

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0003 OF 2010
(Independent Legal Services Commission No. 001/2009)

BETWEEN: ABHAY KUMAR SINGH

Appellant

AND: CHIEF REGISTRAR OF THE HIGH COURT

Respondents

Coram: Khan Izaz JA
Marshall William JA
Chitrasiri Kankani T JA

Hearing: Thursday, 2nd September, 2010

Counsel: Haroon Ali Shah for the Appellant
V. Lidise for the Respondent

Date of Judgment: Wednesday, 22nd September, 2010

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the Commissioner of the Independent Legal Services Commission.
2. The appellant had faced four Complaints and the Commissioner found him guilty of three and acquitted him of the fourth one.
3. The first Complaint and sentence were as follows:
 - a) It was alleged that the respondent had breached the provisions of section 83 (1)(d) (i) of the ***Legal Practitioners Decree 2009*** and was therefore guilty of unsatisfactory professional conduct or professional misconduct in that he was on the 23rd and 25th of October 2006 convicted in the High Court of Fiji for attempting to pervert the course of justice.
 - b) He had been sentenced to 12 months imprisonment by the High Court of Fiji and later, on appeal to the Fiji Court of Appeal, the sentence was reduced to 6 months to be served extramurally.
 - c) The Commissioner, Connors J ordered that the appellant be struck off the role of practitioners in Fiji.

4. The Commissioner went on to deal with Complaint No. 3. The complaint was initially made to the Fiji Law Society by Narendra Prasad.

The first matter complained of was that the respondent in breach of Section 82(1)(b) of the *Legal Practitioners Decree* placed undue pressure on the complainant to transfer a part of his land to the appellant in payment of the balance of fees and further that in the event that the fees were not paid by the transfer of land the appellant would not represent Mr Prasad and his staff.

The second matter of complaint related to the charges by the appellant of excess fees.

After considering all the relevant evidence in respect of this charge, the Commissioner dismissed the Complaint against the appellant.

5. Complaint No. 4 alleged that the appellant was guilty of conduct of a legal practitioner in connection with the practice of law justifying the finding that the practitioner is not fit and proper person to engage in legal practice contrary to the provisions of Section 83 (1) (b).

The Commissioner found the charge proved in this case and fined the appellant the sum of one thousand dollar (\$1000.00) to be paid within 14 days.

6. By a separate judgment delivered on 1st February 2010 the Commissioner dealt with complaint No. 2 which alleged that the appellant was guilty of unsatisfactory professional conduct contrary to

Section 81 of the *Legal Practitioners Decree 2009* in that between the 1st day of June 2004 and 13th June 2005 he delayed the payment of the sum of \$6750.00 to Kishore Kumar which money had been deposited into the appellant's trust account as rent money received from Eagle Boys Pizza in relation to the tenancy agreement between Kishore Kumar as the lessor and Eagle Boys Pizza as the lessee dated 2nd October 2004 which conduct occurred in connection with the appellant's practice of law, falling short of the standard of competence and diligence that the member of the public is entitled to expect of a reasonably competent Solicitor.

7. There are 13 grounds of appeal and almost 60 pages of submissions by the appellant and 20 pages of submissions by the respondent. In addition, there were 12 pages of submissions in reply by the appellant.
8. At the start of the hearing of this appeal, the presiding judge Justice Khan suggested to the appellant's counsel that as the grounds of appeal were numerous, and as the submissions of both parties were lengthy, it might be a good idea to restrict argument to those matters which the parties thought ought to be highlighted and explained. This course of action was accepted by counsel for both parties and the appeal proceeded on that basis.
9. Mr Anwar Ali Shah, counsel for the appellant argued a number of points which were in his grounds of appeal and in his written submissions.
10. The first ground upon which he made submissions was the failure of the Commissioner to grant the appellant an adjournment when he was

having difficulties contacting and arranging for his witnesses to attend the hearing. It was argued that this denial was a denial of natural justice which affected the decision of the Commissioner and therefore his judgment ought to be set aside.

The arguments of the appellant are set out on page 10 of the written submission which were orally developed by Mr Shah at the hearing. They were *inter alia* that the appellant was unable to find and locate his witnesses in a very short time, that the incident was five years old and the appellant needed time to locate and call his witnesses for the hearing especially when his witnesses had left Fiji. Further the Commissioner had failed to consider that the delay of Complainants' 1 and 2 had been unreasonable, that the appellant's livelihood depended on this hearing before the Commissioner and the refusal of adjournment was a denial of natural justice to him. And, the appellant argued that he had not been given sufficient time to prepare the matter for hearing especially when his counsel, Mr Raza withdrew from the case and that the Commissioner erred in law regarding the standard of proof that he should have applied.

11. On 20th October 2009 the appellants matter was listed for hearing on 3rd and 4th November 2009. He had appeared himself with his counsel, Mr Raza had accepted those dates as suitable to him and his counsel.
12. At this juncture, it would be reasonable to deduce that the appellant and his counsel would have attended the Commission to obtain a hearing date for their case, having first considered, the suitability of

various dates that might have been offered by the Commission and the availability of their witnesses.

13. Nevertheless, on 23rd October 2009 the appellant appeared before the Commissioner and made an application for the vacation of the hearing date upon the basis that he had wrongly accepted the dates that had been fixed for hearing, that he was having difficulty locating his witnesses and that he had overlooked the fact that he needed urgent medical attention in Australia.
14. The transcript of the adjournment application shows heated exchanges between the Commissioner and the appellant who attended in person.

At the hearing when the hearing dates were allocated, the Commissioner alleged that the appellant was talking to his counsel in his native language and working out how to delay the matter.
15. It is not clear to us from any evidence as to whether the Commissioner speaks Hindustani which would have been the language in which the appellant would have conferred with his counsel, both being Indians.
16. Be that as it may the transcript of the adjournment hearing made it very clear that the Commissioner was suspicious of the appellants' motives for adjournment.
17. The power to adjourn or to refuse to adjourn a proceedings or hearing is entirely within the discretion of the court. This is a universally applied principle. Generally, an Appeals Court will be reluctant to interfere

with the exercise of the judge's discretion regarding the granting or refusal of an adjournment except upon compelling reasons.

18. Many authorities have enunciated the principle in relation to this matter. The Fiji Court of Appeal in *Plastic Manufacturing (Fiji) Ltd v. ICI (Fiji) Ltd [1984] FJCA 3* said that a judge's exercise of discretion in the granting or refusal of an adjournment is clearly an appellable matter.
19. There is no doubt that, if a judge adjourns a case, or refuses to do so, he has performed a judicial act which can be reviewed by the Court of Appeal. But an adjournment or a refusal of an adjournment is entirely within the discretion of the judge.
20. In our view, notwithstanding that there were compelling circumstances which could in other situations have lead a court or Tribunal to grant an adjournment mainly because the appellant's livelihood was at stake here, and he was having difficulty locating his witnesses, in this case, we feel compelled to conclude that the Commissioner was correct in refusing to grant the appellant the adjournment he sought because the circumstances in which he made the application are indicative of an intention to delay the hearing. Our conclusion is based on the fact that when the appellant attended the date on which the hearing dates were given by the Commissioner with his counsel, he had agreed to accept these dates. He must have considered the appropriateness of various dates offered for the hearing of this case and agreed to take the 3rd and 4th which were offered by the Commissioner without raising any protest. Then, when he returned a few days later and made an

application for the vacation of these hearing dates and raised the excuses *inter alia* that the witnesses were difficult to find, that he was to have medical treatment in Australia, and that his counsel had simply accepted the hearing dates, implying, that he had no input into the matter, we find ourselves persuaded towards a holding that, the Commissioner did not fall into error in the exercise of his discretion in refusing to adjourn the matter as sought by the appellant.

21. The next ground of appeal which was argued and expanded in oral submissions by learned counsel for the appellant was that the Commissioner erred in law when he convicted the appellant under Section 82 of the ***Legal Practitioners Decree 2009*** when he was charged for unsatisfactory or professional misconduct under Section 83(1)(d) (i).
22. As the submission relates to unsatisfactory professional conduct or professional misconduct under Section 83 (1)(d)(i) of the ***Legal Practitioners Decree 2009***, it might be convenient to set out as much as is necessary of Complaint No.1 which was the relevant complaint which was found to have been proven by the Commissioner and the appellant was struck off for life.

COMPLAINT NO. 1

ALLEGATIONS OF PROFESSIONAL

MISCONDUCT/UNSATISFACTORY PROFESSIONAL CONDUCT

ABHAY SINGH

COMPLAINT NO.1 OF 1

Complainant Details:

*Breach of Section 83 (1) (d) (i) of the Legal Practitioners Decree
2009*

**UNSATISFACTORY PROFESSIONAL CONDUCT OR
PROFESSIONAL MISCONDUCT**

Particulars of Breach:

*Being convicted of the criminal offence of attempting to pervert
the course of justice:*

- (i) (1 x count) *Contrary to section 131 (d) Cap 17 in Criminal
Case AC004/2004X. The conviction was upheld in all
courts that is the Court of Appeal and Supreme Court.*

(and the Complaint goes on to set out the documents relied upon
and the complainant's details).

The Commissioner appears to us to have thoroughly analyzed the issue
of unsatisfactory professional conduct and professional misconduct
because in his judgment of 25th January 2010 he not only looked

closely at the definitions of unsatisfactory professional conduct and professional misconduct as defined in Sections 81 and 82 of the Decree, but also looked at the relevant authorities on these matters: See Paragraphs 21 to 39 of the Judgment of 25th January, 2010.

23. His Lordship analyzed the meaning of unsatisfactory professional conduct and professional misconduct as discussed by various authorities including **Law Society of NSW v. Bannister (1993) 4 LPDR 24**, **Ziems v. Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279**.
24. In dealing with these issues the Commissioner extensively quoted from both cases. He asked himself the question whether the appellant's conviction for attempting to pervert the cause of justice amounted to unsatisfactory professional conduct or professional misconduct. He then went on to advise himself that the definition of unsatisfactory professional conduct required the conduct complained of to be in connection with the practice of law and fall short of the standard of confidence and diligence that a member of the public is entitled to expect of a reasonably competent and professional legal practitioner: See Paragraph 31 of the Judgment.

Then in paragraph 32 and 33, the Commissioner said:

"Conviction for criminal offence may by virtue of Section 83 of the Decree amount to unsatisfactory professional conduct.

Professional misconduct is relevantly conduct of a legal practitioner occurring in connection with the practice of law that will justify a

finding that the practitioner is not a fit and proper person to engage in legal practice. In determining fitness, regard must be had to the matters enumerated in Section 44 of the **Decree**.

Enumerated in section 44 (1) of the **Decree** are paragraphs (a) to (j) which provide the Registrar guidelines in deciding whether to cancel or to refuse issuing a practicing certificate. The matters dealt with in paragraphs (a) to (j) are **inter alia** matters such as whether the applicant is an undischarged bankrupt, whether he has been convicted of an offence, which involves moral turpitude or fraud or whether he has failed to comply with any laws relating to the trust fund and has failed to give the Registrar an explanation of the matter when called upon to do so.

25. At paragraph 38 of his judgment, the Commissioner went on to conclude in the following words:

The conduct of the respondent must therefore satisfy the definitions of unsatisfactory conduct and that of professional misconduct. He has been convicted of an offence which involves moral turpitude on his part; he has been convicted of a crime directly relating to his professional practice and his relationship with the court and his fellow practitioners.

I find that the respondent is guilty of professional misconduct pursuant under Section 82 of the Legal Practitioners Decree 2009.

26. The appellant tried to argue as strongly as he could through his counsel that as the complaint stipulated that he had been charged under Section 83(1) (d) (i) of the **Decree** and as the Commissioner convicted him under Section 82 as I have just quoted him, the appellant must succeed in this appeal on the basis that the Commissioner erred in finding the appellant guilty of professional misconduct under Section 82 which was not the section under which he had been charged.
27. We do not think there is anything in this submission. We are of the view that the Commissioner was clearly thinking of the provisions of Section 83 as is shown by the Commissioner's analysis of Sections 81, 82 and 83 mentioned above.
28. In our view, the facts remain that the Commissioner, on proper analysis, found the appellant guilty of professional misconduct and the fact that he might have quoted a section which did not directly relate to that complaint is of no effect.
29. The Commission deals with complaints which in our view are not subject to the strictures of Criminal charges. Further, no prejudice has been caused to the appellant who knew at all times the charge he was facing in Complaint No.1 and was not left in any doubt about the fact that the Commissioner dealt with this Complaint first upon which the appellant's counsel presented submissions.
30. Accordingly we reject the appellant's argument in this regard.
31. We have also carefully considered all the other grounds of appeal together with the submissions of the appellant and those of the

respondent and upon proper analysis and consideration of these matters we are of the view that none of the submissions of the appellant is made out and accordingly we reject them.

32. We now proceed to deal with the question of mitigation and sentence. Obviously, the most serious Complaint and resultant sentence which the appellant faces is that in relation to complaint No.1 which involved his conviction for attempting to pervert the cause of justice and being struck off.
33. The appellant claims that he did not have sufficient opportunity to mitigate the penalties imposed on him. However, there were documents handed to us at the hearing of this appeal by the respondent's counsel which showed that a good deal of argument was raised by the appellant at the end of the hearing before the Commissioner in respect of mitigation of sentence. Accordingly, we reject this submission.
34. The appellant's counsel Mr Anwar Shah placed heavy reliance in his submissions on dicta of Justice Kitto in *Ziem v. Prothonotary* [1957 197CLR 279] when his honor discussed the appropriateness of holding that a person was not a fit and proper person to be a member of the Bar when he was guilty of an offence unrelated to his practice and profession. It may be difficult to rely on such conduct to conclude that a barrister was unprofessional.
35. The fact of being charged, convicted and sentenced to imprisonment for the offence of attempting to pervert the cause of justice by attempting to

get a witness to lie to the court is quite a different matter from *Ziems Case*. In the appellants' case, his honesty was directly at issue and the appellant could be described as a person who was guilty of moral turpitude as a ground for refusal of a practicing certificate: see Section 44(1)(b) as well as Section 83(1) (d) (i) of the *Legal Practitioners Act Decree 2009*.

36. Be that as it may, certain matters on the positive side of the appellant which we take regard of are that he obtained the Diploma in Law at the University of South Pacific in about 1990. Commendably he then went to New Zealand and obtained a Bachelor of Laws Degree from the University of Waikato in 1994. He practiced in New Zealand until September 1996 when he returned to Fiji. Whilst he was practicing in New Zealand he obtained a Master of Laws in Commercial Laws from the University of Queensland in December 2004. He is presently finishing an Advanced Master of Laws course specializing in commercial code and the law of evidence.
37. He had been practicing in the name and style of Messrs A K Singh Law at Nausori with four civilian staff since 1999. Prior to this he had been practicing under the name and style of Messrs GP Shankar & Company Nausori.
38. The immediately foregoing two paragraphs show that the appellant's interest in law exceeds using law just as a trade or calling. He is obviously dedicated to its more intrinsic values as the courses he has done show.

39. In dealing with the appellant's sentence of strike off, we are very cognizant of the exhortation of Isaacs J in *Law Institute of New South Wales v. Meagher (1910) 9 CLR 655 at 681* when his honor said;

"That is therefore a serious responsibility on the court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credentials. It is not a question of what he has suffered in the past, it is the question of his worthiness and liability for the future"

40. Cases such as *Attorney General v. Bax [1999] 2 Qld R 9 at 20* rely on the discussion of principle that where the lawyers misconduct could reasonably be construed as an isolated blight on an otherwise exemplary professional career, it may be reasonable to impose a less severe disciplinary sanction than otherwise may have been the case.
41. In this case it appears to us that the charge of attempting to pervert the cause of justice which the appellant was found guilty of was a blight on an otherwise unblemished career. A career, we might add, that demonstrated a significant interest in the law as we have already said.
42. In our view the sentence of strike off without any limitation of time was harsh in all the circumstances of this case. We do not believe that the other sentences imposed by the Commissioner fall into this category and we make no orders in respect to them.

43. As for the charge of professional misconduct arising from a conviction relating to attempting to pervert the cause of justice contrary to the provision of Section 131(d) of the *Penal Code Cap 17*, we are of the view that the appellant deserves to be struck off, but that the striking off had to be restricted by some time limitation.
44. In coming to the conclusion that the penalty of being struck off for life was harsh, we are not to be taken to be diminishing the gravity of the offence of attempting to pervert the cause of justice of which the appellant was guilty. This is a very serious offence which is made more heinous when an officer of the court which the appellant was as a solicitor commits it. Such conduct tends to undermine the rule of law and of confidence in our courts. No doubt he must be punished severely. But we think that he has already paid some of that penance. Personal, professional, family and community shame brought on by conviction, imprisonment and strike off must have taken their toll on the appellant. So we think that he deserves some mercy from this court in all the circumstances of this case.

We are of the view that in all the circumstances the appellant should be struck off from the date of judgment of the Commissioner which is 1st February 2010 for a period of 10 years thereafter.

Accordingly we make the following orders:

1. We dismiss the appeal on all substantive grounds argued before us.

2. We reduce the appellant's sentence of strike off from life to 10 years commencing 1st February, 2010.
3. We order that the appellant pay the respondents cost to be agreed or assessed.

DATED at Suva this 22nd day of September, 2010.

Izaz Khan

Hon. Justice Izaz Khan
Judge of Appeal



William Marshall

Hon. Justice William Marshall
Judge of Appeal

Kankani Chitrasiri

Hon. Justice Kankani Chitrasiri
Judge of Appeal

Solicitors

Haroon Ali Shah, Lautoka for Appellants
Chief Registrar Legal Practitioners Unit,
Suva for the Respondent