

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

No. 008 of 2015

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

RENEE DEVINA SINA LAL

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. A. Chand with Ms. V. Prasad

Respondent: Dr. K. Chambers with Mr. A. Bale instructed by Ms. R. Lal;

Date of Hearing: 12th June 2018

Date of Written Submissions: 12th June 2018

Date of Judgment: 13th June 2018

EX TEMPORE RULING

1. Introduction

- [1] This is a ruling involving two oral applications, one by Counsel for the Applicant Chief Registrar and one by the Leading Counsel for the Respondent legal practitioner.
- [2] The substantive application in this matter was filed with the Commission on 3rd December 2015 alleging seven counts of professional misconduct and one count of unsatisfactory professional conduct.
- [3] The matter was then listed for hearing in the November/December 2017 Commission's sittings.
- [4] I handed down a Ruling on 14th February 2018 involving three formal separate applications, two by Counsel for the Applicant Chief Registrar and one by the Respondent legal practitioner.
- [5] In addition, I also made rulings on two objections and two oral applications. This resulted in eighteen orders being made by me on 14th February 2018.

- [6] As a result of my Ruling on 14th February 2018, the hearing was vacated, the cross-application of the Respondent for the application to be permanently stayed was refused, and the matter listed for mention on the following day, 15th February 2018, to confirm a date for the final hearing.
- [7] On 15th February 2018, a timetable was agreed by consent for the filing of various documents and the matter was set down for hearing for two weeks in the June 2018 sittings, so as to allow two witnesses from India to attend and also to allow the Respondent to attend a hearing in the High Court at the same time as the April 2018 sittings of the Commission.
- [8] The matter was then listed on 23rd April 2018 in the call over of the April 2018 sittings to check compliance with the timetable and to confirm that the matter is ready to proceed in the June 2018 sittings. It was then adjourned until 27th April 2018 to allow the parties to prepare their bundles of documents.
- [9] On the 27th April 2018, Counsel for the Applicant Chief Registrar raised a number of issues including:
- (1) the availability of the Leading Counsel who is also a lecturer in the University of the South Pacific; and
 - (2) if Leading Counsel for the Respondent was not available then Counsel for the Applicant would be objecting to the Respondent appearing on her own behalf. Mr. Bale mentioned that the Respondent may also be cross-examining some witnesses.
- [10] I then made it clear to both Counsel present that the procedure would be, one Counsel dealing with one witness and seeing them through (i.e. meaning examination-in-chief, cross examination, and re-examination).
- [11] I also noted the objection of Counsel for the Applicant having the Respondent appear both as Counsel and witness in her own case, particularly when she is legally represented and the view of Counsel for the

Applicant that the Respondent has to choose whether to be represented by herself or represent herself.

- [12] At that stage, I noted that no application was before me and I did not see a problem if Counsel wish to appear and take some witnesses, however, we would deal with that at the time.
- [13] The hearing of this matter began on Monday, 4th June 2018 and due to objections raised as to problems with the documentation filed by Counsel for the Applicant, the matter was then adjourned until Wednesday, 6th June 2018, wherein further problems were highlighted and Leading Counsel for the Respondent sought time to prepare his cross-examination as a result of the new documentation.
- [14] That request for an adjournment was granted and the matter was adjourned until, Monday, 11th June 2018, noting, however, that Counsel for the Applicant raised that he had two witnesses here from India and they had been previously booked to return on Saturday, 9th June 2018 which would now have to be extended to the following week.
- [15] The hearing then began on Monday, 11th June 2018, when Leading Counsel for the Respondent raised further issues concerning possible tampering of documents and that a complaint had been lodged with the Criminal Division of the Police. Orders were then made for the assisted Counsel for the Respondent to file and serve by 1.00pm that day copies of what had been filed with the Police and the matter finally proceeded at 10.05am when Reema Gokal was called as the first witness for the Applicant.
- [16] Apart from the witness needing a break in the afternoon, the matter proceeded without any great incident with Counsel for the Applicant taking her through in evidence in chief.
- [17] The evidence-in-chief of Reema Gokal continued yesterday, however, at one stage I observed that the witness was putting a Kleenex box to her head

and seemed, in my view, somewhat in distress. I then asked the witness if she was okay and whether she needed a break to which she indicated to me that she did.

[18] During the absence of the witness, I then raised with Counsel the possibility of evidence being taken from re-arranging the Commission's hearing room so that the witness did not need to face the Respondent as it was clear to me from observing her that she was trying to block out the Respondent from her vision. I was concerned also having been carefully watching the witness that she was somewhat distraught and further I wondered whether I was dealing with a witness who may have other issues to which I had not been made aware.

[19] In that regards, I had noted to myself her slow answers was an indication to me not of an attempt to find time to make up an answer, rather, whether she was understanding everything that has been asked of her apart from her memory of matters.

[20] A short adjournment was then taken whilst my staff attempted a different way of reorganizing the Commission's hearing room. There was objection raised by the Leading Counsel for the Respondent as the witness would have her back to the Respondent and her Counsel. I also indicated that having now seen what my staff proposed, that it would be preferable to consider taking evidence by Skype with the witness sitting in another room of the Commission to be supervised by either the Secretary or the Court Officer of the Commission. I noted that the Commission has previously taken evidence by Skype from Labasa with the witness supervised in a Labasa court house.

[21] Whilst this was being discussed, it was then revealed by Leading Counsel for the Respondent that however it was proposed to deal with the evidence-in-chief for the witness, the Respondent legal practitioner would be conducting the cross examination of the witness.

[22] It was further raised by Leading Counsel for the Respondent that this was

allegedly approved by me in the previous sittings. I disagreed and said I would check the recordings from those sittings and took a short adjournment to do so.

[23] I then sat with one of the staff of the Commission and listened to the recordings of the 23rd and 27th April 2018 in relation to this matter. I then had the Secretary of the Commission to listen and confirm separately from the recording of the 27th April 2018. The recording confirmed that the Counsel for the Applicant had raised a number of issues including his concern that Leading Counsel for the Respondent who was to conduct this matter was a lecturer at the USP and what would happen if Leading Counsel was not available and further the Respondent cannot be both legally represented and appearing in person and that she had to make a decision whether to have Counsel appear for her or to appear on her own behalf.

[24] I also noted importantly that at the end of that appearance, on 27th April 2018, Mr. Bale for the Respondent had raised the issue that this would not stop the Respondent from “appearing and doing some of the” (inaudible). I made clear to Mr. Bale that there would be one Counsel for one witness and to see them through in their entire evidence. I also made clear that I did not agree with Counsel for the Applicant that the Respondent had to choose whether she was legally represented or appear in person, however, I did not make a ruling at that time noting there was no application before me and that was a matter for the Counsel for the Applicant, if and when the issue arose.

[25] I note that this issue of the Respondent cross examining this witness was never raised by Leading Counsel for the Respondent with the Commission prior to the witness commencing to give her evidence on 11th June 2018, even though it was made clear to Mr. Bale on 27th April 2018 that I would not be allowing evidence to be taken in this manner i.e. one counsel one witness not two counsel one witness. In my view, it smacks of intimidation. Apparently, it was raised by the Leading Counsel for the Respondent with Counsel for the Applicant prior to this witness commencing to give her

evidence, however, my understanding from what Counsel for the Applicant said from the bar table is that he advised Leading Counsel for the Respondent that Leading Counsel for the Respondent would need to make an application to the Commission to do so. Presumably, Leading Counsel for the Respondent and also the Respondent herself were going to allow evidence-in-chief to be taken and suddenly spring a surprise upon the witness (and the Commission) that the witness was now to be cross examined by the person against whom the witness had made certain allegations. Of more concern, is that no indication was ever given to the Commission when I as the Commissioner explained to the witness that she would be examined by Mr. Chand for the Applicant then Dr. Chambers for the Respondent and then Mr. Chand if anything arose from that and I might have some questions. This explanation was given to the witness as a preliminary guide as to what she could expect before she began her evidence on Monday, 11th June 2018 and was explained again to her yesterday, 12th June 2018 before she continues with her evidence. I note there was no attempt by Leading Counsel for the Respondent to correct me that I was, in effect, misleading the witness. I take the point that Leading Counsel for the Respondent has said from the bar table that he was never advised by Mr. Bale of my comments on 27th April 2018 nor would it appear that he was advised by Mr. Bale of the objection raised by the Counsel for the Applicant on 27th April 2018. On Monday, 11th June 2018, it would appear that there were some informal discussions between the Counsel for the Applicant and the Leading Counsel for the Respondent but still no formal application was forthcoming.

[26] I then heard oral submissions from Counsel for the Applicant and Leading Counsel for the Respondent on whether the witness, Reema Gokal, should continue with her evidence in a different manner that is to be taken by Skype from another hearing room in the Commission and further whether the Respondent should be permitted to personally cross-examine her rather than through Leading Counsel.

[27] Leading Counsel for the Respondent indicated that due to the seriousness of

the issue he wished to be given an opportunity to file written submissions. Counsel for the Applicant indicated he wished to deal with this by way of oral submissions. I allowed each Counsel to address me and then took a short adjournment whilst I decided how to proceed.

[28] My ruling was as follows:

(1) On the skype issue and whether Reema Gokal should be allowed to take evidence through Skype – it was my view that Counsel for the Applicant needed to tease out what he was saying in relation to the witness allegedly being intimidated. I also noted that whilst Leading Counsel for the Respondent had raised judgments of the Court of Appeal limiting the use of Skype, my preliminary view was I questioned whether this is relevant as from memory those cases were in relation to the use of Skype by overseas witness and not a witness present in Fiji in an adjacent room of the Commission. I also noted the submission of Leading Counsel for the Respondent that in the interest of fairness that they should be given the opportunity to crystalise their submissions (through written submissions) that they should be allowed to face the complainant subject to supervision by the Commission;

(2) Cross examination of the witness by the Respondent - I advised both parties that I was going to need to be referred to some law on this topic.

[29] Being cogniscent of Section 114 of the Legal Practitioners Act 2009, accordingly, I then made the following orders:

1. Both parties to file with the Commission by hand by 5.30pm yesterday, 12th June 2018 written submissions on these two issues;
2. Both parties to email and serve each other by 6.00pm yesterday with a copy of their respective written submissions;
3. The matter to be relisted at 9.00am today for Ruling.

[30] I note that Counsel for the Applicant then sought leave to take evidence from the witness solely in relation to the issue on intimidation, which I granted. The Respondent offered to leave the hearing room for which I thanked her. The witness then gave evidence and was then cross-examined by Leading

Counsel for the Respondent. The parties were then reminded to file their written submissions by 5.30pm yesterday and that a Ruling would be handed down this morning. This then is my Ruling.

1. The Skype Issue

[31] The written submissions of Counsel for the Applicant Chief Registrar on the issue that the evidence of Reema Gokal to be continued by Skype, were in summary, as follows:

(1) Counsel cited *State v Aiden Alec Hurtado* Criminal Appeal No. AAU 00148 of 2015 and paras [37]-[39] therein and, in particular, the interests of justice;

(2) *'It is in the interest of justice and public interest that Ms. Gokal's evidence is taken by Skype in light of her evidence and allegation today before the Commission that she felt intimidated by the Respondent's certain overtures'*;

(3) *'Alternatively, if the Commission is not minded to accept that the remaining evidence of Ms. Gokal be taken by Skype, the Commission could make relevant orders for a screen to be put in between the Respondent and the witness'*.

[32] The written submissions for Counsel for the Respondent were, in summary, as follows:

(1) Counsel cited the judgment of the Fiji Court of Appeal in *Lotawa v State* (Unreported, Fiji Court of Appeal, Criminal Appeal No. AAU0091 of 2011, 5 December 2014, Calanchini P, Gamalath and Madigan JJA; PacLII: [2014] FJCA 186, <<http://www.pacii.org/fj/cases/FJCA/2014/186.html>>);

(2) Skype should be restricted to vulnerable witnesses *'generally categorized as ...*

- *Witnesses under the age of 16 years*
- *Witnesses who suffer from an intellectual disability*
- *Witness who are victims of sexual offense*
- *Witnesses under other serious offenses such as abduction, blackmail, stalking, unlawful threats to kill or endanger life, causing serious harm and attempted murder or attempted manslaughter'*;

(3) A relevant case law showing a vulnerable witness can be found in *State v Inia Rayalo* - Summing Up [2017] FJHC 322; HAC400.2016 (28 April 2017), where the witness was under 16 years of age and allegedly a victim of a sexual offence.

[33] My Ruling is that I believe that with strong supervision by myself, as well as oversight by my staff, that the evidence can continue to be taken in the Commission's Hearing Room. If, however, I become aware of any attempt of intimidation, the proceedings will stop forthwith and the remainder of the evidence of Reema Gokal will be taken by Skype from another room in the Commission.

2. Cross-Examination of Reema Gokal

[34] The written submissions of Counsel for the Applicant were, in summary:

(1) Section 229 of the Criminal Procedure Act 2009 states -

'The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his or her lawyer, and to re-examination by the prosecutor';

(2) *'... the Respondent's right to cross-examine prosecution witness will not be prejudiced since the Respondent is legally represented. The Respondent chose to be represented by a counsel for the hearing. She cannot choose as to which particular prosecution witnesses she can cross examine when her counsel is already there to defend her';*

(3) *'... if Respondent is familiar with the matter then she could withdraw her instructions or waive her right to counsel and defend her matter in person. She would then have the right to cross-examine the prosecution witnesses';*

(4) *'Further, in the interest of justice as well as for parties to have a fair trial, the counsel for the Respondent should cross examine Ms. Gokal in light of her allegations of intimidation';*

(5) *'If the Commission is minded to allow the Respondent to cross examine Ms. Gokal, it would be prejudicial in the public interest given the circumstances'.*

[35] The written submissions of Counsel for the Respondent were, in summary:

(1) Section 14(2)(1) of the Fijian Constitution says that the respondent has the right ‘...to challenge evidence presented against him or her’;

(2) Counsel cited where the Canadian Supreme Court considered a similar constitutional provision in **R v Lyttle** [2004] 1 SCR 193; CanLII: 2004 SCC 5,

<<https://www.canlii.org/en/ca/scc/doc/2004/2004scc5/2004scc5.html>>,

where ‘the trial judge unduly restricted the right of the accused to conduct a full and proper cross-examination of the principal crown witness’ and the Court allowed the appeal.

[36] My Ruling is as follows:

(1) Section 14 of the Fijian Constitution is irrelevant as I have discussed in my previous Ruling in this matter of 14th February 2018 (**Chief Registrar v Lal** (Unreported, ILSC, Case No.008 of 2015, 14 February 2018; PacLII: [2018] FJILSC 2, <<http://www.paclii.org/fj/cases/FJILSC/2018/2.html>>)), where I stated at paras [117]-[119]:

‘117. ***I further note that the Court of Appeal in Amrit Sen v Chief Registrar (Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0064 of 2014, 29 November 2016, Calanchini P, Basnayake and Kumar JJA; PacLII: [2016] FJCA 158, <<http://www.paclii.org/fj/cases/FJCA/2016/158.html>>), has stated that the provisions of the Constitution of the Republic of Fiji in relation to “offences” do not apply to charges of misconduct before the Commission.***

118. ***On 27th October 2017, the Supreme Court refused the application for Special Leave to appeal by the legal practitioner in Sen and affirmed the judgment of the Court of Appeal. (See Amrit Sen v Chief Registrar, Unreported, Supreme Court of Fiji, Civil Appeal No. CBV0010 of 2016, 27 October 2017, Marsoof, Hettige Chandra JJ; PacLII: [2017] FJSC 31, <<http://www.paclii.org/fj/cases/FJSC/2017/31.html>>.)***

...

119. ***As Chandra J (with whom Marsoof and Hettige JJ agreed) stated at para [30]:***

‘[30] ***The Court of Appeal dealt with these arguments before it at paragraphs [33] to [36] and arrived at the conclusion that the charges against the Petitioner did not fall within the ambit of Section 14(1)(a) of the Constitution. This Court does not see any flaw in the conclusion reached on this point by the Court of Appeal and therefore this ground fails.***’

(2) *R v Lyttle* (supra) is not applicable to the present matter. In *Lyttle*, the accused was represented by defence Counsel. The trial judge ruled in a *voir dire* that ‘defence counsel could only proceed with her proposed cross-examination of the Crown’s witnesses if she provided substantive evidence of the drug debt theory’. This is not the case here. Leading Counsel for the Respondent, Dr. Chambers, has not even begun cross-examination and has not had any such restrictions placed upon him;

(3) The Respondent is **not** being denied the opportunity to cross-examine the witness. She is being represented by Leading Counsel, Dr. Chambers, with him assisted by Mr. Bale;

(4) To allow the Respondent in person to cross-examine this witness rather than through Dr. Chambers has, in my view, all the hallmarks of intimidation particularly when the Respondent is represented by a senior member of the bar who is also an academic at the University of the South Pacific and who has displayed to me in the appearances in the past week that he is clearly aware of the issues. Should, however, Dr. Chambers need time to deal with an unseen document, I will always be granting him a short adjournment (as I have already done so over the past week);

(5) Whilst the law in Fiji proceeds under the adversarial system of the common law, the Commission is a tribunal whose purpose is protection of the public whilst at the same time acting fairly to all who appear before it. I have been given no compelling reason to allow the Respondent to do what a competent senior practitioner has already been doing over the past week. Indeed, Dr. Chambers was able to more than competently (without notice) cross-examine the witness as to her vulnerability before me yesterday.

(6) In relation to the hearing of an application before the Commission, section 112(2) of the *Legal Practitioners Act 2009* states that a legal practitioner ‘may appear and be heard **in person or by Counsel** on those disciplinary proceedings’. I note the section **does not say ‘in person and/or by Counsel’**;

(7) Section 114 of the *Legal Practitioners Act 2009* states ‘the Commission is not bound by the formal rules of evidence ... but must give the legal practitioner ... an opportunity to make written submissions and to be heard and the Commission must act fairly in relation to the proceeding’. In my

view, by allowing leading Counsel to cross-examine the witness rather than by the Respondent legal practitioner herself is fair and does not infringe section 114;

(8) In all the circumstances, I can see no reason why I should allow this witness to be cross-examined by the person against whom she has raised the allegation that is the basis of bring this matter before the Commission, when the Respondent is represented by a very senior and experienced legal practitioner. If, however, the Respondent wished to cease having Leading Counsel for the Respondent represent her and represent herself, then this would be allowed, however, the opportunity would be given for time to be given for Counsel for the Applicant to explain to the witness that she would have to be facing the person against whom she had raised allegations so that she could be prepared and not have the witness to be intimidated by surprise. For me to rule otherwise would not be acting fairly. Indeed, I am reminded of the judgment of Mason P in the New South Wales Court of Appeal in *Vale v Vale* [2001] NSWCA 245; AustLII: <<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2001/245.html>>, where he noted in another context concerning the drawing of inferences but, in my view, is equally applicable to the present matter, *'The goddess of justice may be blindfolded, but she is not blind to the realities of trial tactics'*.

ORDERS

[37] In the hearing before the Commission in Case No. 008 of 2015, *Chief Registrar v Lal*, of rulings in relation to the taking of the further evidence of Reema Gokal by the use of Skype for that cross-examination being undertaken by the Respondent legal practitioner be permitted, the formal Orders of the Commission are:

1. That the request to the taking of the further evidence of Reema Gokal by the use of Skype, be refused at this time.
2. That Leading Counsel for the Applicant has liberty to make a further application should he become aware of further allegations that intimidation is occurring.
3. That the request for the Respondent legal practitioner to be permitted to cross-examine Reema Gokal is refused.

4. That should the Respondent legal practitioner seek to formally cross-examine any other witness in these proceedings, a formal application is to be filed and served upon Leading Counsel for the Applicant Chief Registrar on 24 hours' notice and made prior to any other witness commencing their evidence-in-chief.
5. That the costs of this ruling to be considered after final judgment in the matter.

Dated this day 13th June 2018.



Dr. Thomas V. Muckie
COMMISSIONER