IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0007 of 2015
[On Appeal from the Court of Appeal No: ABU0065/2013; ILSC Application No: 10/2013]

BETWEEN: **AMRIT SEN**

Petitioner

AND: **CHIEF REGISTRAR**

Respondent

Coram: **The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Mr. Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr. Justice Filimone Jitoko, Judge of the Supreme Court

Counsel: **Mr G. O'Driscoll for the Petitioner**
Mr A. Chand for the Respondent

Date of Hearing: **8th June, 2023**

Date of Judgment: **30th June, 2023**

JUDGMENT

Gates J

[1] On 6th November 2013 the Independent Legal Services Commission [ILSC - Mr Justice Madigan] found that count 2 only of two professional disciplinary charges had been proved. That charge alleged discourtesy to the court in breach of Rule 3.2(i) of the Rules of Professional Conduct and Practice, which constituted professional misconduct. The

Commissioner found the Petitioner Mr Amrit Sen guilty of unsatisfactory professional conduct contrary to section 83(1)(a) of the Legal Practitioners Act.

[2] The Commissioner ordered by way of penalty for the practitioner to be "*publicly reprimanded*." He issued a fine of $5,000.00 also. This part of the penalty was subsequently quashed by the Court of Appeal.

[3] The petition to this court is to remove the finding of guilt and to quash the remaining penalty of the "*public reprimand*."

[4] The matter coming to the Supreme Court has had to be re-heard by a fresh bench owing to the death of one judge and the expiry of warrant of another.

[5] Having set out a summary of the evidence in the case in his judgment, and before dealing with the determination, of the disciplinary charges, the Commissioner made the following observations:

> *"11. The Commission is saddened that this most unseemly petty squabble between a practitioner and a Police prosecutor should be brought before it for determination. There are no doubt many other more serious allegations against practitioners awaiting hearing and determination without taking the time and expense to prosecute this matter which is trivial and embarrassing to all parties involved (including this Commission).*
>
> *12. Even taken at its lowest, on the evidence of the two Solicitors involved, it was an unprofessional, demeaning and petty exchange in front of the general public and neither the practitioner, nor the Police Officer should have let it happen nor does it reflect well on either of them."*

[6] These remarks placed the unfortunate events in their right perspective. The matter was indeed trivial, unseemly, and embarrassing to members of the Bar, the court, and to members of the public. Anybody hearing of the incident would think less of the legal profession. One witness referred to it as "*a storm in a tea-cup*." Yet the matter has reached the Supreme Court. In some senses it should never have done so. Had the Magistrate controlled his court, and insisted on proper decorum, the matter could have

ended there. It would have been nipped in the bud. Now that the case is here, we must decide the issues with some dispassion.

The evidence before the ILSC

[7] I shall deal only with the evidence which concerns the remaining count, count 2. Count 2 alleged:

> *"Mr Amrit Sen, a Legal Practitioner, on 10th May 2011 while appearing for the matter State v Hari Lal Junior, showed discourtesy to the court by raising his voice to an unacceptable level and by attacking the reputation of the Prosecutor in the presence of the Magistrate which conduct was a contravention of Rule 3.2(i) of the Rules of Professional Conduct and Practice and was an act of Professional Misconduct."*

[8] The witnesses were called by the nominal prosecutor, the Chief Registrar. The complainant Mr Khalid Hassan testified by skype that he was originally a police prosecutor, with 22 years police service. On 11th April 2021 he was in the Savusavu Magistrates Court at the Bar table with Mr Sen. He said the practitioner called him a liar, accused him of telling lies in court, said his mouth stank, and that nobody wanted to sit next to him. The Resident Magistrate was sitting on the bench at the time.

[9] Cpl. Hassan said he immediately stood up and informed the Magistrate what the practitioner had just told him. He informed him that he was threatened and called a liar. Then the practitioner stood up and in a very loud voice said *"stinking mouth - I said it. No one wants to sit next to him."* Cpl. Hassan said he felt threatened and embarrassed, because members of the public were present. The court room was full.

[10] The second witness for the prosecution was Jale Waromauriano. He was a court clerk at the Savusavu Magistrates Court. A traffic case was to be heard. The practitioner was appearing for the accused and Cpl. Hassan for the prosecution. The Magistrate came on the bench, and Jale saw the practitioner mumbling something to Cpl. Hassan. Cpl. Hassan stood up and informed the Magistrate that the practitioner had been threatening him

saying his day is near, and that he would be reporting Mr Sen in writing. The practitioner got up and tried to justify himself loudly in court. He protested loudly that he could not stand sitting next to Hassan because of his bad breath. The practitioner said that Hassan was not fit to be a prosecutor and that he would complain in writing. In turn Cpl. Hassan asked if he could make a complaint and the court assured him that he could. That was Jale's evidence.

[11] The practitioner gave sworn evidence in his own defence. He said he had had many "*issues*" with the prosecutor Hassan. The Bar table at that court room is small. He was seated to the left of Cpl. Hassan with Mr Lomaloma another lawyer sitting just behind. The practitioner said Cpl. Hassan was "*talking to my face*." He therefore told Hassan that he had bad breath.

[12] Mr Sen said that he said this by way of giving friendly advice. Hassan started spitting and the practitioner said "*put your face away; you have bad breath*."

[13] The Commissioner recorded in his judgment the next part of Mr Sen's evidence[para. 8]:

> *"He said nothing else apart from that. However, because Hassan had spoken inappropriately to Sen's client, Sen told him that his conduct was unbecoming for a prosecutor. The practitioner saw the Magistrate writing in the court record. The practitioner testified that he never said "he tells lies" or that he has a "stinky" breath, and Hassan never complained about that at the time. He claims that the complainant Hassan has fabricated these matters after the practitioner had made a complaint about his general performance to the Police. The whole incident in court (on the 12th April) would not have lasted more than a minute. There was no ill-will when he spoke to Hassan and there was no discourtesy to the bench – the Magistrate never expressed any opinion about the matter, nor did he (Magistrate) ask for an apology or report discourtesy."*

[14] The Commissioner referred to the disclosed papers tendered before the Commission as showing there was a background of pre-existing hostility between the practitioner and Cpl. Hassan, with complaint and counter-complaint from each side. Though this illustrated an acrimonious paper war, which for a practitioner was "*shameful,*

professionally degrading and arrogant," the Commissioner stated that he had to decide the matter on the charges laid and on the evidence placed before the ILSC.

[15] The practitioner called one witness, the lawyer Mr Lomaloma, who was in private practice in the North. He had been a Magistrate himself between 2006 – 2009. He knew both the parties well, seeing them in court almost daily.

[16] Mr Lomaloma is recorded as saying:

> *"Their faces were about 2 feet apart. Hassan was facing Sen and Sen was telling him to get his face away because he had bad breath. The witness saw spittle coming from Hassan's mouth; in fact some landed on Lomaloma's knee. Both gentlemen were talking in a loud voice – the discussion was "vigorous" but not aggressive. When the Magistrate came in Hassan complained to him that Sen had just said his breath was bad. The Magistrate didn't seem to think it was serious enough to take further but told Hassan that if he wanted to make a formal complaint he could. Lomaloma never heard words to the effect that Hassan was a "liar." Mr Sen explained himself to the Magistrate which the witness said he did so in his customary loud voice."*

[17] For that reason the Commissioner accepted that the words of count 1 were not recorded by the Magistrate, and those that were, did not form part of the allegation. Accordingly he found count 1 unproven. He did however accept the Magistrates account in the record of Mr Sen's voice being raised to an unacceptable level. On this he added:

> *"All practitioners, including Mr Sen, are reminded of the need to press their points with humility and dignity. That the practitioner did defend his position in an unacceptable tone obviously did disturb the court to such an extent that the court made a note of it in the record."*

[18] The Commissioner accordingly found count 2 proven on the lesser offence of unsatisfactory professional conduct.

[19] The Commissioner referred to the record of proceedings in the traffic case. This was exhibited [referred to in SC Record Vol.3 p.904]. The Resident Magistrate had noted the following account of what had occurred in court:

"Cpl. Hassan-	*Mr Sen just threatened with the words, "Your day is near." I will be writing to the relevant authority about his conduct.*
Mr Sen -	*I just informed Cpl. Hassan that his conduct is unbecoming of a prosecutor. I also informed him that its absolutely unbearable to sit next to him because of his bad breath.*
Court -	*Cpl. Hassan, if you feel threatened by Mr Sen's behavior then you should report it to the Chief Registrar.*
	Mr Sen was very loud and aggressive towards Cpl. Hassan in court. He was raising his voice to an unacceptable level embarrassing Cpl. Hassan in front of the presence of other Counsel and members of the public."

[20] Accordingly, the Commissioner found Mr Sen guilty on count 2.

[21] Pursuant to section 128(1) of the Legal Practitioners Act the practitioner appealed to the Court of Appeal. That Court affirmed the finding of guilt on count 2, together with the penalty of a "*public reprimand*." The fine of $5,000 however was quashed, and a costs order of $1,500 was imposed on the appellant.

Grounds (a) and (b) extrinsic evidence to vary the Court Record

[22] Extrinsic evidence was disallowed. The Commissioner said the Court record could not be contradicted by evidence in the proceedings.

[23] On this ground the petitioner argues that the record can be changed by virtue of the uncontradicted sworn evidence of the petitioner Mr Sen and the court clerk Jale.

[24] This is not so. In England the procedure has always been that both sides should try to agree the relevant change to be made to the transcript. If it cannot be agreed, counsel for the appellant should bring the matter to the attention of the registrar: **R v Campbell, The Times July 21st 1981**. But any changes must be accepted by the judicial officer as being correct. Without his or her approval the changes cannot be made to the record.

[25] In Fiji the matter has for long been covered by **Practice Direction No. 2 of 1982**. Application must be made to the Magistrates Court by way of motion supported by affidavit. This direction governed appeals from the Magistrate's Court to the Supreme Court [now High Court]. *Mutatis mutandis* the Direction would apply equally to a Magistrates Court record used as evidence in the ILSC or in a further superior court.

[26] For ease of understanding, I set out the entire **Practice Direction** [see High Court Act – *annotated Marie Chan* 2016 p.138-139; see also Fiji Judiciary website]:

> *"IN THE SUPREME COURT OF FIJI*
> *PRACTICE DIRECTION No.2 OF 1982*
>
> *SUPPLEMENTATION OF RECORD OF PROCEEDINGS IN THE MAGISTRATE'S COURT FOR PURPOSES OF APPEAL TO THE SUPREME COURT*
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> *TUIVAGA, C.J. : Where on appeal from a Magistrate's Court to the Supreme Court in a criminal matter it is desired to supplement or enlarge the record of proceedings in the Magistrate's Court, leave of the Supreme Court to supplement such record must be obtained.*
>
> *An application for leave to supplement the record of the Magistrate's Court (which will be considered on its merits) must be made on motion supported by an affidavit. The motion must set out the evidence or other matters alleged to have been omitted from the record and must identify the part of the record by stating the page and line in which the alleged omitted evidence or other matters in proceedings had occurred and should appear in the record. The affidavit in support of the motion must be sworn by someone who was present during the proceedings in the Magistrate's Court and who could speak from his own knowledge and recollection of the matters contained in the motion.*
>
> *Upon filing the motion and affidavit as aforesaid in the Supreme Court the appellant must serve copies thereof on the respondent and also on the Officer-in-Charge of the Magistrate's Court concerned. The Officer-in-Charge will then seek the comments in writing of the Magistrate whose record of proceedings it is sought to supplement. The comments received*

from the Magistrate will be despatched to the Chief Registrar who will place same before the Judge hearing the appeal.

It is necessary to point out that where a Magistrate is unable to accept the correctness of the alleged omitted evidence or other matters in proceedings or any part thereof, the matter will normally rest there and will not be allowed to be pursued further.

At Suva
March, 1982."

[27] The final paragraph is important. Those courts with the advantage of a working audio or video recording system and with an accurate transcript, will have any doubts eliminated over what was said. The procedure laid down in the Practice Direction was not followed here. Therefore the record of the Magistrates court stands. It is not open to the petitioner to pick and choose what he will accept or not accept from the record, whether certified or not. If certification was a genuine complaint the Commissioner could have accepted the record under his powers to accept informal evidence pursuant to section 114 LPA. The Commissioner clearly chose to rely on the record. This ground fails.

Grounds (c), (e) and (h) no complaint of discourtesy made, or noted by the Magistrate, nor warning given, Magistrate not affronted

[28] Section 114 of the LPA provides that in disciplinary proceedings under the Act

(a) the Commission is not bound by formal rules of evidence [other than those in the Act relating to witnesses].

(b) but it must allow those before the Commission to:

(i) make written submissions;

(ii) be heard;

(iii) and the Commission must act fairly in relation to the proceedings.

[29] First, what had the disciplinary prosecutor to prove? He had to prove a breach by the practitioner of the Rules of Professional Conduct and Practice. These are set out in the

Schedule to the LPA 2009. In this case, breach of Rule 3.2(i) was specified. That Rule reads:

"3.2 A practitioner shall at all times:-
(i) act with due courtesy to the Court."

[30] It is said for the petitioner that he was never warned by the Magistrate about any discourtesy. I have earlier referred to the failure of the Magistrate to control his court. The efficient and successful administration of justice demands a gentle but firm control of proceedings. This is necessary to maintain order and decorum in court and to ensure that participants demonstrate mutual respect whilst litigating their disputes, claims and charges before the courts.

[31] A warning should have been administered by the Magistrate, and if so, these proceedings might never have been brought. But it is not an element of the charge that prior warnings need to be issued before there can be any discourtesy established.

[32] It is also said that the Magistrate did not note in the record his own reaction, his disapproval of the supposed discourtesy. It is suggested that this should have been noted "*being the central element of the charge*." With respect, the Magistrate's disapproval was not a relevant part of the charge at all. It is immaterial whether the Magistrate was put out or affronted by the discourtesy. His reaction to the rudeness is not an element requiring proof. The test of discourtesy is entirely objective. In some cases rudeness is directed to the judicial officer, but that is only one kind of discourtesy to the court: **Legal Profession Complaints Committee v in de Braekt** [2012] WASAT 58. Discourtesy can be found in a variety of disruptions to court proceedings not directed at, but presided over by, a judicial officer.

[33] Litigating a case as advocate, if conducted within bounds, can still be pursued with some vigour and robustness. To advocate fearlessly is generally thought to be honourable for a member of the Bar. But counsel have an overriding duty to the court to conduct themselves with control and dignity. To be rude and abusive to other persons in court, irrespective of whether they were fellow legal practitioners or appointed police

prosecutors, will still constitute discourtesy to the court, never mind discourtesy to the victims of their abusive behaviour.

[34] Before the ILSC it was contended that a police prosecutor was not a Legal Practitioner. Therefore it was said courtesy towards him or her was not obligatory. The Director of Public Prosecutions appoints police officers to be police prosecutors. Section 51(2) provides:

> *"(2) The Director of Public Prosecutions as he thinks fit may appoint police officers to be police prosecutors the purposes of conducting prosecutions in the Magistrates Courts. No police prosecutor may appear in the Magistrate Court without such appointment."*

[35] Rule 6.1 which demands that *"a practitioner shall treat other practitioners with courtesy and fairness"* may not strictly apply to police prosecutors so appointed by the DPP. The better interpretation is that the DPP's exercise of his or her powers places such prosecutors in a limited court role to come within the protection of this Rule. In any event rudeness in a judicial officer's court is in itself discourtesy to the judicial officer presiding; [see para.36 Court of Appeal judgment]. These three grounds fail.

Ground (d) words incapable of embarrassing the prosecutor

[36] The Magistrates court record is to the contrary on this ground. The charge in count 2 appears to lack words that dovetail with the evidence to be adduced and which was adduced. The Magistrate considered the embarrassment to be the unacceptable loudness and aggressive behavior towards Cpl. Hassan. This he noted. Significantly though, he himself failed to take decisive and calming action. The Magistrate also noted that the behaviour was embarrassing to Cpl. Hassan, occurring as it did in the presence of other counsel and members of the public. To be shouted at like this is both disrespectful to a colleague, and would tend to belittle him in the estimate of others. In this sense the behaviour attacked the reputation of Cpl. Hassan. There was therefore evidence of embarrassment caused to Cpl. Hassan.

[37] The behaviour however, as recorded by the Magistrate was undoubtedly disrespectful to the presiding judicial officer. This ground fails.

Grounds (f) and (g) standard of proof: failure to scrutinize evidence of witnesses

[38] In the grounds at (f) complaint has been made about the standard of proof applicable. However no argument was raised on this point in the written submissions or orally before us. Nor did it form part of the submissions to the Commissioner in the trial.

[39] The standard of proof in disciplinary proceedings was set out properly by the Court of Appeal in the judgment of Guneratne J (now P). It was also canvassed recently in **Vipul Mishra v Chief Registrar**: CBV0004 of 2013, 3rd February 2023. This requires no further comment.

Ground (i) not granted opportunity to mitigate

[40] After the submissions of counsel on both sides the Commissioner discussed with counsel the likely time it would take before judgment would be delivered. Nothing was said about whether, if Mr Sen was found guilty, the Commissioner would have a separate hearing for mitigation and submissions on penalty.

[41] The practice of the then Commissioner was to deliver judgment speedily, and in cases where a finding of guilt was to be made, to incorporate a penalty decision at the end of the judgment.

[42] This was a known practice. Any counsel appearing before the ILSC for the prosecution or defence would easily discover the Commissioner's practice in this regard by reading recently published decisions of the ILSC. Mr Sen was defended by experienced counsel. His counsel, as well as Mr Sen, would have been aware of this practice. Submissions were to be heard at the close of evidence on both issues – guilt and possible sentence.

[43] After the submissions were made by Mr O'Driscoll at the close of evidence, the Commissioner concluded the proceedings:

> *"Commissioner: Yes Mr O'Driscoll thank you very much. I'm going to issue a judgment on notice. It won't be long within the next 7 days. We don't call you back to Court on proceedings to deliver judgment we tell you when it's ready and we ask you your method of receiving whether you want it faxed or posted or whether you want to send an agent to collect it the secretary will contact you and find out how you want to receive the judgment. Ms Vateitei, Mr O'Driscoll, Mr Sen thank you very much for your corporation. Being conducted without raised voices and without discourtesy to other Counsel. Thank you, you are all dismissed."*

[44] He said nothing about any further submissions.

[45] However, at the commencement of the close of case submissions the Commissioner said he was going to give both counsel a chance to make oral submissions. The prosecutor Ms Vateitei asked to be allowed to file written submissions. Mr O'Driscoll for Mr Sen replied "*no I really rather not. I think oral submissions is on a brief case*." Counsel and the Commissioner then arrived at an agreement to proceed after a few minutes break with the addresses.

[46] The Commissioner could set his own procedure whilst acting fairly and hearing the parties. I believe a better procedure would be to proceed to mitigation. A bad habit has developed in Fiji of invariably adjourning for another day to have evidence and submissions separately in a mitigation hearing. This mitigation should have been prepared well in advance, so that if a guilty verdict is brought in, the mitigation hearing in routine cases proceeds straight afterwards, on the same day. But it is a better procedure to allow mitigation and submissions on penalty to come after the finding, and not positioned in the closing addresses on evidence.

[47] Mr Sen in his evidence in the trial insisted on giving "*a brief background of myself*." He went on to deal with his university career, his practice as a private practitioner for 24 years, and the busy practice he had.

[48] The Court of Appeal quashed the $5000 fine. But on his own evidence he provided a sufficiency of information for a court to consider he had the means to pay a fine.

[49] For the imposition of "*a public reprimand*" what further mitigation did he wish to put before the ILSC? His counsel did not refer to matters he would have put forward if he had been called to mitigate, and which might have achieved a different penalty. The Commissioner realistically only had to decide whether to award "*no penalty*" or "*a public reprimand."* On the evidence, since there was no remorse expressed, the only penalty in reality open was the public reprimand.

[50] Procedurally the Commissioner should have allowed part of the proceedings to be devoted to mitigation and relevant submissions. In the circumstances here, no injustice has resulted. This ground must also fail.

Ground (j) taking wrong matters into account

[51] This ground as set out in Mr. O'Driscoll's submissions has already been covered in the judgment. There is nothing more to be added on this ground.

[52] On the question of leave, it is noticeable the points raised bear mostly on Mr Sen's personal situation. They do not raise matters of substance, of law, of great general public importance or of substantial general interest to the administration of civil justice. Leave should be refused and the petition should be dismissed with a costs order.

Calanchini, J

[53] I have read the draft judgment of Gates J and agree with his reasoning and conlcusions.

Jitoko, J

[54] I have had the advantage of reading the draft judgment of Gates J in this appeal and I express my entire agreement with his reasoning and conclusions and with the orders proposed.

Orders:

1) *Special leave refused.*
2) *Petition dismissed.*
3) *Decision of the Court of Appeal upheld.*
4) *Finding and penalty by the ILSC on count 2 affirmed.*
5) *Petitioner to pay costs to the respondent of $3,000.00.*

Hon. Mr Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

Hon. Mr Justice William Calanchini
Judge of the Supreme Court

Hon. Mr Justice Filimone Jitoko
Judge of the Supreme Court

SOLICITORS:

O'Driscoll & Company for the Petitioner

Legal Practitioners Unit for the Respondent