REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 139 of 2005
HCA No: 1048 of 2005

BETWEEN

GODFREY RAJ-KUMAR

APPELLANT

AND

THE MEDICAL BOARD OF TRINIDAD AND TOBAGO

RESPONDENT

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
G. Smith, J.A.

APPEARANCES: **Mr. S. Jairam, S.C. and Mr. D. Punwasee appeared on behalf of the Appellant**

Fyard Hosein, S.C. and Mr. R. Dass appeared on behalf of the Respondent

DATE DELIVERED: November 15th, 2010

I agree with the judgment of Mendonça J.A. and have nothing to add.

P. Jamadar,
Justice of Appeal

I too agree.

G. Smith,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. On February 16th, 2005 the Council of the Medical Board of Trinidad and Tobago (the Council) found the Appellant, Dr. Godfrey Raj-Kumar, guilty of infamous or disgraceful conduct in a professional respect in the deliberate tampering or alteration of a medical report and ordered that his name be erased from the Register of Medical Practitioners kept by the Council pursuant to section 24 of the Medical Board Act (the Act).

2. The Appellant appealed pursuant to section 29 of the Act to a Judge in Chambers. The matter was heard by Benjamin, J (as he then was). The Judge dismissed the appeal with respect to the finding of the Council of infamous or disgraceful conduct in a professional respect on the part of the Appellant, but remitted the matter to the Council on the question of the appropriate sanction, on the basis that the Council heard no submissions, addresses or explanations from the Appellant before deciding that his name should be erased from the Register. The Appellant now appeals to this Court.

3. The background to this appeal commenced on October 8th, 2003. On that date Mrs. Narissa Mohamdally (Mrs. Mohamdally) visited Dr. Rocke, her family doctor. She was complaining of prolonged heavy vaginal bleeding. Following an ultrasound, which revealed the possible presence of doubtful products of conception, or a possible mass located in the fundus of the uterus, Mrs. Mohamdally was referred by Dr. Rocke to the Appellant.

4. Mrs. Mohamdally together with her husband attended on the Appellant. The Appellant conducted his own ultrasound and detected a mass of mixed echo pattern. He informed Mrs. Mohamdally and her husband that he was uncertain as to the origin of the mass and that he would have to do a dilation and curretage (a D and C) so as to ascertain this.

He further informed them that if the D and C was not successful he would have to resort to operative laparoscopy. The procedures were booked for October 13th, 2003 at the Auzonville Medical Centre.

5. The Appellant performed both the D and C and the laparoscopy on Mrs. Mohamdally and also repaired a wrent in the fundus of the uterus. He took curretings and sent them for analysis to Micro Lab, a private histopathology laboratory run by Dr. Shaheeba Barrow.

6. Mrs. Mohamdally was discharged on October 13th, 2003, but she complained of severe abdominal pain thereafter. Mrs. Mohamdally saw the Appellant again on October 15th, 2003 as a matter of urgency. The Appellant diagnosed possible bowel perforation and arranged for Mrs. Mohamdally to be seen by a specialist surgeon, Dr. Conrad Ariyanayagam. On October 16th, 2003 Mrs. Mohamdally was operated on by Dr. Ariyanayagam, assisted by the Appellant, at the St. Augustine Private Hospital where a perforation at the terminal end of her bowel was repaired.

7. By October 17th, 2003 Mrs. Mohamdally's condition however had not improved and on that date she was transferred to the Intensive Care Unit of the Port of Spain General Hospital. On November 10th, 2003 Mrs. Mohamdally passed away at the General Hospital. She died from acute ventricular failure secondary to anaemia and disseminated intra-vascular coagulation following post-operational sepsis.

8. On October 16th, 2003 Dr. Shaheeba Barrow received the curretings which were sent to Micro Lab by the Auzonville Midical Centre on behalf of the Appellant. On examining the curretings on October 18th, 2003 she found that the tissue sent to her was not uterine tissue but normal small bowel mucosa. This meant that the uterus of Mrs. Mohamdally had been perforated and the perforation had extended to the small bowel. Dr. Barrow immediately telephoned the Appellant and informed him of her findings. The Appellant informed Dr. Barrow that he was aware of the perforation of the bowel. By that time Mrs. Mohamdally had already undergone surgery to correct the perforated bowel. There is however no indication on the record that, although the findings of Dr. Barrow meant that

both the uterus and the small bowel had been perforated, the Appellant did anything further to assist the patient.

9. On the same day Dr. Barrow prepared the formal report of her findings which read "Normal small bowel mucosa only. No endometrium received." According to Dr. Barrow two reports were printed. One was delivered to the Appellant's office at the Lukuni Clinic and the other to the Auzonville Midical Centre from where the sample originated.

10. On November 11th, 2003, the day after Mrs. Mohamdally died, Dr. Barrow performed the autopsy on her body. Upon examining the hospital notes and medical records relating to the deceased Dr. Barrow discovered a faxed copy of a laboratory report dated October 18th, 2003 purportedly signed by her which stated "small endometrial biopsied show mild endometrial hyperplasia. No evidence of cytological atypia or endometritis." Dr. Barrow formed the view that her report of October 18th, 2003 had been deliberately altered.

11. On the very day Dr. Barrow wrote to the Appellant in the following terms:

> *"In my capacity as pathologist attached to Port of Spain General Hospital, I performed an autopsy on Narisa Mohamdally, age 28 who was a patient of yours.*
>
> *I concluded that the patient died from Acute Left Ventricular Failure, Anaemia and D.I.C. following post operational sepsis.*
>
> *In reviewing the hospital medical notes and file I came across a faxed copy of a Laboratory report record number 62006 from Micro Lab purportedly signed by me dated October 18th, 2003 which states "Small endometrial biopsied show mild endometrial hyperplasia. No evidence of cytological atypia or endometritis."*
>
> *As you are aware I personally discussed this case with you in October 18th 2003 in which I informed you that no endometrium was received and there was normal small bowel mucosa only. This was confirmed in writing to you by report of the same date.*
>
> *The faxed report which is on the hospital medical files which was purportedly faxed from telephone number 675-2743 on Tuesday 28th October, 2003 at 11:19am clearly does not reflect the report that was sent to you by Micro Lab.*

These circumstances have warranted me writing to you and copying same to the Medical Board and the Medical Chief of Staff.

My findings have been submitted to the Coroner in accordance with the Coroner's Act.

I advise you accordingly."

The letter was copied to the head of Medical Ethics Committee of the Medical Board of Trinidad and Tobago and the Medical Chief of Staff of the Port of Spain General Hospital.

12. By letter of December 8th, 2003 the Council acknowledged receipt of Dr. Barrow's letter stating that the contents had been duly noted. Dr. Barrow responded by letter dated January 30th, 2004. In that letter she expressed "shock and disappointment" over the response to her letter. She stated that she had expected the Council to take immediate steps to investigate the matter. She expressed the wish to have the matter thoroughly investigated because she considered the "fraudulent forging and falsification of a critical medical report to be a most serious matter." She enclosed with the letter a statutory declaration in which she deposed:

1. She had cause to examine the curretings from Mrs. Mohamdally on October 18th, 2003. When she did so, she realized that it was not endometrium but normal small bowel mucosa.

2. She immediately telephoned the Appellant because her findings meant that the uterus of the patient had been perforated and the perforation extended to the bowel.

3. The Appellant informed her that he was aware of the perforation. She subsequently prepared a written report dated October 18th, 2003 stating "Small bowel mucosa only. No endometrium received."

4. This report was delivered in a sealed envelope to the Appellant's office and a copy sent to the Auzonville Medical Centre.

4. On examining Mrs. Mohamdally's notes and medical records she discovered a faxed copy of a report purportedly signed by her in which her findings were altered and now read "Small endometrial biopsied show mild endometrial hyperplasia. No evidence or cytological atypia or endometritis."

6. She immediately contacted the Chairman of the Medical Board and informed him of the false report and requested that the matter be investigated.

7. She wrote to the Ethics Committee and to the Medical Chief of Staff of the Port of Spain General Hospital. She received a letter of acknowledgment from the Council, the contents of which shocked her and to which she replied.

13. By letter dated February 13th, 2004 the Council wrote to the Appellant seeking his comments on the complaint lodged against him by Dr. Barrow and enclosing a copy of her statutory declaration. The Appellant responded by letter dated April 5th, 2004. He admitted the conversation with Dr. Barrow on October 18th, 2003 in which he was informed that the specimen taken from Mrs. Mohamdally and sent to Micro Lab was not endometrial curretings but small bowel mucosa. He referred to a telephone conversation with Dr. Barrow in November, 2003 in which she indicated that in performing the autopsy on Mrs. Mohamdally she had found on the hospital file a copy of the biopsy report which she thought was "doctored." He however stated that Dr. Barrow did not then indicate that she was of the opinion that he had altered the report. He denied that he had "doctored" or altered "any verbal or written report or statement given by Dr. Barrow in this or any other case." He further denied any unethical behavior in the management of Mrs. Mohamdally. He noted that the telephone number from which the allegedly doctored report was faxed was not his.

14. On August 13th, 2004 the Council wrote to Dr. Barrow under the caption "Allegation of Forgery by [the Appellant]" inviting her to attend before the Council on September 8th, 2004 when the enquiry into the allegation of forgery was to be held.

15. The Council on August 16th, 2004 also wrote to the Appellant under the caption "Allegation of Forgery made by Dr. Shaheeba Barrow." The Council informed the Appellant that under section 24(2) of the Act it proposed to cause an enquiry to be made for the purposes of determining whether the allegation by Dr. Barrow amounted to infamous or disgraceful conduct on his part and if so what sanction ought to be imposed on him. The Appellant was invited to attend before the Council on September 15th, 2004.

16. On September 8th, 2004 Dr. Barrow appeared at the enquiry. It should be noted that the Appellant was not present as he had been invited to appear on September 15th, 2004. Dr. Barrow gave evidence before the enquiry. The evidence was not given under oath and was recorded and a written account prepared.

17. In her evidence before the Council on that date, Dr. Barrow repeated the statements made in her statutory declaration. She also stated that on discovery of what she believed to be an altered report in the patient's notes, she decided to confirm her conviction by contacting Dr. Vinoo at the Auzonville Midical Centre and have him read to her the copy of the report on the Centre's files, sign and send a copy to her. This was done and it confirmed to her that her report had been altered. Dr. Barrow also informed the enquiry that she had previously issued a report some time before which was similarly worded to the one she found on Mrs. Mohamdally's file. She was able to recall the report because it contained a unique typographical error. Based on this recollection Dr. Barrow informed the enquiry that she carried out a search of her database and found one single report that matched her search. This was a report that Dr. Barrow had generated on a Ms. Jillian Joseph. Only a single copy of that report had been generated. The report was addressed to the Appellant and had been sent to him.

18. Dr. Barrow explained to the enquiry that it was her practice to write on the back of the request form accompanying tissue sent to her lab for analysis, the results of her findings. The handwriting was then typed into a formal report by her secretary. On the occasion involving Ms. Joseph, Dr. Barrow had written "Small endometrial biopsied fragments show no evidence of cytological atypia or endometritis." The handwriting on the back of the report however contained deletions and interlineations with the result that her secretary had typed "Small endometrial biopsied show mild endometrial hyperplasia. No evidence of cytological atypia or endometritis." This report was prepared on a request from the Appellant and had been delivered to his office at Lukuni Clinic. According to Dr. Barrow therefore, the Appellant "had access to and was likely to have used that unique report on Ms. Joseph to which he alone had access as the source of his fraudulent report on Mrs. Mohamdally."

19. Dr. Barrow put before the enquiry the video tape of the laparoscopic procedure that the Appellant performed on Mrs. Mohamdally. This had been recorded by the Appellant during the course of the procedure he had conducted on Mrs. Mohamdally on a blank tape provided by Mr. Mohamdally for that purpose.

20. Following Dr. Barrow's evidence before the enquiry the Council requested Dr. Ariyanayagam and Mr. Mohamdally to appear before it on September 13th, 2004 with respect to the "allegation of forgery made by Dr Shaheeba Barrow with regard to medical certificate for Narissa Mohamdally."

21. On that date they both appeared and gave evidence before the enquiry. The evidence was recorded and a written account was prepared. This evidence was also given in the absence of the Appellant and was not given under oath. I will briefly highlight the material parts of their evidence.

22. Dr. Ariyanayagam was a specialist surgeon and on October 15th, 2003 he was contacted by the Appellant to see Mrs. Mohamdally. According to the information Dr. Ariyanayagam was given by the Appellant, Mrs. Mohamdally had an exploratory laparoscopy on October 13th, 2003 and had fallen progressively ill thereafter. She was referred to him by the Appellant for suspected "paralytic ileus and a perforated bowel." He performed surgery on Mrs. Mohamdally when he repaired a one centimeter perforation of her bowel. He stated that he was told by the Appellant that the bowel perforation occurred during laparoscopy. At no time was he informed by the Appellant that he either did a D and C before the laparoscopy or that he had perforated the uterus during the D and C.

23. In reply to a question from the Council, Dr. Ariyanayagam informed the Council that the withholding of information definitely affected his management of Mrs. Mohamdally. He stated that if he was aware of the preceding D and C he might well have been alerted to the possibility of there being not one but two possible perforations: one caused during the D and C and the second during the laparoscopy. Had he known this he might have elected not to treat the patient at a private institution without appropriate support. Dr. Ariyanayagam indicated that he was told of one lesion and had no reason to look for another.

24. After surgery by Dr. Ariyanayagam, Mrs. Mohamdally's condition continued to deteriorate. She was eventually transferred to the Intensive Care Unit of the Port of Spain General Hospital.

25. Mr. Mohamdally in his evidence at the enquiry stated that following upon the referral of his wife to the Appellant, permission was given to him to perform both the D and C and laparoscopic surgery. The procedures were scheduled for October 13th, 2003.

26. Mr. Mohamdally complained that he and his wife were informed of the potential risk involved in the laparoscopic surgery only and not the D and C. He further made mention of the fact that the Appellant indicated to both him and his wife that he (Mr. Mohamdally) would be allowed into the operating theater during the D and C but he was however not allowed in when the procedure was being performed.

27. Mr. Mohamdally explained to the Council that after the surgery on his wife by the Appellant her condition deteriorated and arrangements were made for surgery to be performed by Dr. Ariyanayagam. Notwithstanding that surgery, her condition worsened and she was admitted to the Port of Spain General Hospital on October 17th, 2003.

28. Mr. Mohamdally then gave evidence with respect to the obtaining of medical reports relating to his wife. He stated that the doctors at the General Hospital requested all available reports. As a result he contacted the Appellant on several occasions to obtain them. Eventually on October 28th, 2003 he gave the Appellant his fax number at his office. On that date he received two reports, a copy of the allegedly doctored report and a copy of an earlier report prepared by a laboratory called Saitech Diagonostics (the Saitech report). A short time after receiving the reports (within an hour to an hour and a half) he submitted them to the hospital. Mr. Mohamdally further stated that he contacted the Appellant and personally thanked him for the report. He categorically stated that the Appellant faxed the altered report to him.

29. The faxed documents showed on their face that they had been faxed from Netech a business establishment.

30. On September 15th, 2004 the Appellant appeared before the Council along with an attorney-at-law, Mr. R. Dowlath. Mr. Dowlath indicated to the Council that the Appellant had retained Mr. V. Maharaj, an attorney-at-law, but that he was out of the country and requested that the enquiry be adjourned. Dr. Singh, the then President of the Council, explained to the Appellant and his attorney-at-law that Dr. Barrow had made an allegation against Dr. Raj-kumar with respect to the "doctoring" of one of her medical reports. He further stated that there were other aspects of this allegation which would be raised during the enquiry.

31. The Appellant and his Attorney were then given transcripts of the evidence given before the Council by Dr. Barrow, Dr. Ariyanayagam and Mr. Mohamdally.

32. It is convenient here to outline the procedure adopted by the Council for recording the evidence given before it at the enquiry. The procedure is outlined in an affidavit of Dr. Singh which the trial Judge admitted before him. According to Dr. Singh the evidence of the witnesses was recorded by an audio cassette recorder operated by him. In addition Dr. Baggan, a member of the Council, took his own notes of Dr. Barrow's evidence given on September 8th, 2004. Dr. Singh thereafter handed the recorded statements of the persons to an administrative assistant employed by the Medical Board with instructions to transcribe them. The transcriptions were passed to Dr. Singh and Dr. Smith so that they could be checked against the respective tape recordings. The process of checking entailed playing the audio recording of the evidence and comparing that with the draft transcripts. The drafts were corrected and the transcripts were then signed by Dr. Singh and Dr. Smith.

33. At the hearing on September 15th, 2004 among the documents given to the Appellant and his attorney were drafts of the transcriptions of the tape recordings and the checked versions which Dr. Singh referred to as the final version, as well as the typed version of the notes of Dr. Barrow's evidence that had been taken by Dr. Baggan.

34. Dr. Singh also deposed that the final versions of the transcripts were sent to the witnesses. On November 16th, 2004 he received two letters, one from Dr. Barrow and the other from Mr. Mohamdally, suggesting minor changes to the transcripts and these were incorporated into the final versions which were given to the Appellant's attorney during the hearing on January 21st, 2005.

35. The final statements so produced were not verbatim transcripts of all that transpired during the respective attendances before the Council of Dr. Barrow, Dr. Ariyanayagam and Mr. Mohamdally. However according to Dr. Singh they represented a full summary of all statements by the witnesses.

36. According to affidavits filed by Dr. Barrow and Mr. Mohamdally they confirmed that the final statements were not verbatim accounts. They said however that they were true and accurate statements of the oral evidence containing a detailed summary of it.

37. On September 15th, 2004 the enquiry was adjourned to October 11th, 2004 but was rescheduled before then, at the request of attorney-at-law for the Appellant, to October 25th, 2004.

38. By letter dated October 15th, 2004 the Council provided the Appellant with copies of the histology report prepared by Dr. Barrow on the tissue taken from Mrs. Mohamdally, a copy of the request form which accompanied the tissue, a copy of the request form relating to Ms. Jillian Joseph and a copy of the allegedly altered report, which Mr. Mohamdally stated that he received by fax from the Appellant.

39. At the resumed hearing of the enquiry on October 25th, 2004 the Appellant appeared and was represented by his attorney-at-law, Mr. V. Maharaj. Mr. Maharaj took certain legal objections to the enquiry which were subsequently addressed by the legal assessor to the Council. The Appellant then informed the Council, through his attorney-at-law, that he never received an original histology report from Dr. Barrow either personally or at his office. Mr. Maharaj informed the Council that his client was aware of the existence of only one original report which was located at the Auzonville Medical Centre. He expressed concern about the

allegation that his client tampered with a computer generated report which was electronically signed and was accessible by both Dr. Barrow and her secretary.

40. In response to a question from a member of the Council, the Appellant, through his attorney-at-law, accepted that he submitted a request form to Dr. Barrow for analysis of a specimen taken from the deceased. He further stated that the report was delivered to the Auzonville Midical Centre and that his client never received a report at his office at the Lukuni Clinic.

41. Mr. Maharaj, in response to a further question from the Council, stated that his client had faxed a copy of the Saitech report to Mr. Mohamdally and this was faxed directly from his Lukuni Clinic office and no other location. Mr. Maharaj however vehemently denied that his client faxed any document other than the Saitech report and that report was faxed from his office at the Lukuni Clinic.

42. The Appellant's attorney-at-law further requested that all questions the Council intended to direct to his client be put in writing and forwarded for his prior perusal. The Appellant's attorney also requested the appearance of Dr. Barrow and Mr. Mohamdally for cross-examination. He did not request the appearance of Dr. Ariyanayagam. He in fact stated that he had no reason to request that the doctor attend for cross-examination. The enquiry was adjourned for November 16th, 2004.

43. Before the next hearing the Council forwarded a list of 31 questions to the Appellant's attorney. The Appellant however did not appear at the enquiry on November 16th, 2004. Mr. Maharaj, who was present at the hearing on November 16th, 2003, however indicated that in his opinion only six of the questions, which he identified, were relevant to the enquiry.

44. On December 2nd, 2004 when the enquiry resumed, Mr. Maharaj reiterated his position that his client would respond only to the questions which he had identified at the previous hearing. The Council was consequently informed that:

1. The Appellant could not recall if he had a patient by the name of Jillian Joseph.

2. He could not recall if he had occasion to submit for analysis by Dr. Barrow a tissue specimen from Ms. Joseph. When the Counsel asked the Appellant why he had not prepared for this question as he was given the opportunity to peruse the list of questions in advance, he reiterated his statement that he could not recall.

3. He could not say if he was the only person to have a copy of the report of Ms. Joseph.

4. He had a dedicated fax unit at his office.

5. He could not produce a copy of the histology report received from Dr. Barrow as he did not have it.

6. The Appellant disputed evidence given by Mr. Mohamdally as to a conversation he alleged that the Appellant had with his wife's mother.

45. The enquiry was then adjourned to January 12th 2005. On that date however Mr. Maharaj was unable to attend the enquiry and it was further adjourned to January 21st, 2005. On that date Dr. Barrow and Mr. Mohamdally were cross-examined by the Appellant's attorney.

46. In cross-examination, Mr. Mohamdally, reiterated his position that the faxed copy of the altered report found on the hospital records pertaining to his wife was the faxed copy that was sent to him by the Appellant. He further stated that on receipt of the faxed copy he called the Appellant and thanked him for the report.

47. With respect to Dr. Barrow, she confirmed the position that she issued two copies of the report with respect to Mrs. Mohamdally. One copy was sent to the Auzonville Medical Centre and the other to the Appellant. She stated that no other copy of the report was issued to anyone else.

48. At the end of the hearing on January 21st, 2005 the Council reserved its decision, which it gave on February 16th, 2005. As noted earlier, the Appellant was found guilty of infamous and disgraceful conduct and the sanction of erasure of his name from the Register

of Medical Practitioners was imposed with immediate effect. This was subsequently stayed by the trial Judge pending the hearing of the appeal before him, but on the condition that the Appellant did not practice medicine.

49. The Council set out its findings and decision in some detail. It began by repeating what had been said by Dr. Smith very early in the proceedings that the purpose of the enquiry was to investigate (1) the allegation of Dr. Barrow that her report had been "doctored" and in all probability by the Appellant himself and (2) any other matter flowing from or arising out of the enquiry into the allegation that might be cause for concern. However the Council identified its specific mandate as pertaining to the issue whether or not the Appellant was "guilty of unprofessional conduct as this relates to the deliberate tampering or alteration of a medical report." It further stated that forgery of the signature on the report was not an issue as the "particulars of the allegation" are that the body of the report was what was altered. That required the Council to determine whether (1) the substantive content and meaning of the report was altered and (2) from the evidence as a whole and the surrounding circumstances of the treatment of Mrs. Mohamdally it was the Appellant who had altered the report.

50. Before dealing with these issues the Council referred to three legal objections by the attorney-at-law for the Appellant. The first was that the meaning and purport of the complaint, charges and/or allegations against the Appellant were not made sufficiently clear to him. The Council noted that no formal charges were formulated in its communication to the Appellant. Instead it stated that the complaint was submitted in the form of a statutory declaration made by Dr. Barrow and that was relied on by the Council. The statutory declaration was sent to the Appellant and he responded to it. Having regard to his response, the Council determined that a prima facie case had been made out and on that basis convened a tribunal. In the course of the enquiry it provided the Appellant with the documentary evidence and statements taken from the witnesses. In those circumstances the Council concluded that the Appellant could not reasonably or logically argue that he did not know of the case he had to answer.

51. The other two objections were that the enquiry should be adversary and not inquisitory and that it was unfair due to procedural incorrectness. The Council however, with the benefit of the advice of the legal assessor, was not persuaded by these objections.

52. The Council then reviewed the events from the time of Mrs. Mohamdally's initial contact with the Appellant on October 8th, 2003 to her death in November of that year. The Council was not impressed with certain aspects of the Appellant's treatment as it related to the patient. The Council noted, inter alia, that:

> *"Dr. Raj-kumar, a trained obstetrician and gynecologist, from the statements in our possession, had full knowledge of the fact that he had perforated the uterus and small bowel of this patient. - a suggestion which he has not challenged, although given the opportunity on two occasions to so do, and a fact by his own admission, did nothing about this post-operatively. In fact, he discharged Mrs. Mohamdally home the very day of her surgery. What is worse yet, is the reality that, having been informed by the patient and her relatives that her condition had been worsening, he did absolutely nothing about this until more than 48 hours had elapsed. The tribunal accepts that a patient must experience discomfort following procedures such as those done for Mrs. Mohamdally. However, one does not even have to be medically trained to deduce or to intuit that clearly all is not well if the pain is worsening, something is wrong. Worse yet, as a trained specialist, Dr. Raj-kumar was also made aware that his patient's abdomen was distended, there was no stool and she was vomiting.*
>
> *Dr. Raj-kumar's discussion with Dr. Barrow on the specimen he sent to her laboratory, took place on October 18, 2003. Mrs. Mohamdally was operated on by Dr. Ariyanayagam on October 15, 2004. The latter did a laparotomy on the basis of the content of Dr. Raj-kumar's referral letter which suggested that he (Dr. Raj-Kumar) had perforated the bowel during laparoscopy. Yet, when he was told by Dr. Barrow that the specimen that he had submitted to her and labeled curettings, was small bowel which, Dr. Barrow informed him was obtained via a perforation of the uterus that had extended to the said small bowel, Dr. Raj-kumar indicated to her that he was aware of this fact. His acknowledgement to Dr. Barrow certainly suggests that he knew he had perforated the bowel during his D & C, yet, ACCORDING TO THE EVIDENCE, he withheld that information from Dr. Ariyanayagam, who was told by Dr. Raj-Kumar that the perforation occurred during laparoscopy. Dr. Raj-kumar refused to clear up the conflict when asked by the tribunal.*

53. The Council then addressed the two critical questions it had asked itself with respect to the alteration of the report. The Council had no difficulty with respect to the first question.

The facsimile of Dr. Barrow's report on Mrs. Mohamdally's hospital file was very different from the original report prepared by her. It was therefore clear that Dr. Barrow's report had been altered in its substantive content and meaning. As to the question whether it was altered by the Appellant, the Council was of the view that the alteration of the report relating to Mrs. Mohamdally was done by the superimposition of the content of the report relating to Ms. Joseph onto the former report. The report on Ms. Joseph contained the same text as found in the altered report. The Council noted that the text contained a unique error and only one copy of that report was printed and that was sent to the Appellant. The Appellant therefore had in his possession both the report of Ms. Joseph and the report prepared in respect of Mrs. Mohamdally.

54. The Council then considered who sent the altered report. The Council noted that the Appellant had denied ever receiving the histology report and that attorney for the Appellant had conceded that the Saitech report was faxed by the Appellant to Mrs. Mohamdally but from his office whereas the report was actually faxed from Netech. The Council also noted Mr. Mohamdally's evidence that he had received a fax of the Saitech report on the same day (in fact minutes apart) as he had received the altered report. In the end it accepted Mr. Mohamdally's evidence and concluded that the altered report was faxed by the Appellant.

55. In the circumstances the Council concluded that it:

> "is satisfied that there is sufficient circumstantial and other credible evidence for the tribunal to collectively conclude that Dr. Barrow's report was fraudulently tampered with by Dr. Raj-kumar. This conclusion is based on the following, among other findings:
>
> i) the person who is most likely to be the one who did this is Dr. Godfrey Raj-kumar, since he had the motive (he withheld vital information with regard to the D and C from two surgical teams to whom the patient had been referred);
>
> ii) his medical management of the patient following the perforation left much to be desired;

iii) Dr. Raj-kumar had the opportunity and the means to produce the altered document (he faxed the report from a business place whose trade was in photocopying);

v) he alone had possession of a report from which the fraudulent document was copied, he alone faxed both documents from the one fax unit, since no other facsimile copy of the Saitech lab report exists."

56. The Council referred to other issues arising out of the Appellant's care and treatment of Mrs. Mohamdally namely:

- "The issue of whether or not Dr. Raj-kumar was negligent in the manner in which he cared for Mrs. Mohamdally;

- Dr Raj-kumar's carrying out of a surgical procedure for which he had not obtained informed consent; and.

- Dr. Raj-kumar's betrayal of the trust which both the patient and her relatives had in him when he reassured them that he would allow Mr. Mohamdally to witness the procedure on his wife."

The Council made no finding on these matters but noted that they were deserving of further enquiry.

57. Before the trial Judge several points were taken by the Appellant. These were all dealt with by the Judge and all were rejected. The Appellant contends that the Judge was wrong to do so. The points have been reargued on appeal to this Court. They have been grouped by the Appellant under eight grounds and they are as follows:

(i) excess of jurisdiction due to the absence of a complaint or prima facie grounds to suggest that the report had been altered by the Appellant;

(ii) procedural irregularity in the failure to formulate a charge against the Appellant, the failure to take evidence on oath, the improper participation of the Council's legal assessor and the admission of irrelevant evidence as to negligence;

(iii) the failure of natural justice by permitting absent members of the Council to adjudicate, by the taking of evidence in the absence of the

Appellant or his attorney-at-law, by the alteration of the evidence and by the refusal to permit cross-examination as to witnesses' previous statements;

(iv) fundamental and unconstitutional failure to protect against self-incrimination, to ensure presumption of innocence and to ensure a fair hearing before an impartial tribunal;

(v) the improper conflation of investigatory and adjudicatory functions;

(vi) evidentially, the improper assessment of a purported concession, as the decision is unreasonable and contrary to the evidence and as the evidence lacked the quality of the high standard of proof required;

(vii) the failure to read, interpret and apply the Act in harmony with the common law right to work/practice one's profession without being unjustly excluded from it; and

(viii) unreasonableness/irrationality.

58. With the exception of grounds (vii) and (viii) I propose to discuss the grounds of appeal in turn. Ground (vii) however does not require individual discussion. This ground raises the issue of the requirement of fairness in these proceedings which is relevant to some of the other grounds of appeal and it will be referred to there. With respect to ground (viii) the submission of the Appellant is that for the reasons referred to in relation to the other grounds of appeal the decision of the Council is unreasonable or irrational. The success or failure of this ground is, therefore, from the Appellant's submission, dependant on the success of one or more of the other grounds. It seems therefore that only if the other grounds are successful, it would become necessary to consider ground (viii).

59. Before discussing the grounds of appeal, it is convenient here to refer to the statutory backdrop. The Act gives the Council of the Medical Board the power of discipline in respect of the medical profession. In this regard section 24 is relevant. Section 24(1) and (2) provide:

"(1) Where any member of the Board or any holder of a temporary licence has either before or after he is registered or licenced under this Act been convicted either in the Commonwealth or elsewhere of an offence which, if committed in Trinidad and Tobago, will be

> punishable on indictment, or is guilty of infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to be dealt with in the manner hereinafter provided.
>
> (2) The Council may, and upon the application of any four members of the Board shall, cause enquiry to be made into the case of a person liable to be dealt with as in this section provided, and on proof of such conviction or of such infamous or disgraceful conduct may:-
>
> (a) censure or reprimand the medical practitioner concerned;
>
> (b) suspend the medical practitioner concerned for a period not exceeding two years; or
>
> (c) cause the name of the practitioner to be erased from the register,…"

60. The medical practitioner is therefore liable to be dealt with as provided in section 24(2) if he is convicted of an offence which if committed in Trinidad and Tobago would be a punishable on indictment or if he is guilty of infamous or disgraceful conduct in a professional respect. It is the latter aspect that is relevant in this case. Section 24(5) lists certain types of conduct which if committed by a medical practitioner shall deem him guilty of infamous or disgraceful conduct. These include (i) where the medical practitioner knowingly gives a false certificate respecting birth, death, notice of disease, state of health, vaccination or disinfection or respecting any matter relating to life, health or accident insurance; and (ii) where the medical practitioner does or fails to do any act or thing the doing of which or the failure to do which the Council considers to be unprofessional or discreditable.

61. It is not disputed that the alteration of the medical report such as the one in the circumstances with which we are here concerned amounts to infamous or disgraceful conduct in a professional respect.

62. Section 29 gives the right of appeal from the decision of the Council to a Judge in Chambers. The appeal to a Judge in Chambers is truly appellate and is not supervisory. So too is the appeal to this Court. This Court is therefore fully entitled to substitute its own

decision and set aside the decision of the Council and the Court below. It may also amend or vary it.

63. The Privy Council in **Gupta v General Medical Council** [2001] UKPC 61 however reminded itself that on questions of fact that turned on the credibility and the reliability of witnesses, the decision maker who has had the advantage of seeing and hearing the witnesses has an advantage not enjoyed by an appellate court and in such cases the appellate court should be slow to interfere. **Lord Rodger** in that case said (at para. 10):

> *"the decisions in **Ghosh v General Medical Council** [2001] 1WLR 1915 and **Preiss v General Dental Council** [2001] 1WLR [1926] are a reminder of the scope of the jurisdiction of this Board in appeals from professional conduct committees. They do indeed emphasize that the Board's role is truly appellate, but they also draw attention to the obvious fact that the appeals are conducted on the basis of the transcript of the hearing and that, unless exceptionally, witnesses are not recalled. In this respect these appeals are similar to many other appeals in both civil and criminal cases from a Judge, jury or other body who has seen and heard the witnesses. In all such cases the appeal court readily acknowledges that the first instance body enjoys an advantage which the appeal court does not have, precisely because that body is in a better position to judge the credibility and reliability of the evidence given by the witnesses. In some appeals that advantage may not be significant since the witness's credibility and reliability are not in issue. But in many cases the advantage is very significant and the appeal court recognizes that it should accordingly be slow to interfere with the decisions on matters of fact taken by the first instance body. This reluctance to interfere is not due to any lack of jurisdiction to do so. Rather, in exercising its full jurisdiction, the appeal court acknowledges that, if the first instance body has observed the witnesses and weighed their evidence, its decision on such matters is more likely to be correct than any decision of a court which cannot deploy those factors when assessing the position. In considering appeals on matters of fact in the various professional conducts of committees, the Board must inevitably follow the same general approach. Which means that, where acute issues arise as to the credibility or reliability of the evidence given before such a committee, the Board, duly exercising its appellate function, will tend to be unable properly to differ from the decision as to fact reached by the committee except in the kinds of situation described by Lord Thankerton in the well known passage in **Watt** or **Thomas v Thomas** [1947] AC 484 and 487-488."*

64. There is one other matter to which I would like to refer before turning to the grounds of appeal. This is the submission by Counsel for the Appellant that the procedure that should apply to the conduct of an enquiry of the Council under section 24 should be closely analogous to the procedure in criminal proceedings. This submission impacts on other

submissions made by Counsel for the Appellant in relation to the grounds of appeal particularly as they relate to the grounds dealing with procedural irregularity and the failure of natural justice. Counsel submitted that he was not suggesting that the Council needed to adopt all the trappings of a criminal trial, but the procedure must conform to the criminal standard. For this submission Counsel relied on Privy Council Appeal 73 of 2001 **Wilston Campbell v Davida Hamlet (as executrix of Simon Alexander)**. Lord Brown in giving the judgment of the Judicial Committee quoted with approval the following passage from the judgment of Auld LJ in **Aaron v The Law Society** [2003] EWHC 2271 (Admin.) at para. 84 where he said:

> *"Disciplinary proceedings before the Solicitors Disciplinary Tribunal are analogous to criminal proceedings. The uncertainty that springs from and festers with unnecessary and unreasonable delay can, in itself, cause great injustice to practicing solicitors, whose livelihood and professional reputations are at stake."*

65. The Privy Council in the **Campbell** case clearly decided that the criminal standard of proof was the applicable standard to all disciplinary proceedings concerning the legal profession. It was accepted that that standard of proof applies to disciplinary proceedings concerning the medical profession as well. The Privy Council however was not concerned with other aspects of the procedure before the disciplinary body when it quoted the above paragraph. It was there dealing with a submission that the delay of the Disciplinary Committee in giving its decision prejudiced or occasioned the appellant injustice. Auld LJ was also dealing with a question of delay. I do not think that the Judicial Committee intended in any way to address the appropriate procedure in disciplinary matters. I do not view this statement as lending any support to Counsel's submission and in my judgment the Council in this case was not obliged to adopt a procedure analogous to the procedure in criminal proceedings.

66. The Act does not stipulate the procedure that the Council must follow in an enquiry. Both parties accepted that in those circumstances the Council is the master of its own procedure. What is important is that the Council must act fairly. This point was made in two cases relating to the discipline of medical practitioners in England to which this Court was referred namely, **Leeson v General Council of Medical Education** [1889] 43 Ch. R. 366

and **General Medical Council v Spackman** [1943] AC 627. In the latter case Viscount Simon L.C noted that the General Medical Council is a master of its own procedure. It therefore has a wide discretion as to its procedure. It is not required to conduct itself as a court of law and is not bound by strict rules of evidence. He stated (at 635-636):

> *"Unless Parliament otherwise enacts, the duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests on any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged – e.g. whether by hearing evidence viva voce or otherwise - is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being given a fair chance of exculpation."*

67. What it means to act fairly depends on the circumstances of each case. In **de Smith's Judicial Review** (6th edition) (at para. 7-039) the point is made, with which I agree, that "the content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject matter." As Lord Mustill stated in **R v Secretary of State for the Home Department, ex parte Doody** [1994] 1AC 531, 560:

> *"(3)The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential factor of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."*

68. It is appropriate here to refer to ground (vii) of the grounds of appeal. The submission under this ground is that as the possible penalty the Appellant faced if found guilty was erasure from the Register and the consequential disqualification of his right to practice his profession, the Council should have ensured that the enquiry was scrupulously fair to him.

69. In considering what fairness requires in this case, it is of course relevant to take into account the gravity of the charge and its consequences. But in this case this does not translate into a requirement that the proceedings before the Council should be closely analogous to criminal proceedings. In **Spackman** and **Leeson** some guidance may be found

as to what is required of the Council in this case. Here the comments by Viscount Simon referred to earlier are also relevant. In **Leeson**, Bowen LJ noted at (at p 383):

> *"… substantial elements of justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard. With respect to the charge made, the charge of which he has notice, it is a charge of infamous conduct in some professional respect, and the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. That is all."*

70. I do not however regard this case as establishing the limits of what fairness requires before the Council. As Counsel for the Appellant pointed out those cases are not recent cases and procedural fairness is not a static concept. As is apparent in some of the grounds of appeal Counsel challenges the decision of the Council on grounds of fairness. The question in each case is whether the procedure adopted by the Council, in the bona fide exercise of the wide discretion as to procedure reposed in it, sufficiently complied with the requirements of natural justice. It must however be emphasized that it would not be enough for the Appellant to say that some other procedure which the Council failed to adopt would have been fairer. What must be shown is that the procedure in fact adopted was unfair.

71. I turn now to the grounds of appeal. Ground (i). Counsel submitted that nowhere in Dr. Barrow's statutory declaration was any allegation of wrong-doing made against the Appellant. Counsel argued that it was the Council which took it upon itself to interpret the declaration as a complaint against the Appellant. In the absence of a complaint from Dr. Barrow, the Council went beyond the jurisdiction given to it by the Act in entertaining the case and proceeding to cause an enquiry to be made and adjudicating upon it.

In support of his submission, Counsel referred to **Allinson v General Medical Council of Medical Education and Registration** [1894] 1QB 750. But this case does not support the proposition that the Council in this case exceeded it jurisdiction if it embarked on an enquiry in the absence of a complaint from Dr. Barrow. What **Lord Esher, MR,** who gave the

leading judgment of the Court, stated is that if there was no evidence to say that the medical practitioner had been guilty of infamous conduct in a professional respect the General Council would have exceeded its jurisdiction in entertaining the case and proceeding to adjudicate upon it. That is not the same thing as saying there had to be a complaint from a medical practitioner. In any event in this jurisdiction, the jurisdiction of the Council is not dependant on a complaint made to it by a medical practitioner. As de la Bastide CJ (as he then was) observed in the **Medical Board of Trinidad and Tobago v des Vignes** (2000) 60 WIR 375, 380 the "intention and effect" of sections 24(1) and (2) of the Act is:

> *"to enable the Council to initiate an enquiry for the purpose of determining whether a member has been guilty of misconduct, and for that purpose to make the allegation of misconduct itself giving the requisite particulars to the member concerned."*

72. The Council itself may therefore make the allegation and its jurisdiction to initiate an enquiry is not dependant on a complaint made to it. In any event however, it seems to me that the submission of Counsel is misconceived for the other simple reason that there was a complaint by Dr. Barrow directed at the Appellant.

73. In dealing with this submission in the Court below the trial Judge referred to the first letter written by Dr. Barrow when she discovered the report in the hospital file relating to Mrs. Mohamdally and to the statutory declaration made by Dr. Barrow. The Judge found that it was a plausible interpretation of the letter that Dr. Barrow did not make the complaint against the Appellant. The position was otherwise however when the statutory declaration was considered. According to the Judge, Dr. Barrow in the statutory declaration drew to:

> *"the Appellant's attention that the absence of any endometrial tissue meant that both the bowel and the uterus were perforated and that her report had been altered. In two separate paragraphs of the statutory declaration Dr. Barrow calls for an investigation by the Council into this false report, which she quite properly describes as a most serious matter in her letter to the Council dated January 13th 2003. Dr. Barrow did not say who altered it; she could not. It is an obvious inference as to whom she suspected."*

74. I think that it is a perfectly accurate statement. The clear inference is that Dr. Barrow suspected the Appellant to have altered the report. This appears to me to be obvious as it was

to the Council, who on receipt of Dr. Barrow's statutory declaration wrote to the Appellant "requesting his comments on complaint lodged against [him] by Dr. Shaheeba Barrow." Indeed, Dr. Barrow's evidence before the Council at the enquiry could leave no doubt that that was the correct interpretation of what she was alleging.

75. In my judgment therefore the first ground must fail.

76. Ground (ii). This ground is categorized as procedural irregularity and there are four issues raised under it, namely;

(a) the failure of the Council to formulate a charge against the Appellant;

(b) the failure of the Council to take evidence on oath;

(c) the participation of the Council's legal assessor; and

(d) the admission of evidence as to negligence.

77. Counsel submitted that the Council failed to formulate a charge of infamous or disgraceful conduct in a professional respect and to provide particulars of the charge. In his opinion this alone is sufficient to vitiate the decision of the Council.

78. It is not disputed that the Council did not lay a formal charge against the Appellant. That in itself however is not sufficient to vitiate the proceedings before the Council. The Act does not provide any specific procedure for the initiation of the disciplinary process. As the Council is master of its own procedure, the absence of a formal charge cannot by itself be sufficient to set aside its decision. The relevant question that must be asked is whether the Appellant was in some way treated unfairly, prejudiced and/or embarrassed by the absence of a formal charge. I think that the answer is that clearly he was not.

79. The Council after it received Dr. Barrow's statutory declaration sent it to the Appellant requesting his comments on the "complaint lodged against you by Dr. Barrow." Included among the documents annexed to the statutory declaration was a letter dated November 12th, 2003 written by Dr. Barrow to the Appellant. The letter identified the patient

by name, the report which Dr. Barrow was alleging was improperly altered and what was altered in the report. Dr. Barrow in the statutory declaration stated that "she was shocked to see this false report with [her] signature appended to it." The Judge correctly observed that the statutory declaration provided not only adequate particulars "but also a precise account of the background as well as the evidence upon the allegation."

80. It is clear from the Appellant's response to the request of the Council for its comments on Dr. Barrow's declaration that he was well aware of the allegations against him. According to him he did not "doctor" or alter any verbal or written report or statement given by Dr. Barrow. It is clear that the Appellant, from the time he had sight of Dr. Barrow's declaration, knew the precise allegation against him and the case he had to answer.

81. However in addressing this issue in my judgment, it is also relevant to take into account events subsequent to Dr. Barrow's declaration and the Appellant's response thereto as these impact on the question of unfairness to or prejudice and embarrassment that may have been suffered by the Appellant in the absence of a formal charge.

82. After the Council received the Appellant's response, it wrote to the Appellant on August 16th, 2004 under the caption "Allegation of Forgery made by Dr. Shaheeba Barrow", notifying him of its intention to cause an enquiry to be made for the purposes of determining whether the said allegation amounts to infamous or disgraceful conduct on his part and if so what sanction ought to be imposed on him.

83. When the Appellant appeared before the Council for the first time, the purpose of the enquiry was explained to him. He was given a summary of the evidence which the witnesses had given and the enquiry was adjourned. The fact that the Appellant was absent when the witnesses appeared before the Council and gave evidence is the subject of a complaint made by the Appellant which will be addressed later in the judgment, but, having been made aware of the evidence is a matter that should be considered in determining the unfairness, prejudice or embarrassment, if any, suffered by the Appellant by the failure to formulate a charge. I think also relevant are the utterances of the Appellant's Counsel at the enquiry which show that he was aware of the case against his client.

84. In my judgment the Appellant can have no legitimate complaint arising out of the failure of the Council to formulate a charge. He was well aware of the allegation against him and had full particulars. He cannot reasonably claim that he was treated unfairly or that he suffered any prejudice or embarrassment.

85. The next issue under this ground of appeal relates to the failure of the Council to take evidence on oath. It was the submission of Counsel for the Appellant that the Council was required to take evidence on oath. He sought to obtain support for this submission from the speech of Lord Atkin in **Spackman,** supra, where he said (at page 638) that the council in that case had the power to administer an oath.

86. The view of Lord Atkin that the General Medical Council had power to administer an oath contradicted the view expressed by Lord Wright in **Spackman** that there was no such power. However, it should be noted that Lord Atkin was referring to the power to take an oath and not the necessity or requirement to do so. It however seems to me that all the Law Lords, including Lord Atkin, agreed that the General Medical Council, as the Council here, is the master of its own procedure, and in determining its procedure could have regard to unsworn evidence. If I am wrong in that regard and the contrary view can be attributed to **Lord Atkin**, he was in a minority of one. I do not therefore regard **Spackman** as an authority for the proposition advanced by the Appellant that the Council was required to take evidence on oath. Indeed it supports the contrary position, that as master of its own procedure the Council can have regard to unsworn evidence. I therefore reject Counsel's submission on this point.

87. The next issue under this ground of appeal relates to the participation of the Council's legal assessor. Before referring to the Appellant's submission on this issue it is convenient to touch briefly on the role of a legal assessor. His role may be deduced from two cases referred to in this Court namely, **Fox v General Medical Council** [1960] 3ALL ER 225, PC and **R v Eccles Justices**, **ex parte Fitzpatrick** (1989) 89 Cr. App. R. 324. The legal assessor is not in charge of the proceedings. His duties are confined to advising on questions of law or mixed questions of law and fact referred to him. He may also intervene in the proceedings for the

purpose of either informing the tribunal of any irregularity in the conduct of the proceedings which comes to his knowledge, or of advising them when it appears to him but for such advice there is a possibility of a mistake of law being made. He may also refresh the presiding officer's mind as to any matter of evidence which has been given. He may draw the tribunal's attention to powers they have but what he must not do, is advise that the powers should be exercised in a certain way. That is a matter for the tribunal. Further it is essential that the decision of the tribunal must be its own decision and not that of the legal assessor.

88. Counsel for the Appellant submitted that the legal assessor of the Council did not limit herself to advising the Council on questions of law or mixed questions of law and fact. He contended that she actively engaged in the decision making process and on various occasions adopted the role of the prosecutor going so far as to illicit improper and prejudicial evidence from persons summoned to the enquiry and in other instances purporting to chair the enquiry. This Counsel submitted is wholly illegitimate and impermissible. In the circumstances, Counsel contended that the legal assessor's conduct created a reasonable suspicion of improper influence and accordingly the finding of guilt arrived at by the Council should be set aside.

89. The Council had eight days of hearing namely; September 8th, 13th, and 15th, October 25th, November 16th, December 2nd, 2004, January 12th and 21st, 2005. The legal assessor was present on three of these days namely; November 16th, 2004, January 12th and 21st, 2005. The submissions made by Counsel for the Appellant relates to the assessor's conduct on the last day, January 21st, 2005. On this day the assessor intervened at certain junctures during the cross-examination of Mr. Mohamdally and Dr. Barrow. During the cross-examination of Mr. Mohamdally the legal assessor intervened when it was suggested to Mr. Mohamdally that he had made no report to the Council against the Appellant. The legal assessor pointed out that in fact a report was made to the Council. The legal assessor further intervened to say that the notes of evidence which the Council took and provided to the Appellant were not verbatim notes of the proceedings. There was a further intervention, in response to attorney-at-law for the Appellant saying that the witness could not answer anything he wants to answer, to indicate that the Council was not sitting as a court of law that he was entitled "not

to answer any question." On another occasion the legal assessor indicated that certain corrections had been made to the verbatim notes. And in response to an answer given by Mr. Mohamdally, she indicated "and that is a most appropriate answer!"

90. During the cross-examination of Dr. Barrow there were also interventions by the legal assessor. The trial Judge describes them in this way:

> *"…there was a complaint from Dr. Raj-kumar's Counsel about the absence of verbatim notes. Things had gotten slightly heated by this stage and her invention appeared to calm the waters. The last intervention occurred when [the legal assessor] took over the questioning of Dr. Barrow. This occurred because Dr. Raj-kumar's counsel was asking a number of questions based on drafts of the transcripts that the Council had provided to Dr. Raj-kumar. Then Dr. Raj-kumar's counsel said that he had no further questions and that he accepted the fact that she made no allegation against his client. At this stage [the legal assessor] asked Dr. Barrow formally whom she was complaining about and she said Dr. Raj-kumar. It was obvious from the other questions from Dr. Mahadeo a member of the Council that this was clear to all concerned."*

91. The Judge considered the interventions of the assessor to be improper. He however went on to consider whether they had any significance or bearing upon the ultimate decision of the Council. After considering the findings and decision of the Council he concluded that they had no bearing at all. By that I understand him to mean, that there was no indication that the interventions of the legal assessor had any actual bearing or significance upon the decision of the Council. He then went on to consider the question of apparent bias and concluded that there was no appearance of bias.

92. I do not think that there could be any real issue relating to the finding of the Judge as to any actual influence by the legal assessor in the decision of the Council. There is no evidence, as the Counsel for the Appellant contends, that the legal assessor was actively engaged in the decision making process. Nor could the intervention of the legal assessor as has been contended, reasonably be said to have elicited any prejudicial evidence. What is the real issue here and is at the core of Counsel's submission is the question of apparent bias.

93. Whether there is an appearance of bias is to be tested by the application of the test as laid down in **Porter v Magill** [2002] AC 357, and that is whether the fair minded and informed observer having considered the facts would consider there is a real possibility that the Council was biased (see also Privy Council Appeal 9 of 2003 **Meerabux v The Attorney General of Belize**). To relate this specifically to this case, the question is whether the fair minded and informed observer having considered the facts would consider there was a real possibility that the assessor had improperly influenced the decision of the Council.

94. The trial Judge concluded that the observer would conclude that there was no appearance of bias. I agree with that conclusion. The observer would consider that the assessor had intervened in the manner and on the occasions as described earlier. But he would consider that the assessor was aware of her role not to influence the decision making process and had openly stated this and that the Council was aware of this. The observer would also be aware that the Council had given extensive reasons for its finding of guilt which outlined the facts and matters taken into account and which excluded any suggestion that the assessor had improperly influence the decision of the Council. In my judgment the observer having considered all the facts would not think that there was any real possibility of bias or to put it in the manner expressed earlier, he would not think that there was any real possibility that the assessor had improperly influenced the decision of the Council.

95. This next issue that arises under this ground relates to the admission of evidence as to negligence. Counsel for the Appellant submitted that the Council acted unfairly towards the Appellant when it allowed evidence at the enquiry as to the treatment and management of Mrs. Mohamdally. In doing so Counsel submitted that the Council allowed itself to consider and be influenced by matters which were irrelevant to the enquiry.

96. To begin with, it is relevant to note that the Council did not find that the Appellant was negligent in the treatment of Mrs. Mohamdally. The Council however noted that certain issues required further investigation, one of which was whether or not the Appellant was negligent in the manner in which he cared for Mrs. Mohamdally. It is not correct to say, as Counsel for the Appellant submits, that the Council "veered off" from the enquiry into the

alteration of the report and turned it into one relating to the Appellant's treatment and management of the deceased.

97. The question is of course whether the evidence of which the Appellant complained was relevant. In **Misra v The General Medical Council** Privy Council Appeal 43 of 2002 evidence as to the doctor's problems with alcohol was allowed by the General Medical Council. This, the Privy Council found, was irrelevant to the issue, which was the doctor's failure to visit a patient. There was no attempt in that case to relate that evidence to the doctor's failure to visit his patient. The Privy Council therefore was of the opinion that the evidence ought not to have been allowed as it was irrelevant and highly prejudicial.

98. In my judgment however, the evidence in this case was relevant. The evidence seems to me to be relevant to motive. This was the view taken of the evidence by the Council, since it came to its conclusion that the Respondent had altered the report in part on the basis that he had the motive to do so - "he withheld vital information with regard to the D and C from two surgical teams to whom the patient had been referred" and "his medical management of the patient following the perforation left much to be desired." Unlike the **Misra** case, here it could not be said there was no attempt to relate the evidence to the charge.

99. Counsel for the Appellant seemed to acknowledge that the evidence could be relevant to motive but submitted that the finding as to motive by the Council flew in the face of the facts since the Appellant had openly acknowledged and admitted that Mrs. Mohamdally had suffered a bowel perforation. There was therefore, Counsel contended, no need for him to alter the report that pointed to that fact.

100. The admission of a bowel perforation is however not to the point. According to Dr. Ariyanayagam, the Appellant at no time informed him that he either did a D and C before the laparoscopy or that he had perforated the uterus during the D and C. According to Dr. Ariyanayagam the relevance of that omission was that there could be two perforations and not one. He stated before the Council:

"If he was aware of the preceding D&C he might well have been alerted to the possibility of there being not one but two possible perforations - one caused by the perforation at D and C and the second during laparoscopy. He was told of one lesion. and so had no reason to look for another."

101. The knowledge of the preceding D and C, according to Dr. Ariyanayagam, was therefore relevant to the possibility of there being not one but not two perforations. That there were in fact two perforations was what Dr. Barrow said the report meant. The Appellant was aware of this but, according to the evidence, did nothing to bring it to anyone's attention. This, it would seem to me, would provide a motive to him to alter the effect of the report. There was therefore clear evidence on which the Council could have arrived at its findings as to motive and as such it was relevant to the enquiry.

102. Ground (iii). The Appellant under this ground complains that there was a failure of natural justice by:

(i) permitting absent members of the Council to adjudicate;

(ii) the taking of evidence in the absence of the Appellant's attorney-at-law;

(iii) the alteration of the evidence; and

(iv) the refusal to permit cross-examination as to the witnesses' previous statements.

103. I will discuss separately the first complaint that the Council allowed absent members to adjudicate. The other complaints will be taken together.

104. Counsel's submission on the first issue was that, although all the members of the Council deliberated and decided the allegation made against the Appellant, not all of them heard the evidence.

105. There are two documents that are relevant here. The first is the findings and decision of the Council. That document comprises 20 pages and is signed by the Council's president and secretary. It gives the name of the complainant and then states the composition of the

tribunal – "incumbent members of the Council of the Medical Board of Trinidad and Tobago" and then lists the names of all seven members of the Council. It is not in dispute that all seven members were not present throughout the enquiry. The second relevant document sets out the decision of the Council. It states, inter alia, that the Council agreed that the Appellant was guilty of infamous and disgraceful conduct and sets out the sanction of erasure. The document identifies the members of the Council who were present and states that the Council requested three doctors who were identified by name to be excused from the deliberations "due to non-attendance at some of the enquiry hearings."

106. The trial Judge in dealing with this submission in the Court below rejected Counsel's submission on the facts. In his opinion, the first document recorded, not who was present at the enquiry, but the composition of the Council. The second document stated the members of the Council who were present, and on that basis it was clear to him that it was only the members of the Council who were present at every hearing and heard all the evidence, who deliberated and made the findings and decision against the Appellant.

107. Counsel in his submissions to the Court accepted that the Judge's interpretation of the documents was correct. Counsel however asked this Court, contrary to what the documents on the face of them say, to come to the conclusion that the decision and findings of the Council were arrived at by all seven of its members including those who were not present at every hearing and who did not hear all the evidence. He argued that it was only after the issue was raised in the Court below that the second document was disclosed. He submitted that this brings into question the Council's bona fides and the Court should not accept what the documents say on the face of them.

108. I cannot accept Counsel's submission. There was no cross-examination on this issue in the Court below. What this Court is being asked to do is to decide, without the benefit of any forensic exercise, that the second document was fabricated and the Council is guilty of grave dishonesty. There is nothing on the record that leads one to the conclusion that Counsel has asked this Court to draw, and like the trial Judge I reject this submission on the facts.

109. With regard to the other challenges the submissions of Counsel for the Appellant was developed in this way. Counsel submitted that the Council was required to adopt a procedure analogous to that of a criminal trial. Accordingly the Appellant was entitled to see and hear the witnesses give evidence. This did not happen in this case as the witnesses all gave evidence in the absence of the Appellant. In the event that that submission was not accepted by the Court and the Court were to hold that it was not necessary that evidence should be given in the presence of the Appellant, Counsel argued that there was still unfairness in this case as full disclosure of the evidence taken in the Appellant's absence was not made. This is because the Council did not take verbatim notes at the proceedings. What it produced was a synopsis of the gist of what was said. This is inadequate, unjust and unfair since the gist of what was said was tainted by the Council's understanding or appreciation of what was said and was not representative of what was either said or meant by the persons who were giving evidence. This, it was submitted, is demonstrated by the fact that the Council provided the Appellant with different versions of the evidence. The Appellant was therefore prevented from knowing the evidence of the witnesses which tended to prove that he had "doctored" the report. Further the unfairness was compounded in this case because the Appellant was prevented by the Council from cross-examining the witnesses on the different versions.

110. I have already discussed Counsel's submission that the procedure of the Council should have been analogous to a criminal trial. The question however remains, whether the Council by hearing the evidence of the witnesses in the absence of the Appellant acted in breach of the principles of natural justice. To support his contention that it did Counsel referred to **Kanda v Malaya** [1962] AC 322.

111. In **Kanda** the adjudicating officer found the Appellant guilty of certain disciplinary charges. In coming to his decision he had considered a report condemnatory of the Appellant which was never shown to him. The Privy Council was of the opinion that the principles of natural justice were violated in relation to the Appellant - more specifically the right to be heard. The Judicial Committee stated if the right to be heard was worth anything, it entailed that the accused must have a right to know the case made against him. Lord Denning in giving the decision of the Committee stated (at p. 337):

"He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them… It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough."

112. The **Kanda** case is to be contrasted with **Ceylon University v Fernando** [1960] 1WLR 223. In this case the commission of enquiry, which was set up to enquire into whether the respondent, a student of the university, had prior knowledge of the contents of an examination paper, questioned several witnesses in the absence of the respondent. However, subsequently the nature of the case was explained in detail to the respondent. The Judicial Committee noted that it was open to the commission to question witnesses without inviting the respondent to be present. But it was necessary that the respondent be given a fair opportunity to correct or contradict any irrelevant statement to his prejudice. The commission had discharged that obligation since the respondent had been adequately informed of the case he had to meet and had been given the opportunity to do so.

113. It is relevant to note in **Kanda,** that at no time prior to the adjudicating officer arriving at his decision, was the appellant shown a copy of the adverse report which was considered by the officer. The pronouncements of **Lord Denning** that evidence must not be taken behind the back of a party must be viewed in that light. I therefore do not view the case as authority for the proposition that in disciplinary proceedings it is a breach of the principles natural justice when evidence is taken in the absence of the accused. The **Fernando** case supports the position that that is permissible if the accused is given a fair opportunity of meeting the case against him. In my judgment that is the crux of the matter.

114. I think that the Council was at liberty to hear the evidence in the absence of the Appellant provided that all relevant evidential material was disclosed to him as would allow him to fairly answer the allegations made against him and to present his case. Such material would include any adverse material which the tribunal may take into account. This is a corollary of the axiom that the duty to listen fairly lies upon anyone who decides anything

and of Lord Denning's dictum that the right to be heard if it is to be worth anything must carry with it the right of the accused to know the case against him.

115. To discharge the responsibility on the Council, in my judgment, it was not necessary for it to take verbatim notes of the proceedings. A summary or gist of the evidence is sufficient. This is what was done in this case. The Appellant was given a full summary of the evidence which the witnesses confirmed to be accurate.

116. However, Counsel for the Appellant nonetheless submitted that in this case what was provided was not representative of what was said or meant. Moreover, that there were different versions of the evidence, containing significant differences, each conveying a different impression and all designed to point to the guilt of the Appellant.

117. It is relevant here to refer again briefly to what the Council did in relation to the recording of the evidence. Tape recordings were made of the witness's evidence given in the absence of the Appellant. The recordings were transcribed by the Council. The draft transcripts were given to the Appellant. Dr. Baggan also took notes of Dr. Barrow's evidence which she gave on September 8th, 2004. A transcription of this was also given to the Appellant. The draft transcripts of the recordings made by the Council were corrected and given to the Appellant. The corrected versions were then sent to the witnesses and some corrections thereto were also made and these too were given to the Appellant. The result was that in the case of Dr. Barrow's evidence, there were four versions and three in the case of the other witnesses.

118. Counsel's submission that the synopsis of the evidence was not representative of what was said or meant has to be understood in that context. His submission in essence is that there were differences in what was regarded as the final statement when compared to those that came earlier. The Appellant, therefore, he submits could not know what the evidence was. This was unfair and that unfairness was compounded by the refusal of the Council to allow cross-examination on all but the final statement. The Appellant was therefore denied the opportunity to test the veracity or accuracy of the different versions.

119. In my judgment there is nothing in the submission that the various versions of the witnesses' statements prevented the Appellant from knowing what the evidence was. This submission seems to me to be a non-starter as it was made clear to the Appellant that the Council was relying only on the final statement. The Appellant was not and could not be under any misapprehension as to the nature of the previous statements. When they were given to the Appellant it was indicated to him that they were drafts and subject to correction. Even if that were not so, it was clear from the different versions what was the case against the Appellant. What differences there were in the various versions do not affect the case against the Appellant in either substance or detail. There is nothing in the submission that each version of the evidence conveyed a different impression designed to point to the guilt of the Appellant.

120. There are however differences in the various versions and the issue is whether the Council acted unfairly in preventing cross-examination on them. The real question is therefore whether the refusal to permit cross-examination on the different versions renders the decision unfair in all of the circumstances.

121. Counsel referred to three matters which did not appear in the final statements. These appeared in the other versions of Dr. Barrow's evidence where it is recorded as having been stated by her that:

(i) she did not accuse the Appellant of having doctored the report;

(ii) she was of the opinion that the Appellant had doctored the report because of what she had seen on the video recording of the procedure done by the Appellant on Mrs. Mohamdally; and

(iii) she believed the Appellant subjected his patients to unnecessary procedures.

122. This first matter relates to Counsel's submission referred to earlier in this judgment that Dr. Barrow did not say in her report of the matter to the Council that it was the Appellant who doctored the report. Although she did not say this in her first letter to the Council it was the clear inference from her declaration as to whom she suspected. This is clear from her evidence. She indeed said so very clearly in cross-examination. The refusal to allow cross-

examination on this statement in an earlier version of Dr. Barrow's statement could not be unfair to the Appellant. With respect to the other two matters these could clearly be prejudicial to the Appellant. The Council however made it clear that they were only relying on the final version of the statement. Those matters do not appear in the final version and accordingly it was the clear indication of the Council that they were not relying on them. There is no indication in the findings and decision of the Council that they placed any reliance on those matters. They therefore were of no evidential value and in the circumstances it would have served no useful purpose to permit cross-examination upon them. It therefore follows that the refusal to permit cross-examination on the different versions could have had no impact on the fairness of the decision.

123. Ground (iv). This ground of appeal is that there was fundamental and unconstitutional error by the failure on the part of the Council to protect against self-incrimination, to ensure the presumption of innocence and a fair hearing before an impartial tribunal.

124. Counsel submitted that the Council reversed the burden of proof. It was submitted that the proceedings were conducted on the basis that the Appellant was guilty and the Council placed the onus upon him to prove his innocence. Counsel referred in particular to one aspect of the evidence, which dealt with the admission by the Appellant, that he had faxed the Saitech report to Mr. Mohamdally from his office fax. The report, in fact, showed that it had not been faxed from the Appellant's office but from Netech, a business place. Counsel submitted that the onus was on the prosecution to prove the admission false. The Council was however influenced by the failure of the Appellant to produce his telephone records to show that the fax had not been sent from his office. Such records were critical to the enquiry and should have been produced by the prosecution.

125. In my judgment there is no merit in this submission. There is no indication in the findings and decision of the Council that it reversed the burden of proof. The Council had before it the evidence of Mr. Mohamdally as to the receipt of the reports. His evidence has been referred to earlier in this judgment. This was evidence on which the Council could and did rely on in coming to its finding of guilt. It was not relying on any failure on the part of

the Appellant to prove or disapprove anything, but acted, as it was duty bound to do, on the evidence before it.

126. Ground (v). This ground of appeal is that there was an improper conflation of the investigatory and adjudicatory functions of the Council. Counsel for the Appellant submitted that it is imperative that there be a separation of the investigatory and adjudicatory functions of the Council. It was therefore necessary for the Council, in order for it to avoid the appearance and real danger that it lacked the necessary independence and impartiality, to appoint from its members separate committees with discrete membership to perform separately the investigatory and adjudicatory functions conferred by section 24(2) of the Act. Counsel therefore places his case on this ground on an argument of apparent bias. What it amounts to is that there was an appearance of bias on the part of the Council on the basis that it exercised both investigatory and adjudicatory functions in the enquiry.

127. I have already referred to the test of apparent bias in dealing with an earlier ground of appeal. The question is whether the fair minded and informed observer having considered the facts would consider that there was a real possibility that the tribunal was biased. Among the facts which the fair minded and informed observer must consider would be those derived from the statutory regime. Counsel's submission accepts that the Council has both investigatory and adjudicatory functions. This is correct (see **Medical Board of Trinidad and Tobago v des Vignes,** supra). In my judgment so long as the Council is not acting outside of its statutory authority, it is difficult to accept that the reasonable observer would consider there was a real possibility of bias. A similar point was made in the case of **Brosseau v Alberta Securities Commission** [1989] 1 S.C.R 201. There the issue was whether there was a reasonable apprehension of bias where the chairman of the Securities Commission performed both investigatory and adjudicatory functions. L'Heureux-Dube' J. in giving the judgment of the Court stated:

> *"21. In order to disqualify the commission from hearing the matter in the present case some act of the commission going beyond its statutory duties must be found.*
>
> *22. Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the*

> *legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operations. In some cases, the legislator will determine that it is desirable, in achieving the end of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se. In this case the appellant complaints that the chairman was both the investigator and adjudicator and that, therefore, the hearing should be prevented from continuing on the grounds of reasonable apprehension of or bias."*

128. The Court concluded that the acts of the chairman were within his statutory authority and so long as there was no evidence to show involvement above and beyond the mere fact of the chairman's fulfilling of his statutory duties, a reasonable apprehension of bias affecting the commission as a whole cannot be said to exist.

129. The same could be said here. There is no evidence that the Council went outside what it was authorized to do. That too is a fact that the well-informed observer would take into account.

130. In my judgment the fair minded and informed observer, aware of the fact that the Act vested both investigatory and adjudicatory functions in the Council and that the Council was not acting beyond its statutory authorization, would not consider that there is a real possibility that the tribunal was biased.

131. There are two additional matters that are relevant to this ground to which I will also refer. First, in **des Vignes,** supra, de la Bastide, CJ considered the hypothetical case where the whole of the Council was disqualified from sitting on an enquiry. He concluded that it would be improper and invalid for a Council to purport to delegate or transfer to anyone else the functions which it is given by section 24 of the Act to enquire into allegations of misconduct. He stated:

> *"It follows, therefore, that if the Council were disqualified to a man, then, there would be no one who could conduct this enquiry. It is in such circumstances that the doctrine of necessity would apply and have to be invoked."*

132. If therefore there is any basis in Counsel's submission on apparent bias, it would serve to disqualify the whole Council and the doctrine of necessity would apply. The proceedings would therefore not be vitiated on that basis.

134. Secondly, in **Preiss v General Dental Council** [2001] 1WLR 1926, it was held on the facts of that case that there was an appearance and a real danger of bias on the part of the Professional Conduct Committee, but that the ultimate right of appeal to her Majesty in Council, which was by way of rehearing, saved the day. That is true here as well. The Appellant not only had a similar right of appeal to a Judge in Chambers and to this Court but also has a similarly right of appeal ultimately to the Privy Council.

135. I turn now to consider the sixth ground of appeal. This is in essence that the decision of the Council was wrong having regard to the evidence. It is the submission of Counsel for the Appellant that the Council went wrong evidentially in that:

i) it improperly assessed the concession made by the Appellant;

ii) the decision is unreasonable and contrary to the evidence; and

iii) the evidence lacked the quality or the high standard of proof required.

136. The concession to which Counsel referred is the admission by the Appellant that the only report he had faxed to Mr. Mohamdally was the Saitech report. This he said was faxed from his office at the Lukuni Clinic. This concession, it was submitted by Counsel, was of no evidential value to support the Council's finding that the doctored report was faxed by the Appellant as it was not established that the Saitech report that Mr. Mohamdally received by fax was the report that the Appellant conceded he had faxed. Further, for the concession to be of any value it needed to be shown that the altered report and the Saitech report formed one single document and this was not done.

137. I do not agree. The evidence of Mr. Mohamdally was that the doctors at the Port of Spain General Hospital had requested all available reports. He was never told by the Appellant what he had removed from his wife. He therefore contacted the Appellant on several occasions to have the report submitted to the hospital. The Appellant indicated that the lab was not finished with the report and he would send it when he received it. Mr. Mohamdally also stated that he contacted the Auzonville Medical Centre but the Centre would not release the report without the Appellant's permission. Eventually on October 28th, 2003, he gave the Appellant the fax number at his place of work and received two faxes. According to the evidence these were faxes of the Saitech report and the altered report. He then confirmed receipt with the Appellant and submitted the reports to the hospital. The concession by the Appellant that he had faxed the Saitech report lent support to Mr. Mohamdally's evidence and I do not think that any greater reliance was put on it by the Council.

138. There is no force whatever in Counsel's submission that for the concession to be of any value it had to show that the Saitech report and the altered report comprised one document. As the Judge noted, "the fact that the evidence was that they were both received on the same day, one after the other is sufficient." I agree.

139. The other bases of the Appellant's challenge on the evidence relating to the standard of proof and that the decision of the Council is unreasonable and contrary to the evidence will be taken together.

140. It is clear that in disciplinary proceedings of this nature the standard of proof is the criminal standard (see **Wilston Campbell,** supra). It was submitted by Counsel for the Appellant that this standard was not applied by the Council in its decision nor was it met. There was however no attempt by Counsel for the Appellant to demonstrate that the Council did not apply the criminal standard. On a fair reading of the Council's findings and decision there was no indication that it applied a lower standard. There was in any event an abundance of evidence on which the Council could conclude beyond a reasonable doubt that the report was altered and altered by the Appellant.

141. I have referred to the evidence that was before the Council earlier in this judgment. There is obviously no need to repeat it here. It is sufficient to refer to the gist of it. Apart from the evidence of Mr. Mohamdally as to the receipt of the faxes, there was evidence that the report which was altered was sent to the Appellant and that the doctored report contained the same unique text of the report that had been prepared for the Appellant with respect to Ms. Joseph, another patient of the Appellant. Only one copy of this report was prepared and sent to the Appellant, thus the Appellant had access to a report that, as Dr. Barrow put it, was the source of the fraudulent report. This evidence pointed to the clear conclusion that the Appellant altered the report.

142. The Judge was of a similar view as he noted the documentary and oral evidence pointed to a single conclusion and that was to the guilt of the Appellant. He observed that if there was an innocent explanation it was not forthcoming from the Appellant. Counsel attacked the Judge's conclusion and drew reference to a number of matters to indicate that the evidence did not have that quality. These were:

i) the fact that the Appellant did say that he had never altered a report and that he had never received Dr. Barrow's original report;

ii) that no evidence was led from either Dr. Barrow's secretary or Ms. Joseph as to whether they were in possession of the report on Ms. Joseph or whether they had parted with copies of same;

iii) that Mr. Mohamdally's evidence as to his receipt of the faxed transmission of the altered report and the Saitech report conflicted with the evidence on the face of those faxed reports;

iv) that in the circumstances of the disclosures and admission made by the Appellant to Dr. Barrow, Mr. Mohamdally and Dr. Ariyanayagam there was no motive for his falsifying the report; and

v) the Appellant admitted faxing only a Saitech report to Mr. Mohamdally from his office at the Lukuni Clinic and not the report that was in fact faxed.

I do not however think that any of these matters advance the case for the Appellant.

143. With respect to i) there seems to be an underlying premise that because the Appellant indicated that he did not receive the altered report and that he did not alter it that the Council could not conclude otherwise. That is clearly not so. There was evidence to the contrary, which it was open to the Council to accept. As was noted in **Gupta** where a tribunal has had the advantage of seeing and hearing the witnesses, which is an advantage that an appellate court does not enjoy, the appellate court should be slow to interfere unless it is satisfied that the tribunal wasted that advantage. I cannot say that it did so. It was open to the Council to accept the evidence that led to the inescapable conclusion that the Appellant received and altered the report of Dr. Barrow on Mrs. Mohamdally.

144. With respect to ii), there was no need to lead evidence from Dr. Barrow's secretary or Ms. Joseph as to whether they were in possession of Ms. Joseph's report or whether they had parted with copies of same. Such evidence would have served no useful purpose. What was of relevance is that the Appellant had Mr. Joseph's report. The evidence before the Council was that one copy of the report was prepared and sent to the Appellant. There was no reason to doubt this evidence. The Appellant had submitted tissue in respect of Ms. Joseph to Dr. Barrow's lab for analysis, a fact that was not denied, and in the normal course of things a report would be prepared and sent out. It would be passing strange if that was not the case. There was a suggestion by the Appellant that he did not have the report on Ms. Joseph. However in the absence of any explanation as to what happened to the report or why it was not in his possession this statement of the Appellant rings hollow and is without any value. It was open to the Council to reject it as it clearly did. There was therefore evidence on which the Council could come to the conclusion to the extent that it felt sure that the Appellant received Ms. Joseph's report and had it in his possession. There was no need to go further and lead any additional evidence.

145. As to iii) the evidence of Mr. Mohamdally was that he had received both the altered report and the Saitech report by fax from the Appellant. He was able to say so because he had requested reports from the Appellant and he had received them. Further they were sent to the faxed number he had given to the Appellant and he had subsequently spoken to the Appellant concerning receipt of what turned out to be the altered report. The clear conclusion was that the reports must have been sent to him by the Appellant. There was nothing on the face of the facsimile of the reports that could contradict this.

146. With respect to iv) I have already referred to the issue of motive earlier in this judgment and it is an issue to which I will return shortly. I do not at this stage propose to say anything more on it save that in my judgment there was evidence on which the Council could come to its finding on motive.

147. Lastly with respect to v) the Appellant admitted sending a Saitech report to Mr. Mohamdally. His concession did not extend to admitting that the Saitech report that Mr. Mohamdally said he received from him was the report he had faxed. The Appellant's admission however has to be viewed in the context of the whole of the evidence, particularly Mr. Mohamdally's evidence as to his request for and receipt of reports. The admission was capable of lending support to Mr. Mohamdally's evidence that he received the reports from the Appellant. The fact that the admission did not go so far as to say that the report that Mr. Mohamdally said he received was in fact the report the Appellant faxed did not rob the admission of evidential value.

148. Counsel further attacked the finding of the Council on the basis that there was "collaboration" or "collusion" between Dr. Barrow and Mr. Mohamdally. That submission is without any basis. It is true that they seem to have both consulted the same attorney at some point. That in itself, however, cannot support his submission that the evidence should have been rejected because of collaboration or collusion. It is for the Council at the end of the day to accept or reject the evidence and it cannot be faulted for accepting the evidence of Dr. Barrow and Mr. Mohamdally.

149. Counsel for the Appellant also challenged the finding on the basis that there was no evidence to support the notion that the Appellant, contrary to the finding of the Council, had any motive to tamper with the report. Counsel argued that the Appellant had never denied that he had perforated Mrs. Mohamdally's bowel and in fact had acknowledged this was so. He had admitted to Dr. Ariyanayagam that he had repaired a wrent in the patient's uterus following a myomectomy.

150. I have already in this judgment dealt with an argument as to propriety of the Council's finding on motive. However, given the importance of Counsel for the Appellant attaches to it I will deal with it further.

151. It should be noted that before the trial Judge, Counsel for the Appellant denied that his client had performed any myomectomy procedure on Mrs. Mohamdally. This is somewhat contrary to the submission made by Counsel. It is however correct to say that he performed a repair of a wrent he found at the fundus of Mrs. Mohamdally's uterus and had acknowledged that he perforated her bowel. But that is of no relevance to the finding of motive. Counsel's submissions on motive are in my judgment not to the point. What is relevant is the evidence from Dr. Barrow as to what the findings contained in her report meant. She stated that the tissue samples sent to her were small bowel mucosa only and that endometrium was not received. That meant that the Appellant had perforated the uterus of the deceased and that the perforation had extended to the small bowel. On disclosure of this information to the Appellant he would have been aware of the fact of two perforations. The importance of this can be seen from the evidence of Dr. Ariyanayagam referred to earlier. It is clear from the evidence that information as to the possibility of two perforations was of grave importance. Although Dr. Barrow's findings and report were made known to the Appellant after the surgery performed by Dr. Ariyanayagam on Mrs. Mohamdally, the Appellant made no attempt to inform anyone of the findings. That would provide a motive to the Appellant to alter the report.

152. In the circumstances there was an abundance of evidence from which the Council could conclude beyond a reasonable doubt that the Appellant had altered the report. There is

no basis to the contention that the Council's decision is unreasonable and contrary to the evidence.

153. In view of the above this ground of appeal, in my judgment, also cannot succeed.

154. I have already referred to ground (vii). As to the final ground, ground (viii), as I have mentioned, it seems to me it is only relevant if any of the other grounds succeeded which they have not. In any event there was no independent basis advanced for contending that the decision of the Council is unreasonable or irrational. In the circumstances I would dismiss the appeal with costs to be taxed and paid by the Appellant to the Respondent.

Dated the 15th day of November, 2010

Allan Mendonça
Justice of Appeal