SUPREME COURT OF QUEENSLAND

CITATION:	*R v Berg* [2019] QCA 122
PARTIES:	**R** **v** **BERG, Vincent Victor** (appellant)
FILE NO/S:	CA No 112 of 2018 DC No 137 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport – Date of Conviction: 23 March 2018 (McGinness DCJ)
DELIVERED ON:	21 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2019
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant was found guilty at trial of several dishonesty offences, including dishonestly gaining a position as a psychiatrist and forgery – where those offences flowed from an allegation that the appellant dishonestly represented that he was duly qualified and experienced psychiatrist – where a nolle prosequi was entered on several other counts that alleged that the appellant had done grievous bodily harm or bodily harm to five patients – where, at the time of the nolle prosequi, the jury had heard evidence from three of the patients and the evidence of the other two patients had been opened – where the jury was directed to disregard the evidence of all of the patients – where two doctors had also given expert evidence about the appellant's treatment of one of more of the patients – where the appellant submits that the evidence of the patients and the doctors was so prejudicial, despite the direction to disregard the patients' evidence, that there was a risk that it was impermissibly used by the jury in its consideration of the dishonesty offences – whether the patients' evidence remained relevant and admissible as it was part of a factual basis for an expert opinion expressed by one of the doctors –

whether the doctors' evidence remained relevant and admissible as it could have founded an inference that the appellant was not a qualified psychiatrist – whether the evidence relevant to the discontinued charges was relevant and thereby also admissible to the dishonesty offences – whether there was a miscarriage of justice

Patel v The Queen (2012) 247 CLR 531; [2012] HCA 29, distinguished

COUNSEL: J A Fraser for the appellant
D Nardone for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and the order his Honour proposes.

[2] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the order his Honour proposes.

[3] **McMURDO JA:** In 1992, at the age of 40, the appellant arrived in Australia from Russia where he had been born and educated. He sought residence as a refugee, claiming that he had been persecuted as an active member of a minority Christian group. In that application, he wrote that he had a university degree in applied mathematics and had worked as a teacher, before being awarded a Master of Science from that institution (at the Tula Polytechnic Institute) in 1978. His application made no reference to any other education or professional training. More particularly, he made no reference to any training and experience as a medical practitioner.

[4] Shortly after his arrival in Australia, he made contact with sections of the Anglican Church, from which he received assistance in applying for refugee status. At no time did he indicate to those from the Church to whom he spoke that he had any medical qualification.

[5] In 1996, under the name Victor/Vincent Tchekaline, he applied to Griffith University to enrol in full time study in a Doctor of Philosophy program, when again, he made no reference to any medical qualification. He was conditionally admitted by the University in its Faculty of Education and the Arts, where he studied until July 1998, when his candidature was terminated by the University.

[6] In May 1999, he commenced the course of conduct which resulted in the convictions against which he now appeals. He was charged with three counts of dishonestly gaining a benefit, in the nature of a position with Queensland Health or registration with the Medical Board of Queensland, together with one count of dishonest inducement of that Board and two counts of attempting to dishonestly gain registration for himself with the Royal Australian and New Zealand College of Psychiatrists and the Australian Medical Council. Those offences were alleged to have been committed at various times from 31 May 1999 to 30 April 2003. In essence, it was alleged that he dishonestly represented that he was a duly qualified and experienced psychiatrist. There was a further charge of dishonesty, which was that he

forged a document, which was found on his computer when police executed a search warrant in 2005, in the form of a certificate from the Medical Board of Queensland that he was a person of "good standing".

[7] The first of those charges alleged that the appellant dishonestly gained a position as a "clinical observer" at a hospital at the Gold Coast, by furnishing a document to Queensland Health which was said to have been issued by the Voronezh State University in 1977, granting a medical degree, with a particular accreditation in psychology, to a person named Tchekaline Victor Vladimirovich, which the appellant said was his former name. In this initial application to Queensland Health, as well as in his subsequent applications both to Queensland Health and to various medical boards and associations, he represented that he was an experienced medical practitioner, and in particular a psychiatrist who had worked in a certain clinic in Voronezh, in the Soviet Union. The prosecution case was that all these representations were completely false, because he had no medical training, qualification or experience. He succeeded in obtaining the position as a clinical observer at the Gold Coast Hospital, which he occupied for several months in 1999.

[8] He then succeeded in obtaining a position with Queensland Health in the Townsville District Health Service in its rotational training program, and worked in that position for the calendar year 2000. That was a paid position in which he received a salary of about $70,000, which was a circumstance of aggravation for count four on the indictment, which alleged that he had dishonestly obtained that position.

[9] In addition to those six counts of fraud and the count of forgery, the indictment charged another seven counts, alleging that, by criminal negligence, he had done grievous bodily harm or bodily harm to five patients during his year in Townsville. However, on day nine of the 14 day trial, the prosecution entered a nolle prosequi on four of those counts, and did the same in relation to the three other counts on day ten. By that stage, the jury had heard evidence from three of the patients, a man whom I will call JS, and women whom I will call MJ and FB. The jury had not heard evidence from another two complainants, but their evidence had been opened.

[10] The prosecution case then closed and the appellant gave evidence. The jury was then addressed by both counsel before the judge commenced to sum up on day 11.

[11] The jury was directed to disregard the evidence of all of the patients. The judge said "now that the charges in relation to the patients have been discontinued, you must put all their evidence to one side and not use it in any way. It is not relevant at all to your consideration of the remaining charges."[1] As I will discuss, the jury had heard not only from some of the patients, but also from the psychiatrists who had supervised the appellant in Townsville, who gave opinion evidence which was critical of the appellant's performance, including in his treatment of those five patients. Nevertheless, no application was made by the appellant's trial counsel to have the jury discharged, once the prosecution had discontinued on the counts, and nor had an application been made, at any stage, to have those counts severed from the dishonesty counts.

[12] In this appeal, it is now said that the evidence which the jury heard about the treatment of these patients was so prejudicial that, despite the judge's direction to

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1 AR 79.

disregard it, there was such a risk that it would be used, impermissibly, by the jury in its consideration of the dishonesty offences, that the convictions are the result of a miscarriage of justice. On that ground, the appellant seeks to have the convictions quashed and a re-trial ordered. For the reasons that follow, that argument should be rejected and the appeal dismissed.

[13] On the counts of dishonesty, there was no real question of whether the alleged representation or representations had been made. In each case, they were made in writing and the writing was proved. The question was whether the appellant did have the qualifications and experience which he claimed.

[14] The prosecution adduced evidence from several witnesses from the Russian Federation, as to the absence of any medical qualification. A witness from what used to be called the Tula Polytechnic Institute testified that the appellant did study there, and was awarded an engineering degree specialising in mathematics. That was the qualification which the appellant had claimed when applying for refugee status and enrolment at Griffith University.

[15] Another witness, who was the Chief of Personnel and Administration at the Voronezh State University, testified that, in any relevant period, the University did not have a medical school. She also testified that she had searched the records of the University and had found no diploma having been granted to a person by the name which the appellant said had been his name at the time.

[16] A witness, from an institution called the Voronezh State Medical Academy, testified that, between 1969 and 1977, it did not provide psychiatry focussed medical courses and that the name which appeared on the purported diploma did not appear in any records of that institution.

[17] Another witness, who worked at the Voronezh Regional Clinical Psychiatrical and Neurological Medical Clinic, said that she had searched the records of employees of that Clinic and had found no record of the name used by the appellant.

[18] The appellant answered that body of evidence in this way. He testified that, as a young man, he was recruited by the KGB, which placed him in a medical course which it conducted under the guise of the Voronezh State University. Having thereby graduated in Medical Science and Psychiatry, he said that he worked in hospitals as a psychiatrist employed by the KGB, before fleeing to Australia fearing persecution for both his political and religious beliefs. He said that he arrived in Australia without copies of his diplomas because they had been confiscated. He said that he had had no intention of working as a psychiatrist or more generally as a medical practitioner when he arrived in Australia, and for that reason had made no reference to his qualifications in applying for refugee status and for enrolment at Griffith University. It was only some years later, when he was contacted by a Russian person who was then living in Cairns, and who had had links to the KGB, that he was provided with his Diploma of Medicine which he then used, or attempted to use.

[19] To prove the counts upon which he was convicted, the prosecution had to persuade the jury to reject the appellant's evidence beyond reasonable doubt. If the prosecution so persuaded the jury, convictions upon the dishonesty offences inevitably followed, because the evidence from the witnesses from Russia would then prove the falsity and fraud of the appellant's representations.

[20] As to the forgery count, the appellant's evidence was that he created this certificate on his computer, but without intending to put it forward as an authentic document upon which anyone could rely. For that reason, he said, the document had not been used. Again, the prosecution case depended upon the jury being persuaded to reject that evidence beyond reasonable doubt.

[21] The prosecutor argued to the jury that the appellant's testimony about the KGB was so unlikely that it should be disbelieved. The prosecution also relied upon evidence from two psychiatrists, Dr Allan and Dr Boyes, who had witnessed the appellant's professional performance during his term in Townsville. In particular, Dr Allan's criticisms of the appellant's treatment of the patients, who were the subject of the other charges, were relevant to the dishonesty offences, the argument being that the appellant's treatment of them was so wanting that it supported an inference that he had no qualification in psychiatry. There was no challenge by the appellant's trial counsel to that evidence being used in order to prove that the appellant was unqualified.

[22] In her opening address, the prosecutor told the jury that the evidence of the doctors who supervised the appellant would be relied upon in that way. And in her closing address to the jury, the prosecutor referred to the evidence of Dr Boyes that, at the time, Dr Boyes made it "very clear to both Dr Allan and [another doctor] that I didn't believe Mr Berg was a doctor" and that she "would speak to [the appellant] and tell him that I didn't believe what he was doing was correct". Dr Boyes testified that "I don't believe he had the skills of a general medical doctor."[2]

[23] Dr Allan testified that, as that year progressed, he became less confident in the prospects of the appellant being trained (or re-trained) as a psychiatrist. He said that whilst the appellant "had some limited medical knowledge", Dr Allan did not think that he demonstrated much of it and that "there wasn't much point in continuing to employ him."[3] In a letter to the appellant in August 2000,[4] Dr Allan expressed concerns about the appellant's ability to function as a Psychiatry Registrar and concerns about the appellant's ability to treat patients independently. His letter set out a series of conditions, involving strict supervision of the appellant, which would have to be observed for the appellant to complete his year with the Townsville District Health Service.

[24] The appellant's argument is that the evidence of what happened to particular patients, including the evidence of Dr Allan and another psychiatrist about them, was highly prejudicial and irrelevant to the dishonesty counts. It is necessary therefore to discuss that evidence, and the reasons why the prosecution did not proceed with the charges involving particular patients.

[25] A patient, FB, suffered from post-natal depression for which she had been prescribed anti-depressant medication by a psychiatrist. Subsequently, she was referred by her GP to the same psychiatry unit in Townsville unit, where she encountered the appellant in early 2000. The appellant diagnosed her with bipolar disorder and prescribed certain medication, which made her sick and tired and made her depression worse, she said. He then prescribed several different medications over a nine month period such that with "every appointment I'd come away with

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2 T 6-35, 36.
3 T 7-92, 93.
4 AR 1065.

something new."[5] She developed bad skin rashes and put on a lot of weight, she lost hair, her periods stopped, and her depression worsened. Dr Allan testified that, having reviewed this patient's records, in his view at least some of this medication should not have been prescribed or continued once there were these side effects.

[26] A patient, JS, suffered from schizophrenia and bipolar depression. When he saw the appellant, his medication was changed, and changed again on nearly every occasion when he returned to be treated by the appellant. He said the medication made him feel "shocking", and that he was constantly falling over and sleeping. At one point his flatmate took him to see Dr Stanley-Davies, who sent him to hospital and discontinued the medication which the appellant had prescribed. But the appellant told the patient to continue taking this medication. Dr Stanley-Davies said that the side effects of which the patient was complaining were to be expected at the levels of dose that he was receiving.[6] Discussing JS's case, Dr Allan explained the connection between the matters of which JS complained and the medication which the appellant had prescribed for him.

[27] A patient, MJ, suffered from bipolar disorder, for which she had been treated by several doctors in Townsville. When she saw the appellant, she was told to discontinue the medication she had been using for some years and use something else, which he prescribed. She said that she was getting sick from this new medication, suffering headaches and nausea, and began to develop other side effects, including a swollen abdomen and diarrhoea. She noticed that she was starting to develop jaundice. Her mother gave evidence confirming her observations of some of these symptoms. Dr Allan examined the file of MJ and was critical of her treatment by the appellant. He said that the rash and the effects on her liver indicated a sensitivity to medication which should have been recognised earlier.

[28] Dr Allan gave evidence in relation to another patient, whom I will call P, who had been diagnosed with schizophrenia. The count involving P was discontinued before he testified. The appellant increased the medication which had previously been prescribed for this patient. Dr Allan could see no reason for that change, or for the subsequent prescription of other drugs by the appellant. In particular, the prescription of one of these drugs was described by Dr Allan as "a terribly unwise thing to do".[7]

[29] Another count involved a patient whom I will call CB. She did not testify before the count involving her was discontinued. But Dr Allan gave evidence of her treatment by the appellant. She had been diagnosed with major depression and was on certain medication. The appellant stopped that medication without recording any reason for doing so. He prescribed a substitute medication, which Dr Allan said was not used to treat depression, but was an antipsychotic medication. She had side effects from that medication, including sleep disturbances and dizzy spells, as well as nausea.

[30] The counts involving the individual patients came to be discontinued in this way. During the prosecution case, and in the absence of the jury, there had been some discussion as to whether the evidence supported a finding of bodily harm, or

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5 T 6-5.
6 T5-22.
7 T 5-41.

grievous bodily harm, in relation to counts five, seven, nine and 11. After the conclusion of Dr Allan's evidence, the prosecution said that it would not proceed on those counts. Defence counsel made a no case submission in relation to the three remaining charges, which were ones of unlawful assault occasioning bodily harm. The complainants the subject of those charges were FB, JS and MJ. The prosecution had particularised those offences by saying that the assault was by the administration of medical treatment, or in other words, the prescription of medication which the patient then used. The trial judge accepted the argument of defence counsel that those facts could not constitute an assault, because they did not involve, in the terms of s 245(1) of the *Criminal Code* (Qld), the application of force of any kind. With the agreement of defence counsel, the prosecutor entered a nolle prosequi in relation to those counts, and also counts five, seven, nine and 11, in the presence of the jury. The trial judge then advised the jury "that all the charges … relating to grievous bodily harm and assault occasioning bodily harm are not before you any longer and so it is just the remaining charges that you will be considering,"[8] explaining that, because the prosecution had been unable to prove some of the elements in relation to those offences, they had been taken away from the jury.

[31] In the prosecution case, there was evidence from doctors who had seen something of the appellant during his time at the Gold Coast Hospital. One was Dr Morris, who said that he had "very little" interaction with the appellant and that nothing had been drawn to his attention that indicated that the appellant was not a trained psychiatrist.[9] The other was Dr Petchkovsky, who had had more contact with the appellant, and who said that "by and large, [the appellant] did a job that seemed consistent with the way he presented his background" and that if there had been any concerns as to whether he was, in fact, a doctor, Dr Petchkovsky would have raised them.[10]

[32] In her closing address to the jury, defence counsel sought to make much of Dr Petchkovsky's evidence, on the basis that it demonstrated a training and expertise as a psychiatrist. Defence counsel also sought to rely upon some of the evidence of Dr Allan in the same way. She said to the jury:

> "When you go back to the evidence of Dr Allan, there were, you might think – there's a significant body of evidence from Dr Allan that most of my client's decisions were in fact reasonable. He accepted and he disagreed with some of the decisions that my client made. But, again, remember this: Dr Allan is now and certainly was back then a very senior and experienced psychiatrist."[11]

[33] Again in her closing address to the jury, defence counsel said that, despite the criticisms by Dr Boyes of the appellant's work, what was significant was that, at the time, Dr Boyes did not stop the appellant from seeing patients on his own and prescribing medication for them.

[34] In her summing up, the trial judge referred to the evidence of the doctors as follows:[12]

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8 T 9-10.
9 T 3-33, 39.
10 T 2-49.
11 AR 39.
12 AR 79.

> "So you have been reminded of Dr Boyes' evidence by the prosecution, and Ms Thompson has commented on both Dr Allan and Dr Boyes' evidence, and I will be reminding you of what they said, again, at the end of my summing up. But, again, I can remind you their evidence if you wish me to do so. But you will recall that – yes. So I think at this stage, that is all I wish to say about that part of the circumstantial evidence.
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> Now, you also, of course, heard evidence from Dr Petchovsky and Dr Morris that they did not have any concerns about the defendant's alleged degrees in – as a medical doctor and in psychiatry, then they, you might think, were also psychiatrists, so therefore experts in a position to give an opinion. Now, just briefly in relation to the patients' evidence, we spent quite a lot of time hearing from the patients up at Townsville Hospital. Now, they are not experts. You must disregard their evidence as to their opinions of Mr Berg. In fact, now that the charges in relation to the patients have been discontinued, you must put all their evidence to one side and not use it in any way. It is not relevant at all to your consideration of the remaining charges."

Notably, the jury was not directed to disregard the evidence of Dr Allan and Dr Stanley-Davies about the treatment of one or more of the patients who were the subject of the discontinued charges.

[35] When summarising the address of defence counsel, the trial judge referred to counsel's reliance upon the evidence of Dr Petchkovsky and Dr Allan. And in summarising the prosecutor's closing address, the judge referred to an argument that the evidence of Dr Allan and Dr Boyes supported a finding that the appellant was not a qualified psychiatrist as he had claimed. At no stage was it suggested to the judge that these directions were incorrect or that the evidence of Dr Allan and others, which was critical of the appellant's performance, was not to be used by the jury.

[36] The appellant's argument in this Court is that there was a miscarriage of justice, because the evidence which was given by some of the patients, and the evidence of other patients which was opened, as well as the evidence of Dr Allan and Dr Stanley-Davies about one or more of the patients, was irrelevant and prejudicial. The appellant's argument seeks to liken this case to *Patel v The Queen*.[13]

[37] In *Patel*, the defendant was charged with three counts of manslaughter and one count of unlawfully doing grievous bodily harm in respect of his conduct of surgery on four patients. For much of the trial, there was extensive evidence going to whether the surgery itself had been negligently performed by the defendant, before, on the 43rd day of the trial, the prosecution narrowed its case to one in which the defendant was criminally responsible because of his conduct in deciding to perform the surgical procedures. Consequently, much of the evidence which the jury had heard, over those many weeks of trial, became irrelevant but was highly prejudicial. It was held that it was not possible to ameliorate that prejudicial effect by directions from the trial judge to disregard the evidence and that a miscarriage of justice had occurred.

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13 [2012] HCA 29; (2012) 247 CLR 531.

[38] By contrast in the present case, the evidence of the psychiatrists, including Dr Allan and Dr Stanley-Davies who gave opinion evidence in relation to one or more of the patients, remained relevant and admissible evidence after the counts involving the particular patients were discontinued. This was because their evidence was able to be used, at least with other evidence, to found an inference that the appellant was not a qualified psychiatrist. Notably, there was no objection by defence counsel to the use of their evidence in that way.

[39] The evidence of the three complainants who testified, as well as the evidence which was opened but not given by other complainants, was the subject of a direction by the judge that it should be ignored. In context, it is clear that the jury was told to disregard it, because, unlike the evidence of the psychiatrists, it was not expert opinion evidence. The judge was correct to instruct the jury that they were not to use the evidence of a patient, who complained of side effects from certain medication, to reason that the medication had been wrongly prescribed. However the evidence of the fact of the prescription of that medication remained relevant, because it was part of a factual basis for an opinion expressed by Dr Allan or Dr Stanley-Davies, which was relevant in the way that I have described. The present case is unlike *Patel*, essentially because the evidence which was relevant to the discontinued case remained relevant on the charges for which the appellant was convicted.

[40] The evidence of one or more of the patients might have been distressing to the jury. But it was admissible evidence and there was no submission at the trial that it ought to be excluded because its prejudicial impact outweighed its probative value. In my view, there is no real risk that it improperly affected the reasoning of the jury.

[41] In my conclusion there was no miscarriage of justice. The appeal should be dismissed.