IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION

Miscellaneous Proceedings No. 59 of 2015

IN THE MATTER of Legal Practitioners Act 1973

IN THE MATTER of Legal Practitioners (Admission) Rules 1973

AND IN THE MATTER of Disciplinary Proceedings against ASERI VAKALOLOMA

Before:	Madraiwiwi CJ
For the Respondent:	In Person
Date of Hearing:	18 August 2015
Date of Decision:	19 November 2015

CATCHWORDS:
Legal Practitioners Act 1973-Disciplinary Proceedings- Section 100 (1) Criminal Procedure Code 1972-Recall of witnesses-Professional misconduct-Improper dealings with prosecution witness-Importuning incriminating conduct-Professional misconduct established-Order for striking off roll.

RULING

1. This matter is before the Court sitting as a Disciplinary Tribunal (the "Tribunal") pursuant to jurisdiction conferred by sections 35 to 37 of the Legal Practitioner's Act 1973 (the "Act").

PROFESSIONAL MISCONDUCT

2. In a letter dated 18 August 2015, Aseri Vakaloloma (the "Respondent") was charged by the Tribunal with two counts of professional misconduct pursuant to section 38 (1) (b) of the Act as follows:

"Charge One

That you Aseri Vakaloloma a barrister and solicitor admitted to practice in Nauru did on the 20th day of May 2015 did commit an act of professional misconduct at the Od N Aiwo Hotel in having improper dealings with Ms Cathy Dageago, a witness for the prosecution, while you were engaged as defence counsel for Mr Tyrone Deiye without informing the Director of Public Prosecutions.

Charge Two

That you Aseri Vakaloloma, a barrister and solicitor admitted to practice in Nauru did on the 21st day of May 2015 commit an act of professional misconduct in importuning Ms Cathy Dageago to swear an affidavit incriminating herself in terms of testimony she had previously given as a witness for the prosecution, while engaged as defence counsel in the same proceedings."

STATUTORY PROVISIONS

3. The relevant provisions of the Legal Practitioners Act 1973 (the "Act") are set out for ease of reference:

"35. Any complaint about the conduct of a barrister and solicitor or a pleader in his professional capacity shall be made to the Chief Justice who shall examine the complaint and consider whether there should be a formal investigation of such complaint or not. He shall inform the person making the complaint whether or not he considers it necessary that there should be a formal investigation and, in the event of his decision being such investigation is unnecessary shall, on the request of such person, furnish him with his reasons in writing.

Provided that nothing in this connection shall affect the jurisdiction which, apart from the provisions of this section, is exercisable by the Supreme Court or any judge thereof, or by the District Court or the Family Court over barristers and solicitors and pleaders.

36. The Supreme Court or a judge, the District Court or a magistrate, the Family Court or a member thereof, the Minister or the Director of Public Prosecutions may at any time refer to the Chief Justice any information relating to the conduct of a barrister and solicitor or a pleader in his professional capacity and thereupon the Chief Justice shall proceed as if a complaint against that barrister and solicitor or pleader had been made to him under the provisions of section 35.

37. (1) If after inquiring into any complaint or information the Chief Justice is of opinion that the practitioner has been guilty of professional misconduct or of conduct unbecoming a barrister and solicitor and pleader, he may, if he thinks fit, but subject to the provisions of this Part of this Act, do one or more of the following things-

(a) order that his name be struck off the Roll;

(b) order that he be suspended from practice as a barrister and solicitor or pleader for such period not exceeding three years as he thinks fit;

(c) order him to pay into the Treasury Fund by way of penalty such sum not exceeding two hundred dollars as he thinks fit;

(d) censure him;

(e) order him to pay into the Treasury Fund such sums as he may think fit in respect of the costs and expenses incidental to the inquiry, including all or any part of the cost and expenses of and incidental to any investigations of his conduct or of his accounts carried out by or for the Chief Justice.

(2) For the purpose of this section the expression "professional misconduct" includes any matter mentioned in paragraphs (a) and (b) of subsection (1) of section 38.

38. (1) No order shall be made by the Chief Justice under the provisions of section 37 either striking the name of a practitioner off the Roll or suspending a practitioner from practice except upon any one or more of the following grounds-

(a) that he has been convicted in Nauru or elsewhere of an offence involving dishonesty punishable with imprisonment of three years or more;

(b) that in the opinion of the Chief Justice he has been guilty in Nauru or elsewhere of misconduct in his professional capacity or of conduct unbecoming a barrister and solicitor or pleader, as the case may be, and by reason thereof is not a fit and proper person to practise as a barrister and solicitor or pleader, as the case may be.

(2) for the purposes of this section the term "offence involving dishonesty" includes any offence described in Chapters XXXVI, XXXVII, XXXVIII, XXXIX, XI, XL, XLI and XXLII of the Criminal Code.

39. Except when making an interim suspension order under section 40, the Chief Justice shall not exercise with respect to any practitioner any of the disciplinary functions conferred on him by this Part of this Act without giving that practitioner a reasonable opportunity of being heard in his own defence, either in person or by a barrister and solicitor or pleader.

40. (1) At any time after a complain (sic) of professional misconduct has been made against any practitioner under section 35 of this Act or information has been referred under section 36 the Chief Justice may of his own motion and without the necessity of giving notice to the practitioner, make an order that he be suspended from practice as a barrister and solicitor or pleader until the charge has been heard and disposed of.

(2) The practitioner in respect of whom any interim suspension order is made under this section may apply to the Chief Justice for the revocation of the order and the Chief Justice may grant or refuse any such application as he thinks fit.

41. (1) Where the name of any practitioner has been struck from the Roll or he has been suspended from practice under section 37 of this Act, the Chief Justice may, on the petition of the practitioner, in his absolute discretion by order restore the name of that practitioner to the Roll or terminate any suspension either unconditionally or subject to such terms and

conditions as he may think fit; whereupon, subject to such order, the striking-off or suspension shall be cancelled or cease, and the practitioner shall, subject to the provisions of section 13 and Part IV of this Act be entitled to the return or renewal of his practising certificate as the case may be.

(2) The Chief Justice may make rules or give directions as to the manner in which petitions made under the preceding subsection shall be heard and may by rule limit the frequency with which such petitions may be made."

BACKGROUND

3. This matter initially arose before this Tribunal by way of a ruling by the learned Resident Magistrate delivered on 22 May 2015[1] in which it is apposite to quote paragraphs 1 to 16 *verbatim* because it contextualises the circumstances of the Respondent's alleged conduct and makes important findings in relation thereto:

> *"1. The defendant is charged with 3 counts of stealing contrary to section 398 of the Criminal Code 1899.*
>
> *2. The particulars of the offence for count 2 are that Tyrone Deiye on the 23rd of May 2013 at Nauru did steal AUD$1280.00 one thousand two hundred and eighty dollars the property of the Republic of Nauru.*
>
> *3. The particulars of the offence for count 2 are that Tyrone Deiye on the 9th of May 2013 did steal AUD$640.00 the property of the Republic of Nauru.*
>
> *4. The particulars of the offence for count 3 are that Tyrone Deiye on the 8th of October 2013 did steal AUD$4,320.00 four thousand three hundred and twenty dollars the property of the Republic of Nauru.*
>
> *5. The prosecution has called 4 witnesses. The trial for this matter was scheduled to begin on the 19 May 2015, but the witnesses were not called until the 20 May 2015. The prosecution called four witnesses and closed its case on the 20 May 2015. The defence sought an adjournment to the 21st May 2015 to make a no case to answer submission. That adjournment was granted.*
>
> *6. On the morning of the 21st May 2015, before I went into court, the Registrar Supreme Court approached me in chambers with a letter addressed to the Resident Magistrate, in essence alluding to the witness Ms. Cathy Dageago saying she had was influenced by the Prosecutor and the interpreter to change her evidence in court. Learned counsel for the defendant sought to make arrangements to have an audience with me as presiding magistrate in chambers regarding this issue. I refused to have the audience with defence counsel as sought and informed the Registrar to the effect that if learned counsel has any issues, he should raise these in open court with the relevant application. I point out that it is not proper for counsel to seek an audience with the presiding magistrate in chambers regarding a case, without the*

[1] *Republic v Tyrone Deiye Criminal Case No 154 of 2014*

presence of counsel for the other party and more so when such matters should be properly and procedurally raised in open court.

7. *I now turn to the issue at hand. Mr Vakaloloma representing the defendant when court resumed at 10:00 am on the 21st May 2015 informed the court that contents of his letter to the court dated 20th May 2015. That is the witness Ms Cathy Dageago approached him in his room and complaint (sic) to him that the prosecutor and the interpreter influenced her to change her evidence in court. The court then informed Mr Vakalolomo (sic) that, it acknowledged that these are serious allegations, but pointed out that whatever is said from the bar table by counsel is not evidence. And that the court, whilst acknowledging that it is a serious allegation, granted an adjournment to 2 pm, to allow both the prosecution and the defence to come and assist the court with submissions as to how this matter should be further conducted.*

8. The court resumed at 2:30 pm. The Republic is now represented by the Director of Public Prosecutions Mr. Wilisoni Kurisaqila. The Learned Director informed the court that since the allegations were of (sic) serious criminal nature, Ms Cathy Dageago was interviewed by the Police and a statement was obtained from her without revealing what the contents of the statement obtained by the Police from her were. Mr Vakalolomo (sic) also filed an affidavit by Cathy Dageago with the court on the same day.

9. I point out at this point, the Police had obtained a statement from Ms. Dageago and Mr Vakalolomo (sic) had also prepared and filed an affidavit on her behalf as well regarding the issue. Which party, the prosecution or the defence will call her as a witness and cross-examine her?

10. The issues raised by Ms. Dageago at this stage of the proceedings raises serious allegations against the prosecution, who are officers of the court. At this point in time, the allegations pertaining to the conduct of the prosecutor and prosecution officers must remain a separate issue to be addressed by the relevant departments within the Ministry of Justice Immigration and Border Control. They are separate issues from the trial that is before this court.

11. Whilst there are no properties in witnesses, Ms. Cathy Dageago is a prosecution witness, who has already been called by the prosecution to give evidence. The proper thing for learned counsel Mr Vakalolomo (sic) to have done would have been to exercise make application supported before this court, for this court to consider whether or not to exercise its powers under section 100 (1) of the Criminal Procedure Code 1972, to recall the witness to be further cross-examined and or examined on this issue. This is in my view the procedural and proper provision that would allow counsel to raise the issue in evidence before the court.

12. The action (sic) of learned counsel in obtaining an affidavit from Ms. Cathy Dageago a prosecution witness who has already given evidence and filing the said affidavit is tantamount to hijacking a prosecution witness, to give evidence in a collateral issue for the defence. The approach taken (sic)

learned counsel in my view is not proper both procedurally and ethically. In passing may I make this point that, since it is obvious Mr Vakalolomo (sic) has spoken with Ms. Cathy Dageago a prosecution witness, prepared and obtained an affidavit from her and filed it on behalf of his client, he may be required to give evidence himself. This must further raise issues about his continuing to represent the defendant.

13. I take judicial notice of the fact that when Ms. Cathy Dageago gave evidence in court on 20 May 2015, she needed an interpreter to assist her with giving her evidence. Mr Laurie Tebouwa clerk of court interpreted to assist her in court. With the affidavit filed in court on her behalf, there is nothing to show that the contents had been read and translated to her in Nauruan before she signed the said affidavit. Counsel had informed the court from the bar table that the translation has been done before she signed it. It is my view that the affidavit as filed is defective and should be rejected. Lawyers need to be vigilant in complying with the rules when filing documents with the court. The matter does not end here, even if the affidavit file by MS. Cathy Dageago is in compliance, the effect of not making an application to this court to have Ms Cathy Dageago re called to be cross-examined is fatal, in that no evidence of the allegations she made is being properly put before this court in this matter.

14. Because of the comments that I have made in paragraph 10 of this ruling, (sic) copy of this ruling will be provided to the Registrar Supreme Court to forward to the relevant authorities to take appropriate actions.

15. The prosecution has closed its case. It is only in compelling situations that this court can re-open the case. The defence in effect has not asked for the court to re-open the case, so as to cross-examine Ms Cathy Dageago on the issues.

16. I therefore rule that, I will proceed to write and deliver the judgment on the No Case to Answer Submission made by counsel for the defendant. Judgment will be delivered upon notice being given to both parties."

4. For completeness, mention is also made of section 100 (1) of the Criminal Procedure Code 1972 ("CPC") for the reasons explained in paragraph 11 of the learned Resident Magistrate's Ruling which has a significant bearing on Charge One:

"100. (1) ***Any Court may at any stage of any proceeding under this Act, of its own motion or on the application of any party, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall, unless the circumstances make it impossible to do so, summon and re-examine or recall any such person if his evidence, or further evidence, appears to it essential to the just decision of the case:***

Provided that the prosecutor, or the barrister and solicitor or pleader, if any, for the prosecution, and the accused, or his barrister and solicitor or pleader, if any, shall have the right to cross-examine any such person, and the Court shall adjourn the case for such time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as witness.' (emphasis added)

5. On 27 May 2015 the Acting Secretary for Justice and Border Control formally advised the then learned Registrar of the learned Resident Magistrate's ruling citing paragraph 12 specifically and requested "that this matter ought to be dealt with as speedily as His Honour the Chief Justice determines."

6. It was formally brought to the Tribunal's attention by the learned former Registrar by memorandum dated 8 June 2015 in which he referred to the ruling of the learned Resident Magistrate and the formal complaint made by the Acting Secretary for Justice.

7. In a related development involving this matter, Khan J had on 12 June 2015 dismissed an application for a permanent stay of proceedings sought by the Respondent in Miscellaneous Action No 54 of 2015 on the basis that the prosecution's conduct in allegedly coaching Ms Dageago was an abuse of process. The learned Judge cited dicta by *Mason CJ* in *R v Rogers*[2] in which the doctrine was explained as follows:

> ***"These statements indicate that there are two aspects to abuse of process" first the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute.*** *This led the majority in Walton v Gardiner to state the question whether criminal proceedings should be permanently stayed was to be determined by a weighing process involving a balancing of a variety of considerations (12) (1993) 177 CLR at 395-396). Those considerations, which reflect the two aspects of abuse of process outlined above, include ((13) ibid. at 396.):*
>
> > ***"the requirements of fairness to the accused, the legitimate public Interest on the disposition of charges of serious offences and in the Conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."***(emphasis added)

The onus lay with the party alleging it [3]on a consideration of a totality of all the factors to be taken into account in determining the issue of whether there is an abuse of process.[4] It is a discretionary power to be exercised where grounds for it are established and the procedure generally requires a notice of motion to be supported by an affidavit of the instructing solicitor.[5]

In dismissing the application, Khan J held that the supporting affidavit by the applicant Tyrone Deiye was defective as containing hearsay evidence and was therefore inadmissible; the Respondent himself as the only person who had been the recipient of Ms. Dageago's confidences having failed to do so. And further that:

> *"By having the discussions with Ms Cathy Dageago in his hotel room Mr Vakaloloma usurped the functions vested in the Magistrate presiding over the criminal trial. Section 100 of the CPC provides that any court at any stage*

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[2] *(1994) 181 CLR 251*
[3] *Williams v Spautz (1992) 174 CLR 506 AT 529*
[4] *R v Gagliardi &Filippidis 26 A Crim R 391 at 407*
[5] *Litter v R (2001) 120 A Crim R 512 per Hodgson JA at 513*

of any proceedings of its own motion or an application of any party may recall a witness for further re-examination."[6]

8. The matter was the subject of a formal investigation by the former learned Registrar upon direction by the Tribunal and on 27 July 2015 he made several recommendations the substance of which was that there was sufficient basis to suggest that the Respondent had been guilty of professional misconduct.

9. On 28 July 2015, the Respondent was charged with two counts of professional misconduct by the Tribunal as set out in paragraph 2 hereof and suspended on an interim basis as a barrister and solicitor with immediate effect pursuant to section 40 (1) of the Act.

10. The Tribunal convened on 18 August 2015 to hear the Respondent answer the charges of professional misconduct made against him in the presence of the former learned Registrar. The proceedings were conducted in the nature of an inquiry with the Respondent having filed substantive written submissions in response to the charges (in advance), expanding on them in the course of the hearing and answering questions by the Tribunal. The Respondent elected to appear in person and declined the opportunity to call witnesses. He also chose not to cross-examine witnesses whose sworn statements were tendered by consent, and also made available beforehand to him.

11. The following documents were considered by the Tribunal (in addition to the findings made by the learned Resident Magistrate and Khan J in their respective decisions of which the Tribunal takes judicial notice):

(I) Initial response by the Respondent to the Registrar dated 15 June 2015;
(II) Respondent's submissions filed 14 August 2015;
(III) Interview statement of Ms Cath Dageago to police dated 21 May 2015;
(IV) Affidavit of Ms Cathy Dageago drafted by the Respondent dated 21 May 2015;
(V) Affidavit of Prosecutor Mr Lival Sovau dated 22 May 2015;
(VI) Affidavit Of Paralegal Mr Kristian Aingimea dated 22 May 2015;
(VII) Affidavit of Sergeant Jacaranda dated 22 May 2015.

12. The two charges of alleged professional misconduct were read by the Tribunal and put to the Respondent as follows:

"CHARGE ONE

That you Aseri Vakaloloma a barrister and solicitor admitted to practice in Nauru did on the 20th day of May 2015 did commit an act of professional misconduct at the 0d N Aiwo Hotel in having improper dealings with Ms Cathy Dageago, a witness for the prosecution, while you were engaged as defence counsel for Mr Tyrone Deiye without informing the Director of Public Prosecutions.

[6] *Misc. No 54 of 2015 at paragraph 40*

CHARGE TWO

That you Aseri Vakaloloma a barrister and solicitor admitted to prractice in Nauru did on the 21st day of May commit an act of professional misconduct in importuning Ms Cathy Dageago to swear an affidavit incriminating herself in terms of the testimony she had previously given as a witness for the prosecution, while engaged as defence counsel in the same proceedings."

The Respondent denied both charges. However, in both his voluminous submissions and in his oral evidence he did not *"condescend upon particulars"* as in proffering a credible explanation to allow the Tribunal to determine that there was ample exculpatory material to exonerate the mischief with which he had been charged. Inexplicably, the approach was adopted to concentrate on the alleged misconduct of the learned prosecutor and the prosecution paralegal rather than on the Respondent's own predicament.

13. As regards the standard of proof, professional misconduct requires a high standard of proof.[7] In *Bhandari v Advocates Committee* their Lordships of the Privy Council cited with approval the following dicta of the Court of Appeal for Easter Africa:

> *"We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities."*[8]

14. "Professional misconduct" is very loosely defined in section 37 (1) as *"professional misconduct or conduct unbecoming a barrister and solicitor or pleader ..."* In the absence of formal rules in place, which anomaly the Tribunal hopes to address in the near future in consultation with other learned members of the Judiciary Department, the Secretary for and Department of Justice and the legal profession of Nauru, it must have recourse to the common law. This is readily established by reference to the duty a barrister and solicitor has to the court. Paragraph 3 of *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*[9] deals with *"Fundamental duties of solicitors"* and the relevant provisions are excerpted below:

> *"Fundamental duties of solicitors*
>
> *3. Paramount duty to the court and the administration of justice*
> *3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the inconsistency of any other duty.*
>
> *3.1 Duty to court overrides duty to client*
>
> *The duty to court is well-established at common law and has four mutually supporting categories:*
>
> - *a duty of disclosure to the court;*
> - *a duty not to abuse the court's process;*

7.Bhandari v Advocates Committee [1956] 3 ALL ER 742; Briginshaw v Briginshaw (1930) 60 CLR 336
8 Bhandari ibid, 744, 745
8. First Edition 2014

- *a duty not to corrupt the administration of justice; and*

- *a duty to conduct cases efficiently and expeditiously. 1*

It has been said

"The first three mentioned general duties are derived from the public interest in ensuring that the administration of justice is not subverted or distorted by dishonest, obstructive or efficient practices. The essence of these duties is the requirement for lawyers (within the context of the adversarial system) to act professionally, with scrupulous fairness and integrity and to aid the court in promoting the course of justice. By their nature, these requirements are immutable, but the content of the particular duties that flow therefrom may change over time as litlgation practices and social values change."

The duty to the court prevails to the extent of inconsistency with any other duty including a solicitor's duties to the client or others: Gianerelli v Wraith (1988) CLR 543, 555-6 (Mason CJ), 572 (Wilson J). As Lord Reid put it Rondel v Worsley [1969] AC, 191, 227 ('Rondel'):2

"Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful which he thinks will help his client's case. But as an officer of the court *concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests."*

1. *David Ipp, 'Lawyers' Duties to the Court' (1998) 14 Legal Quarterly 63,66*
2. *Ibid.*

The duty involves 'candour, honesty and fairness': Council of the Queensland Law Society Inc v Wright [2001] QCA, 58 (67). For example, a solicitor must not mislead the court, make unfounded aspersions against other parties or witnesses or withhold authority or documents unfavourable to the client: Rondel at 227. Solicitors therefore must inform the court of legal authorities that may be unfavourable to their client's case: Glebe Sugar Refining Co Ltd v Victoria Legal Aid (2006) 223 CLR 1 [112].

CHARGE ONE

15. The Tribunal will now deal with the substance of the first charge of unprofessional conduct. The *verbatim* evidence of the Respondent regarding what transpired between him and prosecution witness Ms Cathy Dageago on the evening of 20 May 2015 is recorded as follows:

"After the case closed, I retired to the Hotel. About 6 pm I heard a knock on my door. I opened the door and here were two ladies at door. I invited them in. They sat

down. I asked them what they wanted. One of the ladies said she was the prosecution witness in court, Cathy. I did not know them. I was not aware of their coming to my hotel. My hotel room was my office. On that evening I thought they were my client. It did not occur to me that she was the same lady in the witness box. I did not recognise her. I was taken by surprise. I did not know my client's wife either. I did mention I was defence counsel and you are a prosecution witness. Her response was that I lied, and that is why I am here. Conversation was five to ten minutes. Best interest of the court and client was for me to inform them what has happened. They then left. So I thought I would write to the Magistrate and attention the letter to the Registrar. I also explained that to the DPP."

The respondent does not deny meeting Ms Dageago. Nor that they had a conversation about the nature of the evidence she had given for the prosecution. There are aspects of his evidence that reflect adversely on his credibility such as the Respondent's assertion that he did not recognise the principal witness testifying against his client, one whom he had not just cross-examined that morning, but whose evidence could convict Mr Tyron Deiye as well. Further, that he did not know the other lady was his client's wife. Nauru is a very small community and the phrase "everyone knows everyone else" is not a mere truism. Moreover, the Respondent made no effort to discourage Ms Dageago from engaging in conversation that lasted some *"five to ten minutes"*.

As if that were not sufficient caveat, the negative inferences drawn by Khan J in that learned Judge's ruling on the application for a permanent stay of proceedings about the Respondent's apparent ignorance complement this unfortunate scenario.[10] Not only has the Respondent been less than truthful in aspects of his evidence, the salient point is that he admits he had dealings as a defence counsel with a prosecution witness without advising the Director of Public Prosecutions.

16. The question then is whether those dealings constituted 'professional misconduct' for present purposes? The standard of proof is not in issue because the Respondent does not dispute what transpired. In *Re Barrister and Solicitor*[11] Scott JA observed as follows about the standard of proof:

> *"Although as pointed out in Kerin (supra) it is undoubtedly a wise practice for tribunals of enquiry to make specific reference to the standard of proof, I do not believe that a failure in that regard necessary (sic) amounts to a fatal procedural defect particularly when, as here there, was no challenge offered to the basic facts which constituted the two complaints ..."*

In these proceedings, the Respondent similarly does not challenge the basic facts of the charges but denies the professional misconduct. The issue then is what characterisation is to be given that engagement? However, he responded robustly by way of justification to the Tribunal when paragraph 11 of the learned Resident Magistrate's ruling was put to him as follows:

> *"My understanding is that given what had transpired was for me to inform the court. The witness was not mine but I was going through the Registrar. Then I would make an application by way of section 100. At that point in time, that is what I thought was my best course of action, because the prosecution had closed its case. I*

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[10] *Refer paragraphs 38 to 40*

[11] *[1999] FJHC 13; [1999] 45 FLR 59 (9 March 1999)*

addressed the letter to the Magistrate and did say if there were any queries I was ready to see her. At that point of time, I had not looked at the provisions of section 100 of the Criminal Procedure Code. Only when it was raised by the Magistrate did I come to know. I do understand that ignorance of the law is no defence. I applied for an interim stay because there was no judge and then a permanent stay when one arrived. What I was trying to raise was prosecutorial misconduct and I thought to inform the court."

Professor Dal Pont has observed as a general comment:

"When interviewing a prosecution witness, defence counsel must be careful to ensure that nothing is said or done to intimidate the witness. It is especially unwise to interview complainants in sexual offences without notifying the prosecutor in advance. "[12]

17. *In Harold v Legal Complaints Review Officer*[13] Asher J had to consider whether defence counsel may only contact crown witnesses on notice to the prosecution, as well as the status of professional conduct rules. Defence counsel in a criminal assault case met with the complainant in a meeting arranged by his client. The complainant's version of events was inconsistent with the prosecution case, but she died before the matter went to trial. Counsel was criticised by the Judge at first instance who opined " *"a more appropriate and safer practice would be for counsel to decline to meet with the complainant and refer her to an Independent solicitor"; Police v Rahman [2009] DCR 614, 615"*

On a subsequent complaint by the Crown Solicitor that counsel breached a *"well-established convention"* that contact between defence counsel should only take place after notice to the prosecution, the Standards Committee determined that established convention, together with various Court practice directions was sufficient to establish a finding of unsatisfactory professional misconduct.[14] This was upheld by the Legal Complaints Review Officer.

In *Harold's case*[15] Asher J in an application for judicial review cited the NZ Court of Appeal in *Black v Taylor*[16] and differed with that finding stating as follows:

"The rules are not the only source of ethical standards, and in the commentaries there are references to cases and other sources of authority. The introduction makes it clear that they do not purport to deal with every circumstance that might give rise to an ethical
responsibility ... and the rules are not considered an exhaustive code or treatise". [17]

The Rules reflected the traditional view that there *"was no property in a witness"*, acting consistently with that approach, although dangerous, was not prohibited in itself:

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[12] *G Dal Pont, Professional Responsibility (5th Ed) 2012, Thompson Reuters at 569*
[13] *[2012] NZHC 145*
[14] *The New Zealand Professional Conduct Rules contain a provision to the effect that a solicitor is not to attempt to prevent opposing counsel speaking with a witness and that explicitly state that counsel may interview any witness.*
[15] *supra fn 11*
[16] *[1993] 3 NZLR 403 (CA)*
[17] *Ibid. at paragraph 32*

> *"...There is no requirement to notify,* ***but it is made clear that a practitioner takes a risk if he she talks about the case to an opponent's prospective witness without notifying the other side particularly in a sensitive criminal matter. It follows that contact in certain circumstances may constitute unsatisfactory conduct .... whether the discussion or interview involves unsatisfactory conduct will turn on the particular background and facts of the discussion or interview ..."*** [18] (emphasis added)

18. Applying that approach to the facts of Charge One and having regard to the four mutually supporting criteria encompassing the paramount duty of barristers and solicitors to the Court at common law, the Tribunal concludes that the Respondent is guilty of professional misconduct.

19. Once apprised of Ms Dageago's identity and the purpose of her visit, he made no effort to either abort the conversation or remonstrate with her about its impropriety. Instead, he proceeded to have a "five to ten minute conversation" (in his own words) with her in which the outlines of the alleged perfidy of the learned prosecutor was briefly sketched. He then used that incident as a pretext to pre-empt the exercise of the learned Resident Magistrate's discretion under section 100 (1) of the CPC the next day under section 100 by alleging coaching of Ms Dageago by the prosecution. He raised the matter initially with the learned Registrar and then later from the bar table before the learned Resident Magistrate. That outcome, unforseen by the Respondent at the relevant time (as reflected in his earlier admission he was unaware of the provisions of section 100 (1) of the CPC) was nevertheless a direct consequence of his attempts to cast aspersions on the prosecution case which commenced with the folly of conversing with Ms Dageago on the evening of 20 May 2015. Khan J commented in like terms in a passage from his ruling to which the Tribunal has already made reference.

CHARGE TWO

20. The second charge of professional misconduct relates to the Respondent's conduct in drafting an affidavit by Ms Dageago on 21 May 2015 in which she contradicted the sworn evidence she had given as a prosecution witness the previous day, and in effect incriminated herself on the basis that she had committed perjury.

21. The circumstances relating to Ms Daeago's caution statement dated 21 May 2015 in which she denied being "misled *influence (sic) or coached by the prosecutor"* together with the manner in which the *incriminating"* affidavit of Ms Dageago was drafted emerged from in the Respondent's oral evidence as follows:

> *"I cannot say much here because it was taken before the affidavit was made.*[19] *I was not aware of their arrival. I only went back after the Magistrate said I was giving evidence from the bar table and approached her about the affidavit. I approached the DPP and Ms Dageago was speaking to the police, and he agreed I could approach her for the affidavit after she spoke to the police. She was sitting there (in the hotel room), I was doing the typing. Only before she signed it was it explained by Liz, the Chief Justice's secretary. Liz came to the hotel to buy lunch and to buy water and I saw her standing outside.*
> *I was just taking the story Ms Dageago was telling me. That was her story. What I am trying to say is that she approached me in court on her own mind. I put down on*

[18] *Ibid.at paragraph 43*
[19] i.e. the caution statement of Ms Dageago

paper what she was telling me. From my understanding, what she told me was wrong compared to what she said in court.

At that point I did not know about section 100 but I was raising this matter in court as there was some coaching of the prosecution witness according to what was done. I applied for a stay because I realised there was some prejudice to my client which I sought to inform the court. Both stay and injunction were refused. I was not aware of the provisions of section 100 of the CPC when I got the decision of the Magistrate.

I have seen the affidavits. They do not deny the directions. I believe those directions could have affected her giving evidence.

I had no part in the approach at the hotel on 20 May and the contents of the affidavit were from Ms Dageago. I merely approached her in relation to getting what she had said before the court in affidavit form, after the Magistrate refused to accept evidence from the bar table. I did not recognise Ms Dageago or her sister when they came to see me in the hotel on 20 May. I tendered the affidavit but it was not accepted by the learned Magistrate.

That is all I have to say. I return on Sunday. I am currently suspended."

The Respondent does not deny that he assisted in the preparation and drafting of the offending affidavit that is the subject of Charge Two. He takes refuge in the disingenuous *raison d'etre* that he was only *"taking her story'*, seemingly oblivious to the danger that Ms Dageago was at risk of incriminating herself and thereby committing perjury. The Respondent was only concerned about defending his client; he compounded that misadventure by demonstrating a lamentable lack of 'candour, honesty and fairness' to the Court and to Ms Dageago. In essence, it was scant disregard bordering on the callous because nowhere, in either his submissions or in oral evidence, does the Respondent evince the slightest concern for her. The focus is on the alleged wrong done his client absent any repercussions. Ms Dageago was in the Respondent's calculations mere 'collateral damage', a current phrase that deliberately understates the severe consequences of untoward behaviour.

22. With respect, the Tribunal has found it difficult to be sanguine about the Respondent's actions in these proceedings. It is quite breathtaking in its audacity: not satisfied with having attempted to persuade Ms Dageago as the principal witness for the prosecution to engage in conduct tantamount to perjury, he then deployed her plight to undermine the administration of justice by alleging an abuse of process at Ms Dageago's expense. Khan J's bemusement verging on incredulity resonates in these passages of his ruling:

> *"41. To a question by me as to whether it was unethical for him to talk to Cathy Dageago he responded that the case for the prosecution has closed and therefore there was nothing unethical about it.*
>
> *42. The sole basis for making this application is the conversation Mr Vakaloloma had with Ms. Cathy Dageago in that she discussed her evidence in court and confessed to him to having committed perjury and that she was coached by Mr Livai Sovau to give evidence in the way that she did. If I were to grant the application than (sic) I would be elevating the meeting that he had with Ms. Cathy Dageago to the functions*

vested in the Magistrate by virtue of section 100 of the CPC. Had he correctly used section 100 that would have been the natural outcome.

43. Mr Vakaloloma had no regard for the court's process and its'(sic) sanctity He has shown a complete disregard for the welfare of the witness Ms. Cathy Dageago and is using the discussions with her which is a breach of well-established common law practice afforded to a witness in a court of law. This application is in itself an abuse of process of court and is therefore dismissed."

23. In acting as he did, the Respondent failed to "*act professionally, with scrupulous fairness and integrity and to aid the court in promoting the course of* justice ..."[20] He did not disclose to the Court at the appropriate time and manner the nature of his dealings with Ms Dageago. The Respondent then, whether by default or by design, sought to circumvent the Court's process and thereby undermine the administration of justice by rendering Ms Dageago liable for perjury and pre-empting her availability as a witness under section 100 (1) of the Criminal Procedure Code 1972.

24. The Tribunal is accordingly satisfied that Charge Two alleging professional misconduct by the Respondent in importuning Ms Dageago to incriminate herself by swearing an affidavit in terms of testimony she had given as a prosecution witness while he was engaged as defence counsel in the same proceedings is also established.

25. Pursuant to section 37 (1) (a) of the Legal Practitioners Act 1973, **IT IS ORDERED** that Mr Aseri Vakaloloma's name be struck off the Roll of the Court of Barristers and Solicitors and Pleaders of Nauru and that there be no order as to costs.

DATED this day of 2015.

Joni Madraiwiwi
CHIEF JUSTICE

[20] David IPP, 'Lawyers' Duties to the Court' (1998) 114 Legal Quarterly Review 63, 65