

1946 Present : Wijeyewardene and Canekeratne JJ. and Nagalingam A.J.

In re MARIKAR MOHAMED, a Proctor.

IN THE MATTER OF AN APPLICATION BY THE ACTING SOLICITOR-GENERAL FOR A RULE ON ALIA MARIKAR MOHAMED, A PROCTOR OF THE SUPREME COURT, AND IN THE MATTER OF SECTION 17, THE COURTS ORDINANCE.

Proctor—Prosecution for criminal breach of trust—Confession of guilt—Mitigating circumstances—Suspension from practice—Courts Ordinance (Cap. 6), s. 17.

The respondent, a Proctor, had pleaded guilty to a charge of criminal breach of trust in respect of a sum of Rs. 10 and had been dealt with by the Magistrate under section 325 of the Criminal Procedure Code. On application made under section 17 of the Courts Ordinance to have his name removed from the Roll of Proctors it was established that there were circumstances which made it possible for the Court to treat him leniently.

Held, that, in the circumstances, the respondent should be suspended from practice for a period of one month.

THIS was a Rule issued against the respondent, a Proctor of the Supreme Court, to show cause why his name should not be removed from the Roll of Proctors.

F. A. Hayley, K.C. (with him P. Navaratnarajah), for the respondent.—The respondent has cause to show why he should not be removed from the roll of Proctors. The rule states that the respondent has been convicted under section 389 of the Penal Code. But there is no conviction as the respondent has been dealt with under section 325 of Criminal Procedure Code.

[Counsel then states the facts of the case and moves to read in evidence the affidavit of the respondent, to produce the books of the Kathi Court during the relevant period, and to lead the evidence of Mr. E. B. Weerakoon, Proctor. Mr. Pulle, formally objects to the evidence of Mr. Weerakoon on the ground that evidence is tendered to show that an essential ingredient of the offence under section 389 was not present. The evidence is led.]

The respondent's affidavit and the books of the Kathi Court prove that the respondent had no need to take this money and that the failure to enter the sum in the books and pay the sum to Zurath Nazeema was due to an oversight owing to the disturbed state of affairs prevailing at the time. The affidavit, taken together with Mr. Weerakoon's evidence, proves that the respondent pleaded guilty as he was anxious to end the case and as he confidently expected to be dealt with under section 325 of Criminal Procedure Code. The respondent did not think his position as a Proctor would be jeopardised. As a matter of fact the Magistrate himself has stated that in all the circumstances he was satisfied that the respondent had no dishonest intention.

Therefore, it is quite clear that the respondent has not been guilty of any offence, malpractice or deceit as would require him to be dealt with under section 17 of the Courts Ordinance.

M.F.S. Pulle, Acting Solicitor-General (with him E.L.W. de Zoysa, C.C.) in support of the Rule.—A preliminary point arises whether the respondent,

having confessed to an offence, should be permitted to deny the existence of one of the essential ingredients of that offence. The respondent cannot canvass the finding of the Magistrate's Court in these proceedings. See *In re Kandiah*¹ and *In the matter of Rajendro Nath Mukerji*². The application must be disposed of only on the basis that the respondent has been found guilty of an offence under section 389 involving dishonest intention.

The Magistrate had misdirected himself when he stated in his order that the respondent had no dishonest intention in converting the postal order to his use. The plea of guilt tendered by the respondent was the best proof before the Magistrate that the intention of the respondent in cashing the postal order was dishonest.

In calling evidence in this Court the respondent is in effect seeking to revise the Magistrate's order. If the respondent's position is that he is not guilty of the offence his remedy is to get the Magistrate's order set aside in appropriate proceedings.

A Proctor may be removed from the roll for acts committed outside his profession if such acts render him unfit to hold office. See *In re Brito* following *In re Weare*³, and also *Attorney-General v. Ellawella*⁴ and *In the matter of Proctor Joseph Gerald Fernando*⁵.

The respondent was not merely a public servant but a judicial officer who confessed to having misappropriated a suitor's money.

If the respondent pleaded guilty against the advice of his lawyers that would show that he regarded lightly an imputation of dishonestly against him.

F. A. Hayley, K.C., in reply.—If the respondent has been convicted after a full hearing and trial perhaps the submission that the finding of the Magistrate cannot be canvassed in these proceedings might be correct. But no evidence has been led in this case. The power of the Supreme Court in these proceedings is unfettered by ordinary rules of procedure. See *Attorney-General v. Ellawella (supra)*:

This Court has to be satisfied not that the respondent said he was guilty but that he is actually guilty. The respondent has apologised to this Court for his default.

Cur. adv. vult.

December 12, 1946. WIJEWARDENE J.—

On the application of the Solicitor-General under section 17 of the Courts Ordinance an order has been made on the respondent, a Proctor of this Court, calling upon him to show cause why his name should not be removed from the Roll of Proctors entitled to practise before this Court.

The respondent was appointed to the office of Kathi under the Muslim Marriage and Divorce Registration Ordinance on April 10, 1941, and continued to hold that office till December 31, 1942. On April 24, 1942, one Mawjud sent to the respondent a postal order for Rs. 10 in part payment of *mahr* ordered by the respondent as Kathi of the Kathi Court of Maradana to be paid to one Zurath Nazeema. The respondent cashed the postal order and appropriated the proceeds to his own use,

¹ (1932) 25 C. L. W. 87 at 88.

² (1899) 1900 I. L. R. 24 Allahabad 49 at 53.

³ (1942) 43 N. L. R. 529.

⁴ L. R. (1893) 2 Q. B. D. 439.

⁵ (1926) 29 N. L. R. 13.

⁶ (1944) 45 N. L. R. 379.

instead of paying the money to Zurath Nazeema. He omitted further to record the receipt of that money in the prescribed book as required by section 21 (5) of the Ordinance.

As a result of certain investigations made by the Police on a complaint made by the Registrar-General, case No. 44,303 was instituted in the Magistrate's Court of Colombo against the respondent on the following written report under section 148 (1) (b) of the Criminal Procedure Code:—

“That he did on 25th day of April, 1942, at Maradana within the jurisdiction of this Court commit criminal breach of trust of a postal order valued Rs. 10 belonging to M. L. M. Mawjud of No. 40, Madawala road, Katugastota, and thereby committed an offence punishable under section 389 of the Ceylon Penal Code.”

On September 25, the respondent who was represented by Mr. E. B. Weerakoon, Proctor, appeared on summons and pleaded not guilty. The case was then fixed for trial on November 13, and on that date it was postponed for December 22, for want of time. On the latter date the case was postponed for February 9, 1945, on the application of the prosecuting Inspector that a material witness for the prosecution was absent. On February 9, the respondent withdrew his plea of “not guilty” and made an unqualified admission of his guilt. The respondent's Proctor, Mr. Weerakoon, pleaded thereafter that the accused be dealt with under section 325 of the Criminal Procedure Code. The respondent was finger printed on that day and the case was re-fixed for February 13 when the Magistrate dealt with the respondent under section 325 of the Code and ordered the respondent to enter into a personal bond for Rs. 250 to be of good behaviour for six months and to pay Rs. 25 as expenses of this case and a further sum of Rs. 10 as compensation to Mawjud, the sender of the postal order.

The respondent filed for this inquiry an affidavit stating that at the time he received the postal order he was unable to attend to his work as Kathi with his usual care, as, owing to the Japanese Air Raid, he had to leave his Colombo residence somewhat suddenly in April, 1942, and reside some eight miles away from Colombo. He submitted that through a mistake, due mainly to the abnormal conditions at the time, he forgot to pay the proceeds of the postal order to Zurath Nazeema or to record the receipt of the money in his book. He stated further that he pleaded to the charge on February 13, 1945, as he was “anxious to have an end of this case”, and that it did not occur to him at that time that his “position as a Proctor might be prejudiced”.

Mr. Weerakoon, a leading Proctor practising in the Magistrate's Court, Colombo, was called as a witness by the respondent and gave evidence to the following effect:—

“I remember his doing so (i.e., accused pleading guilty). Before he did so I gave him advice. I told him that he was taking a great risk. I told him that we were able to establish that he had no dishonesty on his part and practically he will be getting off altogether from the charge of criminal breach of trust . . . I advised him not to plead guilty. However, he pleaded guilty as he was anxious to finish up the case . . . I told him that a confession of

dishonesty was a serious matter for a Proctor I don't remember exactly what and what advice I gave. I warned him against consequences."

As stated earlier, the respondent says in his affidavit that he pleaded guilty, as he believed that the Magistrate would deal with him under section 325 of the Criminal Procedure Code and he assumed that since the Magistrate could not proceed to conviction under that section, he did not run any risk of being suspended or disenrolled under section 19 of the Courts Ordinance. Even if he felt justified in acting on such an assumption, it is difficult to understand how, as a professional man valuing his reputation for honesty and integrity, he could make up his mind to plead guilty to a charge of criminal breach of trust, if, in fact, he did not act dishonestly in appropriating the money for his own use. On the other hand it is equally difficult to understand how the Magistrate who recorded the plea of "guilty" permitted himself to make thereafter the inconsequential statement, "From all the circumstances in this case I am satisfied that the accused had no dishonest intention".

The respondent has been a Proctor for sixteen years. His appointment as Kathi may be taken as showing to some extent the position he had won for himself as a Proctor. The ledger kept by him as Kathi shows that he has duly recorded ten out of the eleven instalments sent by Mawjud from September, 1941, to September, 1942, amounting to Rs. 125. Six of these instalments amounting to Rs. 85 were received by him before the postal order in question and the remaining four after that. misappropriated and failed to make a payment to Zurath Nazeema.

On a careful consideration of the various aspects of this case I have reached the decision that the respondent had most probably got into the habit of using for his own purpose temporarily the various small remittances he received as Kathi from the litigants of the Kathi Court from time to time. He was, however, in a position to make the payments to those entitled to them when they demanded them, as he duly recorded in his books the remittances received by him. In this instance, however, he omitted to make the entry owing to his failure to attend daily the Kathi Office, as he was living out of Colombo during that period. Owing to the absence of the relative entry he forgot the remittance of Rs. 10 he misappropriated and failed to make a payment to Zurath Nazeema. Such a temporary misuse of the money received by him as a Kathi is highly improper and rightly exposed him to a criminal charge. It is, therefore, necessary to make an order against the respondent to show our condemnation of his conduct, though there are circumstances which make it possible for us to treat him leniently.

The order of this Court is that the respondent be suspended from practice in the office of a Proctor for a period of one month from this date and that a sum of Rs. 100 be paid by him as the costs of these proceedings.

CANEKERATNE J.—I agree.

NAGALINGAM A.J.—I agree.

Proctor suspended from office for one month.