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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 42/99

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.**

**VINOLA FOWLER
V REGINA**

Garth Lyttle for the appellant

Miss Lisa Palmer for the Crown

July 10, 2001 and December 20, 2002

PANTON, J.A.

The appellant was convicted in the Resident Magistrate's Court for the Corporate Area on September 3, 1998, of a breach of section 14 (2)(a) of the Medical Act, and fined four hundred dollars with an alternative punishment of two months imprisonment. The particulars of that offence were stated thus:

"Vinola Fowler use (sic) the title Dr. in such a manner as is (sic) calculated to lead persons to believe that she is a registered medical practitioner."

The prosecution led evidence from Mr. John McHardy, Registrar of the Medical Council of Jamaica, to the effect that the appellant's name does not

appear on the register of medical practitioners. She has never been so registered, and has never applied for registration. Mr. McHardy said that he believed that a Ph.D. in Nutrition is awarded by universities, and was of the view that the qualification of a medical practitioner is not necessary for the handling of the nutritional needs of persons. There are, he said, medicines that are regarded as over the counter medicines which do not require a prescription from a medical practitioner. He had no personal knowledge that the appellant was practising medicine. He also said that a person with a Ph.D. is entitled to be addressed as "doctor" provided the public is not deceived into thinking that the person is a medical doctor.

So far as the factual aspect of the prosecution's case was concerned, evidence was led from a Detective Sergeant of Police, Pauline Henry, who said that she interviewed the appellant at her home on the 11th August, 1994, in the presence of her attorney-at-law. The interview was not under caution. She was in possession of a medical certificate (exhibit 2) which the appellant admitted she had issued to one Delores Barnaby. The appellant, according to the sergeant, also told her that she was a registered nurse with a Bachelor of Science degree in nutrition and a doctorate in naturopathy, and that the doctorate did not entitle her to operate as a medical practitioner and she denied that she had so done. She had further told the sergeant that she had examined, through the eye, Mrs. Delores Barnaby who had attended her clinic. She gave Mrs. Barnaby herbal

medication and recommended ten days leave of absence. The appellant described herself to the sergeant as a nutritionist.

Mrs. Barnaby was not called to the witness stand. However, it appears that she, an employee of the National Housing Trust, had presented the certificate to the Senior Personnel Manager of the National Housing Trust, Mr. Harold Minott, who, being doubtful as to its status, referred it to the Medical Council.

The appellant gave evidence that she was an iridologist who practises herbology and nutrition. She said that she was also a registered nurse who holds a B.Sc. in nursing and a Ph.D. in naturopathy. As the holder of a Ph.D. she is entitled to be addressed as "doctor". She was, she said, a certified naturopathic physician certified by the American Naturopathic Medical Association. She said that there was no truth in the accusation that she had done acts that had led persons to believe that she was a medical practitioner. She had never held herself out as a medical practitioner or as a person qualified to practise medicine. She had never advised upon the physical or medical condition of anyone. She runs a clinic at 17 Sandringham Ave where she practises the science of iridology with nutrition and herbology. Before someone becomes a patient of hers, that person has to sign to indicate that he or she will continue to attend on his or her medical practitioner. So far as Mrs. Barnaby is concerned, the appellant had no personal recollection. However, she disputes the claim that only medical practitioners are authorised legally to issue medical certificates as she is aware

that "physical therapists" do. Considering her qualifications, she does not agree that she cannot legally issue such certificates.

The learned Resident Magistrate, in convicting the appellant, said as follows:

"Court accepts that defendant not registered as medical practitioner. Crown need not prove someone has been deceived. Accept testimony of Police Officer Henry. Find that Delores Barnaby's presence not necessary as regards information number 2545/96, but would be relevant and necessary as regards information number 2546/96."

The latter information had charged the appellant with advising upon the physical and mental condition of a person, although she was not a medical practitioner, contrary to section 14(3)(B) of the Medical Act. On this charge, she was found not guilty.

The grounds of appeal argued by Mr. Lyttle were:

1. the verdict was unreasonable having regard to the evidence;
2. the learned Resident Magistrate acted on hearsay evidence; and
3. the learned Resident Magistrate erred in convicting the appellant when there was virtually no complainant to support the use of the term "Doctor" in such a way or manner as was calculated to lead persons to believe that the appellant was a registered medical practitioner.

Mr. Lyttle's submissions may be summarized thus:

1. the prosecution had a duty to produce in Court that person who was led to believe that the appellant was a registered medical practitioner;

2. the person alleged to have been deceived should have been named in the information;
3. the absence of the designation MBBS from the "certificate" suggests that the appellant was not holding out herself as a medical practitioner;
4. no caution having been administered prior to the questioning of the appellant, there was a breach of the Judges' Rules; and
5. the certificate falls short of what a medical certificate is.

Miss Palmer, on the other hand, submitted that the ingredients to satisfy the breach charged have been proven, and the document may be properly interpreted as a certificate.

The key to determining the appeal rests on an interpretation of the document marked exhibit 2. Before that however, the provisions of section 14(2)(a) of the Medical Act need to be quoted:

"(2) Any person who, not being registered as a medical practitioner under this Act-

- (a) takes or uses any title, addition or description implying or calculated to lead persons to believe that he is registered as a medical practitioner, or that he is recognized by law as a person authorized or qualified to practise medicine.....shall be guilty of an offence."

The document alleged to have been issued to Mrs. Barnaby is headed "Nutrition & Programs". It has, to the left of the page, at the top, the following words:

Dr. V. Fowler R.N. B.Sc. N.D.
Naturopath/Nutrition Consultant
Wholistic Health Educator
Author/Lecturer
Weight Control
Premenstrual Syndrome
Corrective Eating Program.

The body of the document reads thus:

"To whom it may concern

Delores Barnaby is a patient at this clinic. An absence of leave from work is necessary for specific therapy beginning May 8th - May 18th. Your understanding in this matter will be greatly appreciated." And it is signed thus: "Devoted to wellness

Dr. V. Fowler"

We see nothing in this document to suggest that the appellant is using any title or description calculated to lead anyone to believe that she is registered as a medical practitioner. Taken as a whole, the document is saying that Mrs. Barnaby is under the care of the appellant who is among other things a consultant in nutrition and that Mrs. Barnaby needs the period May 8 to 18 for specific therapy. It further craves the understanding of whomsoever the matter may concern. In the absence of evidence from Mrs. Barnaby herself as to her condition and her understanding of the role of the appellant, it cannot in these circumstances be interpreted that the appellant has used her title as a Ph.D. to lead anyone to believe that she is registered as a medical practitioner.

In the light of the absence of evidence to prove that which was charged, we have no alternative but to quash the conviction, set aside the sentence and enter a verdict of acquittal.