

**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

1st Respondent Absent
2nd Respondent in Person

Date of Hearing : 1st June, 18th July, 31st July, 17th August 2012

Date of Judgment : 12th September 2012

JUDGMENT

1. On the 26th January 2011, a Ms. Muskan Ballagan ("MB") an Indian national was arrested at Nadi Airport when she was enroute to Melbourne and was subsequently charged with a drug trafficking offence. She appeared in the Nadi Magistrates Court on the 11th February in answer to the charge at which time the second respondent, Rajendra Chaudhry ("RC"), appeared for her and offered himself as a surety to fulfill her bail conditions. In addition he offered to accommodate her in his family home in Suva. Muskan Ballagan moved into the home where RC lived with his wife and young son. On the 13th June 2011, MB attended at C.I.D Headquarters where she made a complaint against RC – the complaint being that RC had raped her and sexually abused her.

2. On the 4th July 2011, MB attended at the offices of the first respondent where she swore an affidavit to say that the allegations she had made on the 13th June 2011 were untrue and she withdrew them. She deposed in that affidavit that "I have consulted Mr. Kini Marawai and spoken to him and had this affidavit prepared on my instructions". (Mr. Kini Marawai ("KM") being the first respondent).

3. In consequence to that affidavit MB was charged in the Magistrates Court with "Giving false information to a Public Servant", contrary to Section 201(9) of the Crimes Decree 2009. The false information being of course the original allegations of rape and sexual abuse against

the 2nd respondent.

4. On or about the 7th July 2011, MB participated in an interview under caution. This was conducted in the Rakiraki Police Station and in the presence of KM (the first respondent).

5. On the 12th July 2011, MB appeared in the Suva Magistrates Court for the first time on the false information charge. She was represented by Mr. A. Vakaloloma on the instructions of KM (the first respondent).

6. On the 4th August, 2011 KM then appeared for MB when a plea of guilty was taken. He appeared again on the 5th August and the 22nd August. On an appearance on the 5th September on behalf of MB, KM told the court that RC wrote to MB's former employer in Melbourne asking for a character reference.

7. On the 15th September RC, the second respondent appeared in the Magistrates Court for MB. His first submission was to ask the Court to request the accused if she consented to his appearance in order to advance mitigation. MB did so consent. RC then told the Court that he had prepared written submissions which he wished to submit and support with oral submissions. He then, while relying on the written submissions, advanced in some detail oral submissions in support, submissions which included the fact that his client had instructed him that she was coerced by very senior government officials into making the original complaint.

8. In appearing again on the 29th September 2011, RC applied to the Court to have the guilty plea vacated and a new plea entered, on the basis that his client now realized that coercion was a defence. The Magistrate refused, adding that she was of the view that coercion was a point of mitigation and not to be advanced as a defence to the charge. MB was sentenced on that same day.

9. On the 12th October 2011, RC filed an appeal against conviction and sentence on behalf of MB. When first appearing before Goundar, J on the appeal, the learned Judge asked RC to state for the record that he had no conflict of interest in representing MB. According to the Judge's Ruling, RC immediately withdrew. Ms. Vaniqi thereafter appeared for MB on the appeal.

10. At a subsequent hearing of the appeal, Justice Goundar, on the 16th March 2012 was of the view that the second respondent was acting in conflict of interest in his representation of MB and for this reason and others stated in his ruling he referred the whole question to the Chief Registrar for an independent inquiry as to the professional conduct of each of these two Respondents and one other. This was within the power of the learned Judge by Section 100(2) of the Legal Practitioner's Decree.

11. In a response to the Chief Registrar asking for an explanation of his behavior, RC after giving explanations then made detailed and gratuitous remarks on the behavior of Justice Goundar in these proceedings, impugning the Judge's integrity and impartiality.

12. Paragraphs 1–11 hereof set out the background and the relevant facts pertinent to this enquiry.

13. In reviewing the evidence and submissions in this enquiry I have been ever mindful of the requisite burden of proof, which is the preponderance of probabilities, more particularly defined in this Commissions judgment in *C.R. v H.A. Shah. ILSC 007/2012*.

THE FIRST RESPONDENT

14. The first count against KM is one of unsatisfactory professional conduct in that on the 4th July 2011 he prepared an affidavit of one Muskan Balaggan (MB) and witnessed the document himself without having it witnessed by an independent legal practitioner or Commissioner for Oaths which conduct (it is charged) occurring in connection with the practice of law falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner.

15. An affidavit is a statement which is sworn or affirmed and which can serve as evidence in any judicial or quasi-judicial proceedings. As such it is equivalent of evidence given under oath by a witness in court and any untruths therein could possibly lead to perjury charges. Consequently it is most important and in fact accepted good practice that a solicitor taking instructions for and preparing an affidavit does not witness it himself. The deponent should be taken to an independent solicitor or Commissioner of Oaths to swear or affirm his or her affidavit. In that manner, completely independent advice can be given to the deponent if need be and should the solicitor taking the instructions need to be called as a witness in the subsequent proceedings, then he is not compromised in any way.

16. The importance of not acting in the manner that KM did is brought to the fore in this case when it later transpired that KM's client (MB) made a statement on the 22nd July 2011 signed before a Commissioner of Oaths and issued in unexplained circumstances which contains reasons why she (MB) had made the initial complaint against RC – reasons which are in direct contradiction of the reasons given in her affidavit that she had KM prepare for her. The statement of 22nd July 2011 must have alerted KM (and RC of course) to the lady's issues with the truth. The subsequent statement makes the earlier affidavit a lie and KM is deeply involved in that process as the solicitor **and** a potential witness. He is compromised but need not have been so had he had taken the prudent step of taking MB to an independent legal adviser to have it sworn.

17. In his written submissions to the Commission, KM says that when MB instructed him, there was no complaint against him, so there was no conflict of interest. Anyway, he submits, solicitors are daily preparing and witnessing no-contentious documents and there being "no competing interests" he was perfectly entitled to do what he did. Such a submission is naïve in the extreme. This was **not** a "non-contentious document", and the conflicts of interest do not arise until after the document comes into being. It would have been obvious to any practitioner that the very nature of the depositions within the affidavit carried the distinct possibility of factual dispute as well as creating conflicts and as such KM is without doubt drawn into the "arena of contention".

18. KM in his actions on the 4th July 2011 acted imprudently and incompetently against all accepted practices known to every practitioner and as a consequence the first complaint against

him is **established**.

Count 2

19. The second allegation against the first respondent is another of unsatisfactory professional conduct. The count is worded as follows:

"Kini Marawai, a legal practitioner on or around the 4th of July 2011, acted and continued to act for the deponent, Muskan Balaggan who was charged for giving false information to a public officer being matter between State v Muskan Balaggan Criminal Case No. CF 1190 of 2011 on the basis of an affidavit which had been prepared and witnessed by the said Kini Marawai, which conduct was contrary to Rule 3.4 of the Rules of Professional Conduct and Practice of the Legal Practitioners Decree 2009."

20. This count evidentially is obviously an extension of the allegation and factual matrix of the first count.

21. By taking instructions on and then witnessing the affidavit sworn by MB on the 4th July, KM is placing himself in the invidious position of being in conflict if he continues to act for MB.

22. The Rules of Professional Conduct and Practice, as set out in the Schedule to the Legal Practitioners' Decree 2009 provide by Chapter 3, Rule 3.4:

"A practitioner shall not, save in exceptional circumstances, continue to act for a client in a matter in which the practitioner is likely to be a witness unless:-

- (i) the practitioner's evidence relates solely to an uncontested matter;*
- (ii) the practitioner's evidence relates solely to formal matters;*
- (iii) the practitioner's evidence will relate solely to the nature and value of legal services rendered;*
- (iv) refusal to act or withdrawal from the matter will jeopardize the client's interest."*

23. KM is in clear breach of this rule. The *raison d'etre* of the rule is to protect both the practitioner and the Court from what could likely be conflicting evidence. KM as counsel owes his primary duty to the Court and having put himself in a position, unnecessarily, of being a potential witness in the matter, he remains in conflict when he continues to act for the client, both at Rakiraki Police Station, and in the Magistrates Court on the 8th and 12th July and on the 4th August 2011.

24. This conflict is then compounded in the most serious degree when Ms Balaggan issues a statement on the 22nd July which directly contradicts what she has deposed to in her affidavit. KM must then become aware of his client's mendacity and of the complete untruth of an affidavit that has been sworn before him as a witness.

25. One cannot imagine a situation in which a practitioner is in a greater conflict than this. The allegation of the Chief Registrar in Count 2 is **established**.

Count 3

26. A third count proffered against KM relates to Mr. Chaudhry's appearance for MB in the Magistrates Court on the 15th September 2011. The count reads:

"Count 3

Professional Misconduct: Contrary to section 82(1)(b) of the legal Practitioners Decree 2009.

Kini Marawai a legal practitioner on or around the 15th September, 2011 failed to act in the best interest of his client by instructing Mr. Rajendra Chaudhry of Gordon & Chaudhry Lawyers to appear on the 15th September 2011 for mitigation being aware that Mr. Chaudhry was the victim of the false complaint made by Muskan Balaggan and therefore was in conflict of interest, which conduct occurred in connection with the said Kini Marawai's practice of law and would justify a finding that the said Kini Marawai is not a fit and proper person to engage in legal practice."

27. When this matter was first called in the Magistrate's Court on the 12th July 2011 RC was away in Australia. KM having received MB's instructions to prepare the affidavit of withdrawal of complaint against RC, he was obviously well aware of RC's involvement in the original allegations of sexual abuse. To then instruct RC the victim to appear for MB in Court on the 15th September was, taken at its lowest a gross dereliction of duty both to his client and to the Court and to so instruct in those circumstances was an inconceivably injudicious act.

28. KM, in his written submissions, claims that he did not instruct RC of his own accord but was asked to do so by MB and moreover MB had given instructions to RC to appear on KM's behalf. First, this submission contradicts what the first respondent said in his letter of explanation to the Chief Registrar, where he claims quite clearly that he instructed RC to appear on the 15th September. Secondly his new submissions smack of recent invention and if correct would suggest that RC was continuing to advise MB, despite his vehement denials.

29. Any practitioner who could not see the manifestly undeniable conflict of interest that RC faced is not a fit and proper person to engage in legal practice. The allegation as made in Count 3 is **established**.

THE SECOND RESPONDENT

30. The principal charge against RC is one of professional misconduct contrary to Section 82(1) (b) of the Legal Practitioners Decree 2009. The particulars read as follows:

*"Rajendra Chaudhry, a legal practitioner, between the 15th September 2011 to the 29th September 2011 agreed to act and did act as counsel to Ms Balaggan in the matter **State v Balaggan** a case in which he was the victim of a charge of giving false information to a public servant, which conduct occurred in connection with the said Rajendra Chaudhry's practice of law and would justify a finding that the said Rajendra Chaudhry is not a fit and proper person to engage in legal practice."*

31. The facts are not in dispute. When MB appeared in the Magistrates Court on the 15th September 2011, KM was her counsel on record, but RC appeared, he submitting to this Commission that he was appearing only on instructions of KM, yet there is no evidence of that.

32. Mr. Chaudhry submits that when he appeared on the 15th September, it was on the instructions of KM who was unable to appear; it was his firm of Gordon and Chaudhry that was instructed and not RC personally; MB had given written authority for the **firm** to represent her, that he asked in court if the Magistrate could confirm from MB his appearance; neither the Magistrate nor the prosecutor objected to his appearance; and as a consequence there can have been no conflict of interest.

33. Mr. Chaudhry's submissions on this point are far from convincing. There is nothing on the Court record that says RC is appearing on instructions from KM. KM's own letter of explanation says that he had instructed RC personally and not the firm to appear. At the hearing, the record reveals that RC says that he had prepared written submissions (and not that he was handling up KM submissions). He then proceeded to ventilate a long oral plea in mitigation (without reference to KM) and even suggested that 5 very senior government officials be called as defence witnesses. It is a matter of great concern to this Commission that what purports to be a copy of the submissions that were handed up to the Court below has been subsequently tampered with. In looking at the original in the Magistrates Court file, it can be seen that the submissions are signed at the end with one single initial. The copy submitted by RC attached to his letter of explanation to the Chief Registrar, has the full signature of RC with the words written "for & on instructions of "Messrs Marawai Law. Whether RC has committed the forgery or not, the uttering of it as part of R.C.'s explanation is at the very least an attempt to mislead both the Registrar and the Commission as to the true nature of his appearance on the 15th September, If not an attempt to pervert the course of justice. Such an act of dishonesty does not reflect well on R.C.

34. Mr. Marawai in his letter of explanation to the Chief Registrar quite glibly says he instructed RC to appear for him on September 15th.

35. However, instructed by KM or not, it is irrelevant to the charge of conflict of interest. RC appeared and whether he is appearing in his own right or as principal of his firm, by appearing he is acting for MB. RC in his submissions claims that appearing and advancing mitigation on somebody else's instructions is not acting as a practitioner for the accused. That cannot be so. He is acting and he is in conflict of interest. Every time a practitioner appears in Court representing a client, be it on instructions or no, he is acting for that client.

36. Mr. Chaudhry practises in Fiji which has a fused profession. A practitioner is both a solicitor and a barrister. Mr. Chaudhry often appears in Court as a barrister arguing cases for his clients at all levels of the judiciary in this country.

37. Both barristers and solicitors have a duty to the court; they being officers of the Court. A solicitor's primary obligation is to his client; however **a barrister's primary obligation is to the Court.**

38. Anything that intervenes in that relationship almost certainly *per se* creates a conflict of interest. There can be instances where that conflict can be overridden in the case of a solicitor's client, properly advised, giving express authority to the solicitor to act despite the conflict: such a disclaimer can never apply in the case of a barrister; his duty to the court cannot be abrogated or diluted.

39. And so with Mr. Chaudhry. When appearing for MB both on the 15th and 29th September 2011, he has MB sign authorities to act. On the 29th making the authority read: "the firm of Gordon & Chaudhry" and on the 15th "RC of Gordon and Chaudhry, Lawyers". Such authorities not only being extraordinarily contrived are again totally irrelevant. If there be a conflict of interest, it cannot be withdrawn by a carefully drafted authority, even if the authorities were actually written at the time they purport to have been.

THE CONFLICT

40. As soon as MB makes her allegations of rape against RC on 13 June 2011, he then becomes "*functus*" or "*hors de combat*". It matters not how many times she might withdraw the allegation or swear that it wasn't true, RC is tainted by the allegation. Only she and he know whether there is any truth in the allegation. He therefore can never fulfill his duty either to the Court or to the client in respect of proceedings predicated on that allegation. He is compromised; even after she pleads guilty to making a false statement with regard to the initial allegation. By that plea, she has proved herself to be mendacious and unreliable, and RC her counsel knowing that, is no longer in a position to assist the court in his duty to the Court. It is not for the Court to permit him to appear, nor is it for the prosecution to raise objection. Once the conflict arises it is always there in the relationship between RC and his client and no "permission" or signed authority can ever remove it. It is the practitioner's duty to the court to present a case fairly and without favour in all honesty. That could never be achieved in this case.

41. Justice Goundar, in his ruling of 16 March 2012 said this (paragraph 18):

"Finally there is an appearance of collusion between counsel to achieve a favourable result for Mr. Chaudhry at a detriment of having the appellant plead guilty to the charge of giving false information so that any investigation against Mr. Chaudhry is deflected."

42. As RC points out in his submissions to this Commission there is not one scintilla of evidence of collusion which would substantiate Justice Goundar's observation; I agree that there is none but the operative word is "appearance". There is every likelihood and every incentive for either MB or the court to be manipulated in favour of RC. Therein lies the conflict of interest that RC is burdened with.

43. RC appeared again for MB on the 29th September 2011 in the Magistrates Court, this time with no suggestion either from RC himself or KM that he was appearing on behalf of KM who by this time had seemed to have faded from the legal picture, and without leave of the Court as should always be the case. RC made an application that day to have the plea of guilty vacated and a plea of not guilty entered. The application was refused, but what is more apparent is that RC is acting for MB and trying to achieve a favourable result for her while in full knowledge that

she had lied at least once in respect of this matter and in full knowledge of whether he was complicit or not in the initial allegation. The Court is at an extreme risk of being deceived.

44. Mr. Chaudhry submits that he appeared on the 29th September only on explicit instructions of MB and only after the prosecution had alerted MB and RC to a possible defence (coercion). He submits that as an "officer of the Court" he was bound to act for her to vacate the plea. To not so act would have caused prejudice to her and not in her best interests. "Explicit instructions" do not remove a conflict of interest, especially on a delicate factual matter such as change of plea and RC is not the only practitioner in town who could have seen that she was not being prejudiced in her proceedings.

45. As discussed earlier, a conflict of interest arose in this case as early as the 15 June 2011, *vis a vis* MB v RC; it could not be removed by authorization or by appearing on instructions of another; it could not be removed by the consent of the court or tacit approval of the DPP. There was an obvious and clear conflict of interest; Mr. Chaudhry appeared and acted for MB on 15 September and 29 September despite that clear conflict and therefore the charge as complained of in **Count 4** on the application is **established**.

Count 5

46. A second count is complained of by the Chief Registrar, against Mr. Chaudhry. It reads:

"Count 5 – UNSATISFACTORY PROFESSIONAL CONDUCT: Contrary to Section 83(1) (a) of the Legal Practitioners Decree 2009.

Rajendra Chaudhry, a legal practitioner on or about the 15th April 2012 showed discourtesy to High Court namely to Honourable Justice Daniel Goundar, in his response to the enquiry made by the Chief Registrar pursuant to Section 105 of the Legal Practitioners Decree 2009, such conduct being in breach of Rule 3.2 of the Rules of Professional Conduct and Practice of the Legal Practitioners Decree 2009 which was an act of unprofessional conduct."

47. After the learned Judge had referred the representation situation to the Registrar within his powers by Section 100 (2) of the Legal Practitioners Decree, the Chief Registrar wrote to Mr. Chaudhry requiring him to furnish a sufficient and satisfactory explanation in writing of the matters referred to in the Judge's complaint (pursuant to Section 105), the letter being dated 2nd April 2012.

48. Mr. Chaudhry replied to that enquiry of the 15th April, 2012. In that letter he purported to offer explanations to the matters raised in the Chief Registrar's letter and in referring to Mr. Justice Goundar, he concluded his letter by making the following remarks:

1. *"Goundar, J's decision of 16 March 2012 is clearly an anathema to accepted judicial practice. The writer has yet to come across a circumstance where a Judge goes beyond materials that constitute Court record to make very personal, unsubstantiated and disparaging comment about counsel. His decision of 16th March 2012 is even more*

odious....."

2. *"(The Judge) was clearly acting with a pre-concerned opinion with the sole intention to embarrass the writer and to postulate that MB's statement was not false. Such an assumption without knowledge of the facts or based on the imprecise notes of the Magistrates Court record is contrary to good judicial practice."*

49. Such assertions of impropriety, bias, and vindictiveness against a Judge are totally unacceptable apart from being unethical. Mr. Chaudhry has been in practice long enough to know that any decision, ruling or judgment of a Judge of the High Court is appealable and that his allegations could be aired on appeal, no doubt in more temperate and neutral terms.

50. The words Mr. Chaudhry uses in his letter directly transgress the Rules of Professional Conduct and Practice set out in the Schedule to the Legal Practitioners Decree. Rule 3.2 states: *"A Practitioner shall at all times (i) act with due courtesy to the Court"*. The phraseology used by Mr. Chaudhry in his letter is discourteous in the extreme.

51. In his submissions before me, Mr. Chaudhry claims first that the rule (3.2) applies only to a counsel's conduct in the Court, that is the court room. By that he means that the word "court" should be interpreted literally. Secondly, he submits that his comments were part of a private letter written to the Registrar with no reference to anyone else and therefore no one could possibly be privy to his "discourtesy".

52. These submissions are as breathtakingly audacious as they are misconceived. An elementary interpretation of the rule easily reveals that it proscribes discourtesy **to** the court and not **in** Court. Mr. Chaudhry's submission taken to its logical extent would mean that to insult or abuse a Judge in the street would not be a breach of the rule against discourtesy. Such a position is untenable.

53. The Chief Registrar, in writing asking for an explanation from RC for his behavior and RC's reply are letters all becoming documents admissible in evidence before the Commission pursuant to the terms of the Legal Practitioner's Decree. The proceedings of the Commission being public then any evidence, which must include RC's letter, is in the public domain and it is therefore fallacious to claim that it is a private document.

54. Mr. Chaudhry's letter to the Chief Registrar being discourteous in the extreme to Mr. Justice Goundar, and it being contained in a document for public consumption without doubt offends against Rule 3.2 of the Rules of Professional Conduct. The complaint of the Chief Registrar as particularized in Count 5 on the Indictment is **established**.

55. **In summary:**

Against the first respondent:

| | | |
|---------|-------------------------------------|-------------|
| Count 1 | Unsatisfactory Professional Conduct | Established |
| Count 2 | Unsatisfactory Professional Conduct | Established |

Count 3 Professional Misconduct Established

Against the second respondent:

Count 4 Professional Misconduct Established

Count 5 Unsatisfactory Professional Conduct Established

**Commissioner
Justice Paul K. Madigan**