among the members thereof. There is no corresponding provision in the Regulations governing the procedure at the hearing of a case where the conduct of the practitioner is in issue.

The members of the Council who participated in the disciplinary inquiry were the following :—

1. Dr. E. M. Wijerama—President
2. Dr. C. L. A. de Silva
3. Dr. K. M. C. de Silva
4. Dr. W. D. L. Fernando
5. Dr. V. Kumaraswamy
6. Dr. M. O. R. Medonza
7. Dr. Rienzie Peiris
8. Dr. S. Rajanayagam
9. Dr. R. P. Wijeyratne
10. Dr. Wijeygoonewardene

These 10 members have been made respondents to this application. The inquiry commenced on 29th August 1970 on which date the Proctor appearing for the Council opened the case and led the evidence of Dr. T. D. H. Perera. All the members were present except Dr. Wijeygoonewardene. This member was absent on all dates of the inquiry except on 2nd October 1970 when Counsel for the petitioner addressed

the Council at the close of the prosecution that no case had been made out against his client. The Council, however, did not agree with Counsel's submissions. On 11th September Dr. T. D. H. Perera was cross-examined by Counsel and Dr. C. L. A. de Silva was absent on that date. On 20th September Dr. Perera was further cross-examined and the evidence of two other witnesses was led. All members were present on that date and also on the subsequent date (2nd October 1970). On 12th October the petitioner's case commenced and was continued on 30th October and all members were present on both dates. On 31st October a photographer R. Wijeyratne gave evidence and the petitioner testified on his own behalf. On this day Dr. Rajanayagam was absent. The examination-in-chief and the cross-examination of the petitioner was continued on 4th November. On this day Dr. Medonza was absent and Dr. Rajanayagam who was present left before the proceedings commenced. The petitioner's case was concluded and addresses of Counsel commenced on 3rd December on which date Dr. Rajanayagam was again absent. On this date Counsel protested that the entire inquiry was vitiated by the absence of Dr. Rajanayagam who had listened to the evidence and participated actively in the proceedings. It was Counsel's further submission that his client was deprived of the vote of Dr. Rajanayagam which might have been in his favour and which may have influenced the other members of the Council. The President however overruled the objection and decided to continue with the inquiry. The address of Counsel was continued on the subsequent and final date 15th February 1971 on which date too Dr. Rajanayagam was absent . It was brought to the notice of the parties that Dr. Rajanayagam had been taken ill and was unable to participate in the proceedings any further.

I do not think the absence of Dr. Wijeygoonewardene can be said to have prejudiced the petitioner's case. He did not hear the evidence and was only present on a date when Counsel addressed the Council that no prima facie case had been made out against his client. Whatever views he may have had after listening to Counsel, could not have influenced the other members of the Council in regard to their decision on Charge 2 (*a*).

Dr. C. L. A. de Silva heard the evidence and participated in the deliberations but was not present on the date when Dr. T. D. H. Perera was cross-examined. Although the proceedings before the Council arose out of a complaint made by Dr. Perera, his evidence would have been material if there was a conviction on the third charge. He was no doubt severely cross-examined by Counsel in regard to a number of matters which affected his credibility—his claim that he had performed 35 cases on "hole in the heart" operations without mortality; the operations which he performed in conjunction with the "Hope Ship" doctors; his address to the Clinical Association on 24th February 1970 which resulted in the President criticising him for making derogatory remarks about his fellow practitioners; the animus he bore against the petitioner and that the articles P3 and P4 did not necessarily refer to

him as the surgeon who performed the unsuccessful operation as there were five thoracic surgeons at the General Hospital. This appears to have been accepted by the Council in view of the acquittal of the petitioner on the third charge. I agree with the view of the Council that the credibility of Dr. Perera was not in issue except perhaps on which the petitioner has now been found not guilty. As the President remarked in the course of the inquiry even if everything adverse could be said about Dr. Perera it could not affect the conduct of the petitioner in the publication of the article contained in P4 which according to the Council, taken in conjunction with P3 would indicate that the petitioner had advertised himself and thereby was guilty of infamous conduct in a professional respect by drawing attention to his professional skill. I am therefore inclined to take the view that the absence of Dr. C. L. A. de Silva on 11th September 1970 cannot affect the decision of the Council in regard to the finding on Charge 2 (*a*).

The absence of Dr. Medonza on the date when the petitioner was being cross-examined cannot however be so easily brushed aside. Although the record indicated that Dr. Medonza was present on the 4th November it was agreed by Counsel on both sides that this is an error and that Dr. Medonza was absent on this date. One of the essential ingredients of the Charge 2 (*a*) was whether the petitioner caused the publication of P4 *with the intention* of advertising himself for his own professional advantage. The petitioner gave evidence in chief and stated that he never had such an intention; that his only motive in writing to the Editor was to stifle the malicious gossip that was being disseminated that he had performed an unsuccessful operation. If his evidence-in-chief was accepted he had necessarily to be found not guilty on Charge 2 (*a*). His cross-examination appears to have convinced the Council that that was not his intention and they came to a finding adverse to him on this issue. Dr. Medonza, even without hearing his evidence in cross-examination, must be presumed to have participated in the decision of the Council to find him guilty. I am therefore of opinion that there is justification in the submission of Counsel that the absence of Dr. Medonza on 4th November and his participation in the final decision resulted in prejudice to his client.

Dr. Rajanayagam heard the entire case for the Council and also a portion of the petitioner's case but was absent when the petitioner gave evidence and at the stage of the addresses. The petitioner therefore did not have the benefit of his views at the time the Council deliberated on their decision. As Counsel remarked, a situation may have arisen at the time of voting when Dr. Rajanayagam's vote may have tipped the scale in his favour. If one were to take an analogy from a jury trial when one of the jurors is taken ill or is unable to continue to function as a juror the normal course would be for the entire jury to be discharged and a fresh trial ordered by the Judge.

In regard to the absence of Dr. Medonza and Dr. Rajanayagam at material parts of the inquiry, I think the petitioner has a justifiable grievance that the principles of natural justice have not been followed in regard to the inquiry against him. In support of his submission that there had been a failure to follow the principles of natural justice in that members of a judicial tribunal had not heard all the oral evidence and the submissions, Mr. Jayewardene strongly relied on the decision of the Nova Scotia Supreme Court in *Regina v. Committee on Works of Halifax City Council, ex parte Johnston.*[1] In this case in accordance with Section 757 of the Halifax City Charter the City Building Inspector submitted a report to the Committee of Works that a certain building was in such a state of non-repair as to be no longer suitable for habitation or business purposes. The committee appointed a time and place for the consideration of the report, gave the owner notice of the meeting, furnished him with a copy of the report and permitted him to appear and be heard. Consideration of the report extended over five meetings of the Committee. The quorum required for a meeting was four and at all meetings the required quorum was present. Of the five meetings, at two meetings, on 6th July and 18th July there was argument and evidence against the demolition of the building. At the meeting of 6th July Aldermen Macdonald, O'Brien and Wyman were absent and at the subsequent meeting of 18th July Alderman Macdonald was absent. On 5th September it was moved by Alderman Connolly and Alderman Fox that the domolition order be not approved but this motion was defeated 6-2. Alderman O'Brien and Alderman Macdonald then moved that the building be demolished within six months and all voted for the demolition. Of the eight members who voted for the demolition five members were absent from one or more meetings of the Committee at which the demolition order was discussed, yet these five members all took part in the voting dealing with the demolition of the building. The mover and the seconder were both persons who were absent from the meeting of July 6th when the evidence and the arguments in relation to the demolition were being discussed. One of the questions that was raised before the Supreme Court was that the Committee acted contrary to natural justice and not in the spirit of judicial decision, in that members of the Board were not present at all of the hearings, and still participated in the discussion and voted for demolition on 5th September 1961. The Chief Justice held that there was a violation of the principles of natural justice.

I agree that the facts of the Canadian case are stronger than the facts under consideration in the present case but the principle appears to be established that when a person exercising judicial functions does not hear a material part of the case he is disqualified from acting as a Judge. Furthermore a Judge who has heard the evidence should be able to give

[1] *(1962) 34 D. L. R. 45.*

the benefit of his views to his brother Judges at the time the decision is made. Justice MacDonald in the Canadian case puts the matter in this forceful way :—

> " where one or more members of an adjudicatory body (such as a City Council) has failed to attend meetings at which important aspects of a matter involved in the adjudication have been presented or discussed, he thereupon becomes disqualified from participating in the final deliberations of that body or in the decision of that body upon that matter ; and that if he does so participate therein, the decision of that body is vitiated thereby and must be set aside."

Justice MacDonald also relied on several English and Canadian cases in support of the proposition that when qualified members of an adjudicating body have been joined in their later deliberations and decisions by members who had by reason of missing previous meetings disqualified themselves, not only are such persons disqualified by reason of first hand knowledge from participating in final decisions but their presence at their discussions also disqualifies the body as a whole and renders its decisions invalid.

In the present case Dr. Medonza took an active part in the proceedings and often put questions to both witnesses and Counsel, and his views in regard to the culpability of the petitioner would have weighed with the other members of the Council at the time of the deliberations on the final verdict. It is therefore unfortunate that he did not have the benefit of listening to the cross-examination of the petitioner particularly in regard to his object in causing the publication of P4. He may have been sufficiently impressed by his answers in cross-examination to confirm the evidence given in chief that the petitioner had no ulterior motive in causing the publication of the impugned article. S. A. de Smith in Judicial Review of Administrative Action (2nd Ed.) at p. 206 puts it in this way :—

> " It is a breach of natural justice for a member of a judicial tribunal or an arbitrator to participate in a decision if he has not heard all the oral evidence and the submissions. The same principle has been applied to members of administrative bodies who have taken part in decisions affecting individual rights made after oral hearings before those bodies at which they have not been present."

De Smith cites several cases in support of this proposition. In *in re Plews and Middleton*[1] in the course of arbitration proceedings one of the arbitrators examined a witness in the absence of the other arbitrators and the parties, but both arbitrators concurred in the judgment. It was held by Coleridge J. that the taking of evidence by one arbitrator in the absence of the other arbitrator was fatal to the validity of the proceedings being contrary to the principles of natural justice.

[1] *(1845) 14 L. J. Q. B. 139.*

In *King v. Huntingdon Confirming Authority*[1] the Confirming Authority was required to review a licence which had been considered by the licencing authorities. Two meetings of the Confirming Authority were held one on April 25th and the other on May 16th. Some of the justices who did not sit on April 25th when the conditions of the licence were considered sat at the meeting of May 16th which reached a decision for the purposes of confirmation. Romer J. in his judgment at p. 717 stated :—

> " that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown."

Might not the eloquence of Dr. Medonza who did not hear Mr. Paul's evidence in its entirety have persuaded the other members to make an order adverse to the petitioner and might not Dr. Rajanayagam, if he was present at the final meeting, have been able to persuade the members of the Council to give a decision in favour of the petitioner?

The principle of natural justice, that those who decide must hear, is one that is applicable whenever the rights of parties are affected. The presence of the Judge at all stages of the trial has been commented upon by Lord Denning in the Privy Council in *Tameshwar v. Reginam*[2]. This was a criminal case in which the jury viewed the scene in the absence of the Judge. Said Lord Denning at p. 688—

> " Their Lordships think it plain that if a judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case, the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure ; and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked ; and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand."

These observations might well be applicable to Dr. Medonza who at all times took a lively interest in the proceedings.

Finally, there is the interesting case of *Munday v. Munday*[3], a divorce action where the husband sought a variation of the order of maintenance to be paid by him to the wife. The husband's complaint was heard on

[1] *(1928) 1 K. B. D. 698.* [2] *(1957) 2 A. E. R. 683.*
[3] *(1954) 2 A. E. R. 667.*

February 3 by three justices ; the husband gave evidence in chief and the justices adjourned the case until February 17, to enable him to produce certain accounts and files. The same three and two additional justices sat at the adjourned hearing on February 17. A further adjournment was granted to enable the wife's solicitor to examine the accounts and files but the wife gave her evidence on February 17th to avoid the need for her further attendance in Court. The case was concluded at the third hearing on March 3rd and the three justices then sitting, of whom two were the two additional justices on February 17th and the third who had not sat either on February 3rd or February 17th, dismissed the husband's complaint. It was held in appeal by the husband that it was clear from the statement of their reasons that the three justices who made the order of March 3rd dismissing the husband's complaint had acted on evidence given by the husband at the fresh hearing of February 3rd at which none of the three justices had been present. Quite apart from a breach of the provisions of the Magistrate's Act 1952, the Court held that "justice had not manifestly been done". There was a quorum present at the final meeting and reasons had been delivered. In the present case though there was a quorum present at all meetings, the absence of reasons given by the Council make it impossible to even speculate how the members of the Council arrived at their decision.

Having regard to the principles laid down in the above cases, I am of the view that the petitioner is entitled to succeed in his application for a writ of certiorari to quash the proceedings of the Council finding him guilty on Charge 2 (*a*) on the ground that there has been a violation of the principles of natural justice.

There is another aspect of this same principle which, in the circumstances of this case arises for consideration. Under Section 14 of the Medical Act the members of the Council hold office for a term of five years and are eligible for re-election or re-nomination. Since the Penal Cases Committee which investigated into the complaint against the petitioner must consist of the President and four members of the Council, some of the ten members of the Council who sat on the Disciplinary Inquiry had to be members of the Penal Cases Committee which investigated the case against the petitioner.

Subsequently I have been informed by the Registrar of the Medical Council that the members of the Penal Cases Committee who investigated the complaint against the petitioner and submitted a report to the Council consisted of—

Dr. Wijerama—President

Dr. W. D. L. Fernando

Dr. M. O. R. Medonza

Dr. S. Rajanayagam

Dr. R. P. Wijeyratne

According to Rule 1 of the 1st Schedule to the Regulations, the Penal Cases Committee shall consist of the person who for the time being is President of the Council and 4 other members elected by ballot. The constitution of the Penal Cases Committee that considered the petitioner's case before deciding to submit a report to the Council consisted of five members who subsequently functioned as judges at the Disciplinary Inquiry.

Rules 8, 9 and 10 deal with the duties of the Penal Cases Committee and read as follows: —

8. The Committee shall have the following duties :—

   (*a*) to investigate any complaints or reports which are referred in accordance with these regulations to the Committee by the President or by the Council as the case may be, and

   (*b*) to report to the Council upon such investigations.

9. Where a complaint or report is referred to the Committee under these regulations, the Committee shall, as soon as may be practicable, investigate such complaint or report, and having regard to any explanation or affidavits preferred therewith, consider such complaint or report, and report thereon to the Committee.

10. The Committee may, if it thinks fit, before making its report on any complaint or report referred to it, cause such further investigations to be made or obtain such advice or assistance from the Proctor or counsel, as it may consider necessary or requisite in the circumstances of the case.

Having regard to the wide powers given to the Penal Cases Committee under the above rules it is impossible to state to what extent the members of the Council who heard the petitioner's case and who had earlier functioned as members of the Penal Cases Committee, were influenced in their ultimate decision by the investigations conducted by them as members of the Committee. The Regulations, however, provided that the President of the Council shall preside at meetings of the Penal Cases Committee and could also function as a member of the Disciplinary Inquiry. Dr. Wijerama therefore had no alternative but to preside at the hearings of the Penal Cases Committee and was entitled, as a member of the Council, to sit on the Tribunal and preside at its meetings. This was unfortunate, particularly as an application was made at the commencement of the proceedings that he should not function as a member, as the petitioner had cited him as a witness to speak to certain facts. Counsel drew attention to Regulation 44, which empowered a member of the Council to act as Chairman, if the President or Vice President was unable to act. In the course of the proceedings Dr. Mirando, the former President, did speak to an exchange of words between Dr. Wijerama and the petitioner in connection with the complaint of Mr. Paul against Dr. Perera on 24th February 1970. The petitioner alleged

that Dr. Wijerama was endeavouring to "soft pedal" the allegation against Dr. Perera and wanted Dr. Wijerama cited as his witness to give evidence on his behalf. It is no answer to such an application, that Counsel for the petitioner could thereby obstruct the proceedings of the inquiry by summoning all the members of the Council as witnesses. No Counsel of any standing would or could be expected to act in such an irresponsible manner. In the circumstances it might have been better if Dr. Wijerama did not sit on the Tribunal which heard the petitioner's case. The Council however overruled the application to call Dr. Wijerama as a witness, and Dr. Wijerama continued to preside at the sittings. I have no doubt that, having regard to the responsible position which the President held, Dr. Wijerama would have been particularly careful, not to allow his judgment to be coloured in any way by the nature of the investigations he had previously conducted, or be influenced by any personal knowledge of the facts, but it is a well nigh impossible task for any person in such circumstances particularly if he is a layman to exercise that degree of detachment essential for the conduct of a judicial proceeding. But although Dr. Wijerama decided to preside over the sittings of the Disciplinary Inquiry, it was not essential that the other members of the Penal Cases Committee should have functioned as members of the Disciplinary Committee which heard the petitioner's case particularly as the Standing Orders required only a quorum of five members for a sitting of the Council.

De Smith enunciates the principle in the following way at p. 253 :—

> A person " is disqualified if he has personally taken an active part in instituting the proceedings, or has voted in favour of a resolution that the proceedings be instituted ; for he is then in substance both judge and party."

In *R. v. Milledge*[1] a complaint was made in regard to a nuisance. The Town Council was directed to abate the nuisance. They considered the report of a medical man and passed a resolution that necessary steps be taken to abate the nuisance. Summons was taken out and the order made. Milledge and Robens were members of the Council when the resolution was passed and took an active part in the discussions. They were on the bench of justices when the summons came up for hearing. The defence objected on the ground that they were prosecutors. Said Cockburn, C. J. at p. 333 :—

> " The mere fact that some of the council who passed resolutions for this prosecution were borough justices might have been no objection to the order, if these justices had not assisted at the hearing of the summons. But I cannot see how we can get over the fact of their presence when the order was made. They practically made an order in a case where they were prosecutors."

[1] *(1879) 4 Q. B. D. 332.*

In *R. v. Lee*[1] one Shaw was prosecuted for the sale of meat unfit for human food under the Public Health Act. The prosecution was instituted in pursuance of a resolution passed at a meeting of the Sanitary Committee of the borough and approved by a resolution passed at a subsequent meeting directing the town clerk to take steps against Shaw. Lee was a member of the corporation and of the sanitary committee and was present at the meeting at which the latter resolution was passed and concurred in the resolution. He later sat as one of the justices at the hearing of the information and acted as Chairman of the justices.

Field, J. stated that :—

"There is no warrant for holding that, where the justice has acted as a member by directing a prosecution for an offence under the Act, he is a sufficiently disinterested person as to be able to sit as a judge at the hearing of the information."

In *Queen v. Gaisford*[2] a justice taking part in instituting proceedings against a ratepayer was held, following *R. v. Milledge,* to be deemed to be within the rule disqualifying him from sitting as a Magistrate on the ground that it afforded a reasonable suspicion of bias on his part though there might not have been bias in fact.

In *Leeson v. General Council of Medical Education and Registration*[3] the Council held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect and removed his name from the register of medical practitioners. The proceedings were instituted by the managing body of a company called the Medical Defence Union, whose object was to protect the character of medical practitioners and to suppress and prosecute unauthorised practitioners. Two out of the twenty-nine persons who held the inquiry were members of the Medical Defence Union but not of the Managing body. It was held by Cotton and Bowen L.JJ., Fry L. J. dissenting, that the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry. Bowen L. J. held that as a matter of substance and of fact the two members were not accusers on this particular occasion but he severely criticised the action of the Council in including them as members of the Tribunal. He said—

"I think it is to be regretted that these two gentlemen, as soon as they found that the person who was accused was a person against whom a complaint was being alleged by the Council of a society to which they subscribed, and to which they in law belonged as members, did not at once retire from the Council. I think it is to be regretted, because judges, like Caesar's wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the General Medical

[1] *(1882) 9 Q. B. D. 394.* [2] *(1892) 1 Q. B. D. 381.*

[3] *(1889) 43 Ch. D. 366.*

Council will think it reasonable advice that those who sit on these inquiries should cease to occupy a position of subscribers to a society which brings them before the Council."

The dissenting Judge Fry L. J. stated—

"I think that it is a matter of public policy that, so far as is possible, judicial proceedings shall not only be free from actual bias or prejudice of the judges, but that they shall be free from the suspicion of bias or prejudice ; and I do not think that subscribers to associations for the purpose of carrying on prosecutions can be said to be free from suspicion of bias or prejudice in the case of prosecutions instituted by the associations to which they subscribe."

In the present case the position is much more serious than what transpired in *Leeson's case* since five of the investigators sat as Judges at the Disciplinary Inquiry and subsequently came to a finding adverse to the petitioner. At the argument before us we were not informed of the provisions of the law in England corresponding to the Penal Cases Committee, but in view of the decision in *Leeson's case*, it seems reasonable to infer that in England since 1889 they adopted a principle no different from that laid down in *Leeson's case*, namely that it is improper that the prosecutors should subsequently adopt the role of Judges. This would therefore be an added reason why the proceedings have to be quashed due to a failure to follow the principles of natural justice, the ground being the likelihood of bias towards the issue.

Before I conclude I wish to advert to an unfortunate episode that occurred when this application was being argued before us. Under Regulation 17 the decision of the Council whether the name of the practitioner should be erased from the relevant register was postponed from 15th February 1971, for a year. The petitioner has averred in his petition that this in itself has caused him grave mental enxiety sufficient to cause serious detriment to his professional work. When the decision of the Council is so postponed under Regulation 21, the practitioner has to be notified six weeks previously, of the date of the subsequent meeting requiring him to appear. Three weeks before the date fixed for the meeting the practitioner can ask his case to be reconsidered on fresh material. When the notice is sent under Regulation 21 the President may require the practitioner to furnish the Registrar with the names and addresses of a specified number of persons to whom reference may be made as to the character of the practitioner. The petitioner filed this present application on 16th April 1971 and Proctors for the Council tendered their statements of objection on 17th August 1971. The "subsequent meeting" of the Council at which further action was to be taken against the petitioner was fixed for 17th March 1972. The present application was being argued on the 25th, 26th, 28th January and 1st, 2nd and 3rd February 1972. On 28th January 1972 which was six weeks prior to the subsequent meeting fixed for 17th March a

notice was sent under registered cover under Regulation 21 requiring the petitioner to transmit forthwith the names and addresses of five persons to whom reference may be made as to his character and requiring him to set out any facts which had arisen since the hearing, for a re-consideration of his case. He was also required to submit any statement or affidavit upon which he wished to rely and which relates to his conduct or capacity since the hearing of the case. Learned Counsel for the Council Mr. S. Nadesan, Q.C., stated that he was unaware that the proctors for the Council had sent the letter of 28th January to the petitioner. Although the Regulations make provision for the procedure to be followed before the " subsequent Meeting " is held, there is no impediment in the Regulations to the postponement of the subsequent meeting to a later date. It is regrettable that this was not done when the Council was aware that this application was being argued before the Supreme Court, and the impression unnecessarily created thereby that there was a lack of courtesy to this Court by sending the notice under Regulation 21 on a date when this application was set down for argument. Any action under Regulation 21 would have been unnecessary if the Council had only decided to postpone the meeting of 17th March until the decision on this application was made known.

For the reasons stated in my judgment, I am of the view that there has been a breach of the principles of natural justice in the conduct of the inquiry against the petitioner and I would therefore quash the proceedings. The petitioner will be entitled to his costs, which we fix at Rs. 3,000.

WIJAYATILAKE, J.—

I have had the advantage of perusing the judgment prepared by my brother Alles J. which deals with the facts and the law very exhaustively. With great respect, I am in entire agreement with him that the Application for a Writ of Certiorari should be allowed.

I do not think I have anything useful to add except to make a few comments on certain aspects of this case which need emphasis. The respondents have stressed the fact that the question whether the petitioner is guilty of " infamous conduct in any professional respect " is a matter to be decided by the Council under the Medical Ordinance and the said decision is subject to an appeal to the Minister whose decision shall be final in terms of section 18 of the said Ordinance. The respondents further aver that the petitioner having failed to avail himself of the remedy provided by section 18 of the Medical Ordinance he is precluded in law from seeking relief as prayed for in this Court by way of Writs of Certiorari, Prohibition and/or Mandamus.

Therefore the principal question which arises in these proceedings is whether the Medical Council has arrived at a *decision* according to law. The petitioner has sought to set out several reasons to show that the purported decision of the Council is both irregular and illegal as the proceedings of the Council are very conspicuously contrary to the principles of natural justice.

The Medical Ordinance provides for a quorum of at least five members at every sitting of the Council. The respondents state that at every meeting in these proceedings there were at least five members of the Council who were present and who were not absent at any single meeting ; and therefore the absence of some of the other members, who ultimately participated in the decision, at some of the meetings is of little consequence. In other words their answer is that the essential requirements in regard to a quorum were satisfied as throughout the proceedings there was a constant group of five members. In my opinion, this would be an adequate answer if those who purported to make the decision in question were only this group of five members who were present right through. Even a proceeding of this nature may be open to question because one or more of the members present during a part of the proceedings may have exercised a strong influence on one or more of this " constant " five in the course of a protracted Inquiry. However, as I have already observed, it appears to me, unlike in a Trial by jury where the members may not have a specialised knowledge of the matters in issue, a proceeding before the Medical Council where the members are assumed to have such specialised knowledge would not be vitiated by a situation as the one I have mentioned.

What is important in a proceeding before the Medical Council sitting, as in this instance, as a Disciplinary Committee, is the composition of this body at the stage it sought to make a decision. Of the eight members who were present on the last date when the decision was made Dr. C. L. A. de Silva was absent on the 2nd day of the meeting of the Council and Dr. M. O. R. Medonza was absent on the 8th day of the meeting. On the date Dr. de Silva was absent Dr. T. D. H. Perera who initiated this Inquiry was cross-examined. My brother Alles J. has taken the view that the absence of Dr. de Silva cannot affect the decision of the Council in regard to the finding on charge 2(*a*) that Dr. Paul has been guilty of infamous conduct in a professional respect by drawing attention to his professional skill. With great respect on a consideration of the several charges the petitioner had to face, particularly charge 2 (*b*) that he did by the publication of the article " Not me " depreciate the professional skill, knowledge, service or qualifications of Dr. T.D.H. Perera, I am of opinion that these charges are so inter-connected that it is difficult, at this stage, to say with confidence, that if Dr. de Silva was present at the cross-examination of Dr. Perera he would not have arrived at a different decision (assuming, of course, that he did join the majority when the decision was taken). In an Inquiry of this nature dealing with the object and intention of a person accused the mental element plays an important part. Could we now say with confidence that the evidence of Dr. Perera in cross-examination would not have been of some significance in assessing the evidence of Dr. Paul ?

As for the absence of Dr. Medonza on the 8th day of the Inquiry, I am in entire agreement with my brother that the defence of Dr. Paul has been prejudiced and that very materially, as it was on this day

Dr. Paul was cross-examined and re-examined. Dr. Paul has stressed the fact that he was only interested in clearing a misconception and that was his only object. Assuming that Dr. Medonza voted with the majority, could we say with confidence that the evidence of Dr. Paul on this crucial question would not have influenced his judgment ? The very object of calling a person accused would be nullified if his evidence is ignored altogether or obtained second-hand in arriving at a decision, at the end of an Inquiry of this nature. I have no doubt whatever that the defence of Dr. Paul has been seriously prejudiced by the participation of this member at the voting, having absented himself on the most vital date of the Inquiry. It may well be that both Dr. de Silva and Dr. Medonza had the opportunity of reading the proceedings held during their absence or gathering the material from one or more of the members present, but this alone is not sufficient when they seek to act judicially. Demeanour of a witness is a vital factor in the assessment of evidence. This cannot be left to one's imagination.

If Dr. de Silva and Dr. Medonza had refrained from voting in view of their absence at the meetings referred to, perhaps the decision may have been otherwise. I might state that we have to go on the footing of a minimum majority as we have not been furnished any information as to how the voting was registered. Regulation 39 provides for the Chairman to announce the number of members of the Council who have voted each way only in the event of the declaration of the Chairman after counting the votes being challenged. Presumably, here there was no such challenge and we do not know how the eight members who were present voted.

The question does arise whether the charge 2 (*a*) could have been dealt with only on the production of the two articles " Talking point " and " Not me " without any other evidence. In other words, is the publication " Not me " *per se* sufficient to prove the charge made under 2 (*a*) ?

In my opinion the proof of the publication by itself would not be sufficient to establish this serious charge which on the face of it involves the mental element of the person responsible for the publication. Therefore a tribunal inquiring into his conduct is entitled to know whether he has any explanation for the manner in which he has acted ; and when he seeks to give an explanation it is the duty of those sitting in judgment to hear the evidence, assess it and only thereafter arrive at a decision. If there is a failure to do so, however correct the " decision " may be it would be no decision in the eye of the law. It is a well known principle that justice should not only be done but should seem to be done. A person accused should be able to leave the " dock " with the satisfaction that he has been heard and his evidence duly assessed before arriving at the decision made against him. Whichever way one may look at this proceeding, one cannot say with confidence that this important principle has been kept in mind. I presume this Inquiry has taken this

course as a quorum consists of only five members but it must not be forgotten that the Council in this instance has been virtually functioning as a Disciplinary Committee and therefore it should have conformed to the strict procedure contemplated in an Inquiry of this nature, unlike at an ordinary Meeting of the Council dealing with matters not giving rise to justiciable issues.

In coming to the above conclusion I have constantly kept in mind the *ratio decidendi* in the Canadian case of *Regina v. Committee on Works of Halifax City Council. Ex parte Johnston* [1] (1962) 34 D. L. R 45 which dealt with an Application for a writ of certiorari to quash a decision of the Halifax Committee on Works ordering the demolition of a building as no longer suitable for habitation or business. It was held that the Committee had a duty to act judicially and participation by the four Committee members who had not heard all the evidence and arguments in consideration and decision on the resolution to order demolition of the building was contrary to the principles of natural justice. These four were disqualified and, whether or not an effective decision could have been made by a quorum of four, without the participation of the disqualified members, their participation rendered the decision invalid. Our task has been considerably lightened as both Mr. Jayewardene and Mr. Nadesan strongly rely on this judgment. However, Mr. Nadesan seeks to distinguish this case on the ground that in the instant case nothing substantial of any relevance to the charge 2(*a*) were elicited in the evidence of the witnesses when the members (who participated in the decision—Dr. C. L. A. de Silva and Dr. Medonza) were absent. It is submitted that even if they were present and heard the evidence it would not have materially affected their verdict in respect of charge 2 (*a*). With great respect I am unable to agree with this submission. As I have already observed, one cannot say with confidence that the judgment of these absent members would not have been affected if they had the opportunity of seeing and hearing the witnesses when they gave their evidence.

On a petition presented by Dr. T. D. H. Perera the Medical Council has asked Dr. Paul to shew cause. Having done so would it be proper when Dr. Perera gives evidence with reference to his complaint for a member to absent himself and thereafter participate in the decision ? It is much more so when Dr. Paul was being cross-examined. Having granted Dr. Paul this opportunity of shewing cause, at the most crucial stage a member who sits in judgment absents himself and later participates in the decision. Of what value is such a decision ? In my opinion it is contrary to the fundamental principles of natural justice. I might state that in the Canadian case they were dealing with the demolition of a dilapidated building but here the Medical Council was dealing virtually with the prospective demolition of the professional career of an eminent surgeon. In my opinion, the principle set out in that case should apply

[1] *(1962) 34 D. L. R. 45.*

more forcefully in a case of this importance. Furthermore, it is quite evident that Dr. Medonza's absence when Dr. Paul was cross-examined and re-examined, and his participation with the other members at the stage of voting, is a violation of the well known principle of *audi alteram partem.*

I would accordingly hold that the decision the Medical Council purported to make was not a valid decision and it is therefore null and void. In the circumstances, the objection that Dr. Paul should have, in the first instance, conformed to section 18 of the Medical Ordinance by way of an appeal to the Minister cannot be sustained. Clearly the decision contemplated in section 18 is a decision according to law and not any decision however irregular and illegal it may be.

In the light of my above finding I do not think it necessary to deal with the question of fact as to whether on the evidence led in these proceedings the allegation contained in charge 2(*a*) has been proved. Learned Counsel for the petitioner has apart from questioning the procedural irregularities at this Inquiry, questioned the correctness of the decision on the facts. With great respect I agree with my brother Alles J. that by seeking to interfere with a decision on the facts this Court should not trespass on the functions of the Medical Council, who are the proper judges to decide this issue. However, my own view is that this Court is not precluded from questioning a decision which is manifestly erroneous. Now that we have had a very exhaustive argument on the facts it may be of some avail if I set down my own assessment of the situation created by the publications in question.

Dr. Paul has explained that his one object was to clear a misconception as there was a rumour that he had performed this operation. In fact two of the foremost physicians at the General Hospital had casually questioned him on the subject. The rumour that was spreading would have certainly caused serious embarrassment to him as he had nothing to do with it. His reaction in writing to the Press denying that he performed this operation is now in question. Did he do so with the object of advertising for the purpose of obtaining patients or promoting his own professional advantage and thereby is he guilty of infamous conduct in a professional capacity ? It must be kept in mind that Dr. Paul has been acquitted of charge 2 (*b*) of depreciating the professional skill, knowledge, service or qualification of Dr. T. D. H. Perera. No doubt, it would have been prudent of Dr. Paul if, before writing to the Press, he drew the attention of the Medical Council to the aspersion contained in the article "Talking point", but this procedure may well have taken time and a belated explanation would perhaps have been of little value. The question is whether his rushing to the Press was with the object set out in charge 2(*a*). In this context it may be pertinent to assess Dr. T. D. H. Perera's own reactions to a publication of this nature. When Dr. Paul's clarification "Not me" appeared in the "Observer" Dr. Perera was furious about it, considering it an aspersion on him and he rushed to the Permanent

Secretary and the Medical Superintendent, and the latter had telephoned to the Editor of the *Observer*, but the Editor had refused to publish the correction ! What would have been the position if the *Observer* published the fact that Dr. Perera did not perform an operation of this nature. Would it amount to an advertisement of his professional skill ? Could we therefore say that when Dr. Paul had nothing to do with this surgical misadventure he was acting with the object of advertising himself when he made this correction ?

There is another aspect to this question. Despite the publication " Not me " on 17.2.1970 at the instance of Dr. Paul which must have received wide publicity in the medical world here, the Medical Council did not take any action in the matter till Dr. Perera addressed his petition to the Council on 22.4.1970. I have no doubt the Medical Council is quite vigilant about the violation of their rules and regulations and code of medical etiquette and ordinarily they would not have ignored an article published at the instance of a Doctor or Surgeon tantamount to an advertisement of his professional skill. This again shows that at the stage it appeared in the Press it was not recognised as a violation of any rule of medical etiquette—and it developed into a confrontation only on the representation made by Dr. Perera. As it appears to me the Medical Council having acquitted Dr. Paul of the other charges should have proceeded to do so in respect of this charge too. Perhaps if Dr. Perera through the Medical Council clarified the matter when the article "Talking point" appeared and explained that it was not a hole in the heart operation it would have put an end to all the rumours current ; and the necessity for an explanation by Dr. Paul would not have been necessary. As I see it a mere storm in a tea cup has developed into a serious confrontation.

My brother Alles J. has referred to the anomalous procedure set out in the Regulations which permit the members of the Penal Committee which holds the preliminary Investigation to sit in judgment at the Inquiry proper. Here too the President and four others have functioned in both proceedings. This seems highly inequitable as the tendency would be for these members who have conducted the investigation to justify their recommendation to the Council at least in part. However, I do not think that on this ground we can in law question the regularity of these proceedings as they conform to the Regulations. Sooner these regulations are amended the better would it be for the medical profession as any member who faces a charge should have the satisfaction that he is being tried by members of the Council, who have not functioned as investigators and who have not already arrived at a decision.

I share my brother's reaction to the conduct of the Medical Council in addressing a letter to the petitioner during the hearing of this Application requiring him to attend a Meeting of the Council when it would determine whether or not to order his name to be erased from the relevant medical register. The petitioner has also been requested to furnish the names of five persons to whom reference may be made as to his character !

It is true that the Council has conformed to Regulation 21 in issuing this notice, but at the same time as this matter was *sub judice* before this Court the Council should have at least drawn the attention of this Court before taking steps to issue this notice. Counsel for the respondents shared our surprise at this episode and we have accepted his expression of regret.

With respect I agree with the order proposed by my brother.

Application allowed.