

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Hearing
Monday 9 December – Friday 20 December 2024**

Virtual Hearing

Name of Registrant: Darwin Jr Badang

NMC PIN: 21F22110

Part(s) of the register: Registered Nurse - Sub part 1
RNA: Adult Nursing - June 2021

Relevant Location: Medway

Type of case: Misconduct

Panel members: David Evans (Chair, Lay member)
Jane Jones (Registrant member)
Ian Dawes (Lay member)

Legal Assessor: Monica Daley

Hearings Coordinator: Tyrena Agyemang
Dilay Bekteshi (17 December 2024)
Sharmilla Nanan (20 December 2024)

Nursing and Midwifery Council: Represented by Mohsin Malik, Case Presenter

Mr Badang: Present and represented by Neomi Bennett,
Equality 4 Black Nurses

Facts proved: None

Facts not proved: Charges 1 and 2

Fitness to practise: N/a

Sanction: N/a

Interim order: N/a

Details of charge

That you, a registered nurse, on 5 October 2021:

1. Whilst caring for Patient A when they were having a seizure:
 - a. Rubbed Patient A's left breast over their clothing in circular motions.
 - b. Put your hand under Patient A's clothing and/or touched their left breast.
 - c. Rubbed Patient A's vagina over their clothing.
 - d. Touched and/or rubbed Patient A's vagina under their clothing.
 - e. Inserted your fingers into Patient A's vagina.

2. Your conduct at charge 1 above was sexual.

AND in light of the above, your fitness to practise is impaired by reason of your misconduct.

Decision and reasons on application for hearing to be held in private

At the start of the hearing, Mr Malik, on behalf of the Nursing and Midwifery Council (NMC), confirmed that they were not making an application for the hearing to be heard in private. Mr Malik explained that although proper exploration of the hearing involves references to [PRIVATE].

Ms Bennett on your behalf told the panel that the hearing should be held in public as a private hearing would place you at a disadvantage. She explained that you have already endured reputational harm, [PRIVATE], and professional setbacks due to the allegations. She stated that the hearing should be in public hearing in order to restore your professional reputation and reassure the public that regulatory processes are fair, and evidence based. Further she told the panel that this case also raises broader systemic

issues, including racial bias and procedural failings as there were numerous failures by the Trust.

Ms Bennett told the panel that public scrutiny is essential to address the systemic concerns and ensure accountability within healthcare regulation.

Mr Malik did not object to Ms Bennett's submissions.

The panel accepted legal advice.

During the course of the hearing, the panel invited submissions as to whether this case should be held in partly in private.

Mr Malik made a request that this case be held partly in private on the basis that proper exploration of your case involves references to [PRIVATE]. The application was made pursuant to Rule 19 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

Ms Bennett indicated that she supported the application.

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Having heard that there will be references [PRIVATE] the panel determined to hold those parts of the hearing in private to preserve the confidential nature of those matters.

The panel was satisfied that these considerations justify that course, and that this outweighs any prejudice to the general principle of hearings being in public.

Decision and reasons on application of no case to answer

The panel considered an application from Ms Bennett that there is no case to answer in respect of all the charges. This application was made under Rule 24(7).

In relation to this application, Ms Bennett submitted that the allegations against you are based on unreliable testimony, unsubstantiated claims, and significant procedural flaws. She submitted that, at this stage, the primary source of the accusation comes from Patient A, whose allegations are influenced by [PRIVATE].

Ms Bennett submitted that there is no credible evidence to support the claim that you molested Patient A. The investigation into these claims contains significant flaws, including racial profiling, failure to consider the full medical context of Patient A's condition, and a lack of thorough investigation. Patient A [PRIVATE] which severely impaired her ability to provide reliable testimony. [PRIVATE]. Despite this, these critical factors were not adequately addressed in the investigation.

Ms Bennett submitted that the allegation against you evolved over time, initially starting with claims of external touching and later escalating to accusations of penetration. This inconsistency undermines the reliability of Patient A's account and casts significant doubt on her credibility concerning the day in question. She submitted that the ward was chaotic, with no one taking responsibility for its management and no clear leadership present. Multiple staff members were involved in the care of Patient A due to her numerous seizures, resulting in a lack of leadership or accountability. During this time, the incident occurred in a highly volatile environment, making it impossible to pinpoint any individual's role in the alleged events. She submitted that this context is crucial for understanding why no one could be definitively identified as the perpetrator.

Furthermore, Ms Bennett emphasised that Witness 3, who was present during the incident, did not specify the exact time the event occurred. Her description of Patient A's demeanour post-incident was inconsistent with the serious nature of the allegations, as

she reported that Patient A appeared blase, showed no distress, and even smiled, seemingly forgetting the incident. Ms Bennett submitted that this contradicts the nature of the alleged molestation. Moreover, Witness 3 acted on personal assumptions rather than gathering all relevant evidence, including testimonies and statements.

Ms Bennett submitted that Patient A did not identify you as the alleged attacker at the time of the incident. Instead, Patient A referred to a vague description of a male nurse at the front, which could pertain to anyone present on the ward. There are no supporting accounts from other witnesses, and there was no clear identification of the registrant. She submitted the failure to gather witness statements from key staff members and others within the vicinity who could provide critical information. For instance, Person 2, who was present during the incident, has not provided a statement, nor are there statements from key staff, including Person 1 the nurse who was working alongside you, or the support worker who received information from Patient A directly. This lack of witness statements creates a gap in the investigation that significantly undermines its credibility. Additionally, there is no formal incident report, such as a Datix or serious incident report, which raises serious questions about the reliability of the investigation.

Ms Bennett pointed out that Patient A's memory appeared selectively vivid when discussing the incident with authorities such as the NMC and the police, but when initially reporting the incident, she was vague about crucial details, such as who had been comforting her afterward and throughout the day. She submitted that this selective recollection raises significant doubts about the accuracy and reliability of her subsequent claims.

[PRIVATE]. She submitted that the investigation appears to have focused disproportionately on you due to racial profiling.

Ms Bennett submitted that Patient A described the attacker as "*half-caste*", which does not align with your Filipino ethnicity. This focus on you, combined with the failure to investigate other staff members present, suggests that racial bias played a significant role in the

investigation. She submitted that Witness 3's actions and statements indicate reliance on racial stereotypes, informing her opinion about your involvement. This bias led to an immediate presumption rather than an impartial evaluation of the evidence.

In light of these points, Ms Bennett submitted that the allegations against you are based on unreliable testimony, procedural failures, and racial bias. She submitted that the most reliable time recorded in the bundle is the time noted by the police, who indicated that the incident occurred at approximately 15:30, while the witness, Witness 2, stated that you were seated with her at the nurses' desk between 15:00 and 16:00, thus ruling you out.

Ms Bennett, citing the insufficient evidence, procedural flaws, and racial bias, invited the panel to dismiss the case immediately, asserting there is no case to answer for all the charges. She also made reference to relevant case law to support her position.

Mr Malik submitted that there is case to answer on both charges 1 and 2 in accordance with Rule 24 (7) of the Nursing and Midwifery Council (Fitness to Practise Rules) 2004, it is submitted that the NMC has adduced 'sufficient evidence' such that a properly directed panel could find the facts proved.

Mr Malik referred the panel to the NMC Guidance on 'Evidence' (DMA-6) and the case of *R v Galbraith* [1981] 2 All ER 1060, which states:

'...when considering whether there is a case to answer, the Panel should first determine whether there is any evidence upon which a Panel could properly find the charges proved. Where there is none, the Panel should find no case to answer (Limb 1).]

Where there is some evidence presented, the Panel should consider the nature and strength of that evidence and decide whether it can properly be relied upon to find the facts proved. Evidence which is inherently weak and vague, or inconsistent with the remaining evidence in the case, ought not be relied upon (Limb 2)].

Mr Malik submitted that the panel is not reaching conclusions on the facts at this stage, it is solely considering whether, on proper application of the approach set out in Galbraith, it could find any of the contested charges proved.

Mr Malik submitted that your application appears to be brought under the second limb of Galbraith, on the basis that some of the witnesses have provided inherently weak evidence. Further, on an assessment of the evidence presented by the NMC and the evidence of the witnesses, taking the NMC's case at its highest, Ms Bennet had suggested that the Committee properly directing themselves could not find the allegations proved.

Mr Malik submitted that the correct approach under the second limb of Galbraith is as follows: *'Where the strength or weakness of the prosecution case depends on the view to be taken of a witness's reliability or other matters generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury properly directed, could come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury'*

Mr Malik submitted that the correct approach is for the case to proceed and for the panel to consider any inconsistencies in the witness's evidence after the panel has heard all of the evidence.

Mr Malik submitted that there is a case to answer and the NMC has presented sufficient evidence to find the facts proved in relation to both charges. He invited the panel to dismiss the submission of no case to answer and allow the case to proceed.

Mr Malik submitted that the witnesses have given credible, reliable and consistent evidence. Mr Malik submitted that the panel at this stage do not have to consider credibility of a witness but it may be worth noting, as to the reliability of the evidence, whether the witnesses would be untruthful in the accounts given and if they are mistaken in their accounts, consideration may be given to the fact that they are giving evidence

some three years after the incident occurred and sometimes without the benefit of documentation available to them which may have been closer to the time of the incidents.

In relation to charges 1 and 2, Mr Malik submitted that the panel heard from Patient A, who provided a very clear account of what she remembers occurring on 5 October 2021. [PRIVATE].

Mr Malik noted that in Patient A's evidence, she articulated exactly what transpired, and she was consistent in her oral testimony with her police statement made closer to the time. He further submitted that the panel would remember Patient A saying she heard a nurse instructing her partner to wait in the waiting room [PRIVATE]; the panel has heard from Mr A who confirmed this. This clearly indicates that Patient A could hear everything [PRIVATE]. Additionally, Mr A confirmed in oral evidence that he recalled instances when she would remember everything [PRIVATE]; he also indicated that paramedics at the time corroborated this.

Mr Malik stated that the panel will recall Patient A provided a clear and consistent account of what she alleges the registered nurse did to her. She confirmed that you rubbed her left breast over her clothing in circular motions, placed his hands under her clothing, and touched her breast and private parts. She testified in oral evidence that you rubbed her private parts beneath her clothing and inserted your fingers into her vagina. Patient A identified the nurse who was attending to her during the incident. From the evidence the panel has heard, it is absolutely clear that you were the one caring for her that day.

Mr Malik indicated that it was put to the witnesses whether you were alone with Patient A during her seizure and the duration of that time. The timing of when Patient A was having a seizure has been questioned; however, the evidence before the panel was very clear.

Mr Malik pointed out that you have accepted that you remained with Patient A for around two hours [PRIVATE]. He noted that you acknowledged your presence when she emerged from the seizure, stating, "*After the two hours with me on the bedside, the patient slowly*

calmed down and after a few seconds patient is aware and alert.” Therefore, Mr Malik submitted that there can be no dispute that you were present for two hours and were there when she regained consciousness.

Mr Malik submitted that you confirmed in your police statement that you were alone with Patient A during her seizure, and you even accepted that you were holding her hand. From the evidence, the panel knows that the curtains were drawn, which you have also confirmed, stating, *“that the curtains were closed for a period of two hours.”*

Mr Malik further stated that Mr A, in oral evidence, said she was having another seizure. This is again consistent with what you stated: *“I heard the patient call bell and went to check on her”*. You then said, *“she then saw me and started crying and signalling that she does not want me to get close to her”*. Mr Malik submitted that this aligns with Mr A’s evidence, where he instructed you to go away.

Mr Malik noted that both Mr A and Patient A confirmed that you peeked through the curtains, at which point Patient A once again identified you as the person who sexually assaulted her. They both attested to clearly seeing your face, leading Mr A to express his frustration by telling you to *“fuck off.”*

Mr Malik submitted that the panel has heard direct evidence from the nurses present, who stated that Patient A informed them about the sexual assault and what you had done. He submitted that their evidence was clear, concise, and consistent with their police statements.

Mr Malik submitted that the panel heard from Witness 4 and will recall that when he asked her whether it was possible for Patient A to hear, feel, and remember everything, she said that it was very possible. [PRIVATE].

[PRIVATE]. Regarding what Patient A described, Witness 4 said, *“if she said it, it must be; we cannot dismiss what the patient has said.”*

Mr Malik submitted that most of the questions posed by Ms Bennett, to the witnesses pertained to procedure and process. He submitted that the defence is deflecting from the real issues at hand. The charges you face are serious, and he emphasised that the panel has heard direct evidence from witnesses supporting the charges, which cannot be overlooked. He therefore submitted that there is a case to answer.

Mr Malik submitted that you acknowledge Patient A has no reason to lie about these allegations. He submitted that while it has been suggested that you were racially profiled, there is no evidence presented before the panel to support this claim, as none of the witnesses have mentioned it.

Mr Malik concluded that there is sufficient evidence available, and that this evidence is neither inherently weak nor vague. Therefore, there is a case to answer.

The panel accepted the advice of the legal assessor, which included reference to the cases of *R v Galbraith* [1981] 2 All ER 1060 and *R v Shippey* [1988] Crim LR 767.

In reaching its decision, the panel has made an initial assessment of all the evidence that had been presented to it at this stage. The panel was solely considering whether sufficient evidence had been presented, such that it could find the facts proved and whether you had a case to answer.

The panel took into account the submissions of both Ms Bennett and Mr Malik and relevant case law in its consideration. It was of the view that there had been sufficient evidence to support the charges at this stage and, as such, it was not prepared, based on the evidence before it, to accede to an application of no case to answer. The panel considered that this decision is based solely on the documentary and oral evidence from the witnesses called by the NMC relating to the allegations. The panel did not speculate on any evidence which might exist, which was not before it.

The panel are mindful that the weight to give to the evidence, remains to be determined at the conclusion of the facts stage.

Background

The charges arose whilst you were employed as a Band 5 registered nurse on Wakeley Ward at Medway Maritime Hospital, Foundation trust 'the Trust'.

It is alleged that on 5 October 2021 whilst Patient A was having a seizure, you sexually assaulted Patient A by touching her breast, vagina and inserting your fingers into her vagina.

Decision and reasons on facts

In reaching its decisions on the disputed facts, the panel took account of all the oral and documentary evidence in this case together with the submissions made by Mr Malik on behalf of the NMC and on your behalf by Ms Bennett.

The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that a fact will be proved if a panel is satisfied that it is more likely than not that the incident occurred as alleged.

The panel heard live evidence from the following witnesses called on behalf of the NMC:

- Patient A: The Patient involved in the alleged incident;
- Witness 2: A Band 6 registered nurse employed by Medway Foundation Trust, who

was working on Wakeley Ward on the day of the alleged incident.

- Witness 3: The Matron for elderly care at Medway Foundation Trust.

- Mr A: The partner of Patient A.

- Witness 4: Consultant Neurologist and employed at Medway NHS Foundation Trust.

- Witness 5: A Registered Nurse employed by Medway Foundation Trust.

The panel also heard evidence from you under affirmation.

Before making any findings on the facts, the panel heard and accepted the advice of the legal assessor.

The panel then considered each of the disputed charges and made the following findings.

Charges 1a, 1b, 1c, 1d and 1e

1. Whilst caring for Patient A when they were having a seizure:

- a. Rubbed Patient A's left breast over their clothing in circular motions.
- b. Put your hand under Patient A's clothing and/or touched their left breast.
- c. Rubbed Patient A's vagina over their clothing.
- d. Touched and/or rubbed Patient A's vagina under their clothing.
- e. Inserted your fingers into Patient A's vagina.

These charges are found NOT proved.

In reaching this decision, the panel took into account the oral evidence it heard and the documentary evidence before it.

The panel considered the evidence of Patient A and although the panel believed she was trying to be helpful, there were large gaps in her recollection of events and numerous inconsistencies in her evidence.

The panel acknowledged that after a passage of time, a person's recollection of an events can alter. Despite Patient A stating that she had a clear recollection of events that day and [PRIVATE] it was clear to the panel that she had actually been unaware and confused about events that had occurred that day.

The panel had sight of Patient A's notes, heard evidence from witnesses about Patient A's care provided during that day [PRIVATE]. These included Patient A [PRIVATE]; being transferred back to the Wakely ward by you; and being attended at her bedside by two doctors (one male and one female), Witness 2, Witness 3, the female CSW and you. [PRIVATE]. It was clear to the panel that Patient A could not recall any of these significant details of her care.

The panel considered Patient A's evidence that when [PRIVATE] this was the first time, she had seen you. However, this is contradicted by Patient A's medical notes in which the panel could see entries made by you regarding her care, [PRIVATE] and observations taken. [PRIVATE]. This is supported by Witness 2 who in her oral evidence says she saw you providing care and interacting with Patient A on numerous occasions. Witness 2 also described how you assisted her [PRIVATE] Patient A.

The panel considered Patient A's evidence in relation to the timeline of events. It heard from Mr A that Patient A had told him that the alleged incident had occurred hours before and just after lunchtime. In later accounts, Patient A gave subsequent accounts that this

assault occurred immediately prior to Mr A arriving at around 16:30. The panel had regard to Patient A's oral evidence, she said *"it felt like it just happened, but it could have happened way before"*. Based on these inconsistencies, the panel could not determine the exact time of any alleged assault.

[PRIVATE]

The panel also determined that as Patient A's eyes were closed and she could not see, it was not possible for her to have seen who had committed the alleged assault. Patient A's evidence rested entirely on the fact, [PRIVATE], she saw you standing by her bedside for 'the first time'. However, if the alleged assault took place hours earlier 'just after lunchtime' (as said by Mr A in his oral evidence based on the account that Patient A had told him), the panel concluded that this assumption that you were the perpetrator of the alleged assault could not be substantiated. The panel heard evidence that several other staff members had attended to Patient A during that time.

The panel next considered the evidence in relation to Patient A screaming or shouting after the alleged incident. Whilst some witnesses recalled Patient A crying, none of the witnesses, including Mr A, heard any screaming or shouting.

The panel considered Patient A's account that you 'ran away' after she came to from her seizure. No witnesses were able to corroborate this evidence, and no one was seen running away from her cubical or anywhere near that direction of the ward. The panel also considered Patient A's evidence that her partner, Mr A, followed you out of the cubicle however this was denied by Mr A.

[PRIVATE]

The panel noted that Patient A gave a very detailed account of how the patient in the bed next to her was poorly [PRIVATE]. Her account included details of hearing the medical

trolley being moved and of doctors and nurses attending to the patient. However, both you and Witness 2 denied that this occurred.

The panel also considered whether you had the opportunity to carry out the alleged assault in the charges. It noted that you were described as hesitant and very concerned about Patient A. You had asked for assistance from various members of staff, on numerous occasions, during Patient A's seizures and when delivering care to Patient A.

The panel took into account the gaps in Patient A's recollection and the number of discrepancies in her evidence. It noted that Patient A's account of the assault over time has evolved, from her Police Statement to her oral evidence. Further the panel noted that this incident occurred during the pandemic and that you and all hospital staff were wearing face masks. This significant detail was not mentioned by Patient A or Mr A when discussing their identification of you.

The panel considered that you provided clear, concise and plausible evidence. It preferred your account to that of Patient A. The panel found that you were doing your best to provide a caring, safe and professional level of support to Patient A during a difficult and challenging shift which was supported by the evidence of Witness 2 and Witness 3.

The panel, taking all the above into account, could not be satisfied on the balance of probabilities that whilst caring for Patient A you had committed the alleged assault. It therefore finds these charges not proved.

Charge 2

2. Your conduct at charge 1 above was sexual.

This charge is found NOT proved.

In light of the panel's decision at charge 1, this charge now falls away.

Having found none of the charges proved in this case the case will progress no further.

The panel's determination will not be published on the NMC's website. If you would like the NMC to publish the panel's determination you must contact your NMC case officer to arrange for this to be done.

The panel's determination will be confirmed to you in writing.

That concludes this hearing.