Professional misconduct – recent case law

New South Wales Bar Association v Punch [2008] NSWADT 78

By Tilda Hum

It is one thing for a practitioner to believe that their client is guilty and quite another to know it, the Administrative Decisions Tribunal of NSW ruled in March 2008, when it found barrister, John Patrick Punch, guilty of professional misconduct.

Mr Punch was briefed to represent Tony Haddad in relation to an armed robbery of a residential home in Roselands, allegedly committed in November 1994. In December, Mr Punch visited the accused and his co-accused in the Bankstown police cells, where Haddad made statements, which were recorded by police, indicating that he was present during the robbery.

Police had obtained a warrant to place a listening device in the cell under the *Listening Devices Act* 1984 (NSW) in relation to another offence, the murder of Andre Rahme in 1994. In an affidavit, the police indicated that the device was not intended to be used in relation to the armed robbery Haddad and co-accused, Giovanni Treglia, were charged with.

The listening device picked up the following interchange, which the NSW Bar Association sought to rely on:

> 'Haddad: But she said, she said, in the house, she said, Rami, get out.
> Respondent [Mr Punch]: Yeah.
> Haddad: She said something about Rami.
> Treglia: Yeah.
> Haddad: Rami, get out, get out. I'll, I, cause I was in the back room like I was telling you.
> Respondent: Yeah, Rami get out…'[1]

In relation to an alleged assault that occurred during the robbery, the following conversation ensued:

> 'Treglia: Who kicked her in the guts?
> Respondent: The bloke holding the gun. That's what she said anyway.
> Haddad: It wasn't none of us'.[2]

In the cells, Mr Punch gave the following advice to the clients:

> 'Now if you're not actually, physically in there. You were out the back but your [sic] still guilty you know, if they can prove that. But your whole case is just centred on if the prosecution can identify you. If you knock that out that's the end of the case. They've got nothing else.'[3]

Subsequently, at trial, Punch led evidence from five witnesses, including Haddad, that he was not at the scene of the crime, but at home in his bed in Punchbowl. While clearly not comfortable with the verdict, the District Court judge acquitted Haddad on the basis that the alibi evidence prevented a finding of guilt beyond reasonable doubt[4]

In 2004, the NSW Bar Association filed an application for Punch to be struck off as a barrister on the basis of professional misconduct under s127 of the *Legal Profession Act* 1987 (NSW). It alleged that Punch led evidence before the courts that he knew to be untrue, breaching rule 33 of the *New South Wales Barristers' Rules*, which prevents barristers from leading evidence inconsistent with clients' admissions of guilt.

Punch argued that he received further instructions from his client to the effect that he was not present at the time of the alleged offence. The instructions were supported by four alibis, making it reasonable for Punch to accept the change in instructions. He argued that this suggested that his client had explained his earlier representations to him when Punch received the further instructions.

Punch elected not to give evidence as a witness in the professional misconduct hearing. The Bar Association of NSW argued that the Tribunal should draw the inference that Punch's knowledge in relation to his client's guilt had not changed, and argued that his failure to address or explain any change in his state of mind in oral evidence should strengthen that inference.

The Tribunal accepted this argument and, in the absence of testimony from Punch, drew the inference that his testimony would not have assisted his case.[5]

The Tribunal held that to establish professional misconduct, it is not enough that a practitioner has a personal belief that his or her client is guilty. It was held that:

> 'It would not, however, have been enough to prove professional misconduct if the evidence merely showed that the respondent believed that Haddad was at the premises during the armed robbery. Barristers will sometimes find themselves in situations where the evidence strongly indicates that the client is not telling the truth. The fact that the barrister's personal belief is that the client is not telling the truth as to the facts of the case, does not mean that the barrister is prohibited from conducting the case in accordance with the client's instructions. This was not what the evidence revealed in these proceedings.'[6]

The Tribunal held that a barrister who believes that a client has committed a serious crime; holds that belief because the

client told the barrister that he or she committed the crime; and the admissions took place in circumstances that strongly support the conclusion taht the client was telling the truth; who then subsequently leads evidence to the contrary, is guilty of professional misconduct.

Accordingly, Punch was held to have engaged in professional misconduct.

On 21 May 2008, the Administrative Decisions Tribunal handed down the disciplinary orders.[7] The Bar Association argued that the courts could not have confidence in Mr Punch not to mislead, and pointed out that he demonstrated no remorse or contrition.

Mr Punch argued that the events subject to the complaint occurred more than 10 years ago, and that he had practised without complaint since then. He argued that previous disciplinary action should not be taken into consideration, but did request that in the event that the Tribunal made the order to strike him off, its effect be delayed until he finishes matters for which he is currently briefed in order to avoid inconvenience to his clients.

The Tribunal considered s171C of the *Legal Profession Act* 1987, and found that Mr Punch should be struck off the NSW roll of practitioners, have his practising certificate cancelled and be ordered to pay the costs of the NSW Bar Association. It also held that the decision be published.

The Tribunal held:

> '[The evidence] resulted in the acquittal of the respondent's client on a very serious charge of assault and armed robbery. Thus it can fairly be said that the respondent's misconduct facilitated a grave miscarriage of justice.'[8]

The Tribunal relied heavily on the fact that Mr Punch failed to lead evidence explaining the events, failed to show remorse or demonstrate that he had rehabilitated. It also held that the mere passage of time since a complaint does not demonstrate reformation, and that Mr Punch lacked the trustworthiness essential to those entrusted with legal practice. ■

Notes: **1** *New South Wales Bar Association v Punch* [2008] NSWADT 78 at [17]. **2** Ibid at [19]. **3** Ibid at [18]. **4** Haddad and Treglia subsequently pleaded guilty to perjury once the transcripts came to the police's attention. They were unsuccessful in obtaining an order to exclude the use of the transcripts in proceedings against them – Haddad & Treglia [2000] NSWCCA 351. **5** In accordance with *New South Wales Bar Association v Meakes* [2006] NSWCA 340 per Tobias JA. **6** *New South Wales Bar Association v Punch* [2008] NSWADT 78 at 23. **7** *New South Wales Bar Association v Punch* (No 3) [2008] NSWADT 146 **8** Ibid, at [12].

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