IN THE INDEPENDENT LEGAL SERVICES COMMISSION
AT SUVA
NO. 002 OF 2012

BETWEEN:

CHIEF REGISTRAR
Applicant

AND:

KINI MARAWAI
First Respondent

AND:

RAJENDRA CHAUDHRY
Second Respondent

First Respondent Absent
Second Respondent in Person

Date of Hearing : 1st June, 18th July, 31st July, 17th August 2012
Date of Judgment : 12th September 2012
Date of Sentence : 5th October 2012

SENTENCE

1. After a hearing before this Commission, each of these two Respondents has been found guilty of misconduct in his practice as a legal practitioner, and after considering their written mitigation, the Commission now proceeds to determine appropriate disciplinary penalties. It is to be noted that a finding of misconduct does not necessarily lead to punishment for the practitioner above all else, but a balance is to be sought between protection of society (which includes both the client consumer of legal services and the Court) and the need to impose proper sanction on the miscreant practitioner.

2. The first Respondent, Mr. Kini Marawai ("KM"), faced two charges of unsatisfactory professional misconduct both of which have been established along with one count of the more serious professional misconduct. All of these charges emanated from his conduct in acting for a Miss Muskan Balaggan ("MB") who had in early June 2011 made an accusation of rape and sexual abuse against the second respondent and who had then subsequently withdrawn the allegation. The second respondent, Mr. Rajendra Chaudhry ("RC") faced one charge of professional misconduct, also with regard to his acting for the same client, and also one count of unsatisfactory professional conduct in the discourteous way he made reference to a Judge of the High Court in a letter which he furnished to the Chief Registrar. Both of the charges were found to be established.

3. MB's affidavit, prepared for her by KM on 4 July 2011 deposes that she had made her initial complaint of sexual abuse against RC out of anger and frustration. The anger being that

RC had "deserted" her and gone to Australia with his wife and the frustration that in his absence her drugs case was not proceeding. In a sworn statement on 22 July 2011 she tells an entirely different story - she avers that after RC had gone to Australia she wanted to speak to "some people who were close to the Government". She attempted to see the President in vain, she says; she spoke to the Attorney, the Director of Legal Aid and to an Assistant Police Commissioner, all of whom said that if she made a complaint of rape against RC her drug charge would be withdrawn and she would be free to return to Melbourne. By the 4th July, she realized that she had been "used" by the Attorney and the Police and that their promises were false.

4. It is not in evidence before the Commission how that sworn statement came into being, yet in that statement she refers to Mr. Gordon, RC's law partner, acting for her on the instructions of RC and of his being "briefed by Mr. Chaudhry". After she had spoken to Mr. Gordon she "thought a lot about my case and decided to withdraw the allegation against Mr. Chaudhry".

5. It can be irresistibly presumed in the light of that evidence that there was some contact between RC and MB while he was in Australia and after she had made the original complaint. Her evidence shows in any event whether he was talking to her or not, RC, the second respondent, was involved in this matter at a very early stage after the allegations were made against him and even while he was still in Australia.

6. There is also every indication that KM has himself been "used" or "manipulated" in this affair to act for MB in her making of the withdrawal affidavit and to appear for her in her first few appearances in the Magistrates Court. RC would have had every reason to have the withdrawal of the allegation against him "cemented" as it were, even at the expense of his client's liberty and even at the risk of deceiving the Court. As I have said in the judgment in this matter, therein lays the true nub of the conflict.

7. Even if KM was being used, he must be no less blameworthy when it comes to acting in conflict of interest. That is professional misconduct of a most serious kind. To so act and not to realize the implications of so acting raises the unavoidable presumption that the practitioner is not a fit and proper person to engage in legal practice. That applies to Mr. Chaudhry and Mr. Marawai, both.

8. The first two charges of unsatisfactory professional conduct found proved against the first respondent are in fact part and parcel of the same misconduct although the two charges each refer, quite correctly, to two specific courses of action undertaken by the first respondent. Contrary to all accepted norms of solicitorial practice he witnessed an affidavit which he had created himself on the instructions of his client, thereby creating the distinct possibility that he might become in the future a witness in the cause.

9. In his primary duty to the Court, RC appeared to lose all objectivity in this matter.

10. It is the duty of this Commission not only to regulate the conduct of practitioners and to see that a high standard of professional ethics is maintained, but also to protect the dignity and integrity of the Court. Both KM and RC have offended on all limbs of those terms of reference: they professionally misconducted themselves, their conduct does not reach the high standards expected of experienced legal practitioners and they have failed in their duty to the Court.

11. KM and RC have filed a composite written plea in mitigation. I have perused that submission and taken it into account before making my final determination. Neither respondent has been professionally disciplined before.

12. KM is 58 years old and has been practising for almost 20 years. He has a practice in both Suva and in Vanua Levu. He is the legal advisor to the Cakaudrove Province. In his mitigation he still refuses to understand the seriousness of his conduct in claiming that as there was no deceit or fraud practised on MB, he should be rewarded with a lenient penalty. He says he was merely trying to help her and he did what he thought was necessary at the time and he did not "envisage any problems arising".

13. RC is 45 years old with 7 years practice since admission. He is married with a young child. He practises in Suva and in Sigatoka. As with KM he also does not appear to understand the seriousness of his conduct. He is still maintaining in his mitigation submissions that in asking for permission from the Court to appear for MB, he thought he "was not offending any legal instrument". In addition there was no-one else to help MB in her defence and he did so "with good intentions and was not dishonest with her or the Court". In referring to his discourtesy to Goundar J, he claims not to have realized that duty to the Court included matters such as "filing, submissions, and correspondence". He has written a letter of apology to the learned Judge and the Commission has seen a copy of it. It is a humble and very apologetic letter. The remainder of RC's mitigation submissions continue to display a very unfortunate failure on the part of RC to understand how he was in conflict. He concludes by arguing that as MB was not the initial complainant in the disciplinary allegation and because she has "made no issue of any adverse conduct on the part of the Respondents" then that is a strong mitigating factor.

Adjudication of Penalty

14. In respect of the professional misconduct of acting in a very serious and obvious conflict of interest, KM instructing and RC appearing; both Respondents must bear the same penalty. In the light of their lack of remorse and their seeming failure to appreciate the gravity of the offending, there can be no option but to deny them the right to practise their profession. Such a penalty is not a punishment but it is to protect society from incompetent lawyers and especially the Court from deceitful advocacy, as well as a duty to inculcate high ethical standards on Fiji's practitioners.

15. In the case of **NSW Bar Association v Evatt** (1968) HCA 20, the High Court of Australia said:

> *"The power of the Court to discipline a Barrister is, however, entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved."*

and later and of great relevance to the within enquiry:

> *The respondent's failure to understand the error of his ways of itself demonstrates his unfitness to belong to a profession where, in practice the client must depend upon the standards as well as the skill of his professional advisor".*

16. Neither of these two respondents appear to appreciate their wrongdoing; the first respondent submits in mitigation "lawyers often prepare and witness affidavits when there is no Court proceedings on foot" and later "he did not envisage and problems arising when he acted on her instructions at the outset". Such submissions are jejune in the extreme. Lawyers do not prepare **and witness** affidavits and even if proceedings are not "on foot", an experienced practitioner must recognize a situation when they could well be as a result of the instructions he is being given. To then instruct the very barrister against whom the initial serious allegation was made to appear for the client in court is astonishingly unwise to the extent of being incomprehensible.

17. The second respondent claims in mitigation that MB had nobody else to defend her and **if** his appearance on the 15th September 2011 "has now been established to have been a breach of duty to Court then he is contrite and seeks the understanding and mercy of the Court". RC is but one of about 450 practitioners in Fiji, and to submit that only he could represent her is arrogant and shows a total lack of remorse. His submission suggests that he still does not think he was in breach of any ethical principle. He later submits that "he did seek and was granted permission by the Court to appear and so thought he was not offending any legal instrument in appearing". Again he displays a misunderstanding of the huge and obvious conflict he was faced with in thinking that the permission of the Court or the client, could expurgate that conflict.

18. KM the first respondent, apart from the conflict of interest charge, carries the additional burden of having had proved against him two counts of unsatisfactory professional conduct in that he created and witnessed MB's affidavit. I nevertheless regard those two findings as one. The offending is the same. He has witnessed an affidavit and continued to act on the strength of it. Although such a practice runs contrary to Order 41 of the High Court Rules in respect of civil proceedings, it is otherwise (and certainly for criminal proceedings) conduct that is incompetent and unacceptable.

19. RC in contrast has one additional finding of unsatisfactory professional conduct which does in fact offend against a stated Rule of Professional Conduct and Practice - in that he has shown discourtesy to the Court. Such an offence is made the more serious by his refusal to appreciate the gravity of the offence and the disrespect that has been shown to the learned Judge who is very experienced and highly respected within the jurisdiction. He has as earlier stated written to the Judge to apologize which is to his credit, but his failure to understand the offence is exemplified by his mitigation submission that he should be treated leniently because "he did not raise his voice in open Court and (show) disrespect in a Court sitting to the presiding Judge." Obviously disrespect to the Court has myriad ways in manifesting itself apart from these two examples provided by RC, It is this Commission's duty to oversee and protect the integrity and dignity of the Court as well as maintaining the standards of the profession.

20. In view of their misconduct, neither practitioner is a fit and proper person to engage in legal practice and to give effect to that decision, the Commission is presented with one option; either to strike the name of the practitioner from the Roll, or to suspend him for a period from practice.

21. Striking off is a sanction reserved for repeated misconduct or a pattern of misconduct calling into question the practitioner's ability to **ever** be fit and proper: suspension is to be reserved for conduct that is isolated, caused by illness or unsoundness of mind, conduct that

is explicable by its own circumstances and which will not necessarily occur again.

22. The Commission regards this conduct on the part of both practitioners to be more in the latter category (that is conduct of a singular nature) rather than a proved pattern of misconduct. The circumstances lead to an inference that RC was if anything unbalanced, obsessed and lacking objectivity in his defence of MB to the extent that he failed, and still fails to appreciate the enormity of the conflict of interest that he was saddled with before appearing in Court, and I infer that in that state he prevailed upon KM to assist him while he (RC) was in Australia. On the evidence of his own client (statement of 22 July 2011) he was at a very early stage briefing his partner Gordon who was acting for her in his absence. Although both are found to have acted in conflict of interest; that presenting itself to RC is much greater. He was the alleged perpetrator of the rapes and assaults, an allegation that he could not and never will be able to free himself from, yet continued to act. On top of that he has slandered a Judge in the most unacceptable terms. If he were to remain in practice he would clearly need further training in professional ethics.

23. The penalties this Commission impose are therefore terms of suspension from practice on both practitioners as well as an order for costs to cover the conduct of this enquiry:

ORDERS

For the First Respondent, Kini Marawai

1. The said Kini Marawai be suspended from practice as a legal practitioner in Fiji with immediate effect until 1 March 2016.

2. He be publicly reprimanded.

3. He pay costs to the Commission of $1,000, such costs to be shared equally between the Commission and the Legal Practitioner's Unit of the Chief Registrar's Office.

4. He only be re-certified as a practitioner by the Chief Registrar on the proof of having undertaken 5 hours of training in Legal Ethics by an institution or a tutor acceptable to the Chief Registrar.

For the Second Respondent, Rajendra Chaudhry

5. The said Rajendra Chaudhry be suspended from practice as a legal practitioner in Fiji until 1 March, 2017.

6. That he be publicly reprimanded.

7. That he pay costs to the Commission of $1,000, such costs to be shared equally between the Commission and the Legal Practitioner's Unit of the Chief Registrar's Office.

8. That in order to hand over his current matters, Mr. Chaudhry be allowed to remain in practice for the next 21 days until 5pm on October 26, 2012, however in that period he is not to appear in Court, nor accept any new instructions from either existing or new clients.

9. He only be re-certified as a practitioner by the Chief Registrar on the proof of having undertaken 5 hours of training in Legal Ethics by an institution or tutor acceptable to the Chief Registrar.

COMMISSIONER
Justice Paul K. Madigan