1958 *Present :* **Weerasooriya, J., Sansoni, J., and Sinnetamby, J.**

THE ATTORNEY-GENERAL, Applicant, *and* SENERATNE, Respondent

In the matter of an Application under Section 17 of the Courts Ordinance (Cap. 6)

Courts Ordinance—Section 17—Proctor convicted of offence—Proceedings for his removal from Roll of Proctors—Application to lead more evidence to show that conviction was wrong—Permissibility.

Quaere, whether, in an application made under section 17 of the Courts Ordinance for an order of removal of a Proctor convicted of a crime or offence, the respondent can be permitted by Court to adduce evidence relating to the offence which was not led at the trial and which would prove that he was not guilty of that offence although he was convicted of it.

ORDER made in relation to an application under section 17 of the Courts, Ordinance.

M. Tiruchelvam, Acting Solicitor-General, with *J. G. T. Weeraratne* Crown Counsel, and *Arthur Keuneman*, Crown Counsel, in support of the Application.

E. B. Wikramanayake, Q.C., with ***M. C. Abeywardene, A. Sambandan*** and ***C. D. S. Siriwardene***, for the respondent.

Cur. adv. vult.

April 1, 1958. WEERASOORIYA, J.—

The respondent has been called upon in these proceedings to show cause under Section 17 of the Courts Ordinance why he should not be removed from the office of Proctor of the Supreme Court. The ground of removal as stated in the rule issued on him is that he was on the 2nd of July, 1956, found guilty and convicted by the District Court of Colombo of the following offences:

1. That between the 8th day of October, 1952, and the 11th day of December, 1952, at Colombo in the division of Colombo within the jurisdiction of the District Court, Colombo, he being entrusted with property, to wit, a sum of Rs. 760 by M. Wijesiri Thero in the way of his business as Agent, to wit, Proctor for the Plaintiff in case No. 5,517/L of the District Court of Colombo did commit criminal breach of trust in respect of the said property, and that he did thereby commit an offence punishable under Section 392 of the Penal Code;

2. That on or about the 26th day of May, 1953, at Colombo in the division of Colombo within the jurisdiction of the said District Court of Colombo, he being entrusted with property, to wit, a sum of Rs. 1,575 by Mr. H. M. A. S. Abeywardene in the way of his business as Agent, to wit, Proctor for the defendant in case No. 380/Z of the District Court of Colombo, did commit criminal breach of trust in respect of the said property and that he did thereby commit an offence punishable under Section 392 of the Penal Code.

For each offence the respondent was sentenced to undergo simple imprisonment for six months and to pay a fine of Rs. 100, in default of payment to undergo simple imprisonment for a further period of two weeks, the sentences of imprisonment to run concurrently.

The respondent appealed to this Court against the conviction and sentences aforesaid but his appeal was dismissed on the 13th March, 1957. His application to the Privy Council for special leave to appeal from the order of this Court dismissing his appeal was refused on the 3rd October, 1957.

The first of the offences referred to was committed while the respondent was acting as Proctor for the Rev. Dhammadassi who was the plaintiff in D. C. Colombo case No. 5,517/L which was an action relating to the incumbency of a certain temple at Mount Lavinia. The Rev. Dhammadassi was at the time nearly eighty years old and resident in Kandy, and his pupil Rev. Wijesiri, who lived in a temple at Gampaha, attended to various matters connected with the case. After trial judgment was given in favour of the plaintiff but an appeal which had been filed against it was pending.

Rev. Wijesiri was called as a witness for the prosecution at the trial of the criminal case against the respondent, and he said that in connection with the pending appeal he gave the respondent a sum of Rs. 230 on the 8th October, 1952, of which Rs. 210 was on account of fees to be paid to Counsel who would be retained to appear for the Rev. Dhammadassi at the hearing of the appeal and Rs. 20 was for a typewritten copy of the evidence. He also said that some time later he received the letter P2

dated the 9th December, 1952, from the respondent requesting him to "send another Rs. 420 for Mr. Weerasooria's fees and Rs. 105 for Mr. Dissanayaka's fees. Also Rs. 25 for extra typewritten copy", that as he was ill at the time he gave the sums called for in P2 (totalling Rs. 550) to the Rev. Nandasena on the 10th December, 1952, to be handed to the respondent on the following day and the Rev. Nandasena left for Colombo early on the 11th December (which was a Thursday) and returned at about 11 a.m. saying that he had given the money to the respondent.

But when the appeal came up for hearing there was no appearance of Counsel for the plaintiff-respondent (the Rev. Dhammadassi). Judgment was delivered on the 19th July, 1954, allowing the appeal and dismissing the plaintiff's action with costs in both Courts. The Rev. Dhammadassi has stated in evidence that when he heard of the result, and also that there had been no appearance of Counsel for him, he got in touch with the respondent who informed him that he had retained Counsel for the purposes of the appeal. This evidence is of special importance because it is entirely contrary to the defence put forward by the respondent at his trial, which was that he did not retain Counsel as he never received any monies to enable him to do so, either from the Rev. Wijesiri or the Rev. Nandasena. In fact, the respondent could not possibly have taken up any other defence since it has been established beyond all doubt that no Counsel was retained by him in connection with the appeal. Rev. Dhammadassi subsequently retained another Proctor and took steps to have the appeal decision vacated in which he succeeded. The appeal was thereafter re-listed and was heard in the presence of Counsel for both sides, and on that occasion judgment was delivered dismissing the appeal with costs. In convicting the respondent of the two offences with which he was charged the learned District Judge stated that he had not the slightest doubt regarding the truthfulness of the evidence of the Rev. Dhammadassi, the Rev. Wijesiri and the Rev. Nandasena.

I have set out in some detail the facts relating to the first offence of which the respondent was convicted in view of an application made to us by Mr. Wickremanayake, who appeared for the respondent, that he be permitted to adduce certain evidence relating to the offence which had not been led at the trial and which, he submitted, would prove that the respondent was not guilty of that offence although he was convicted of it. In making this application, Mr. Wikramanayake cited the case of *In re Kandiah* [1]. In that case the principle applicable as regards the leading of evidence in proceedings under Section 17 of the Courts Ordinance where (as in the present case) an order of removal is sought to be obtained against a member of the legal profession on the basis of his conviction for a crime or offence, was expressed in the following terms by Macdonell, C.J.:

"If the conviction alleged be of full force and effect, that is, has been affirmed on appeal or has not been appealed against within the time allowed for appeal then doubtless this Court will not allow that conviction to be re-argued before it on the evidence upon which that conviction was based; it will not re-hear a matter which has been heard

[1] *(1932) 25 C. L. W. 87.*

and determined or allow argument that evidence which was believed by the Court should not have been believed or that evidence disbelieved by it should have been accepted. But if the respondent has evidence besides that produced at the trial and conviction which evidence shows conclusively that he was not guilty of the crime or offence whereof he was convicted, a rule so framed as the present one—which is the usual way of framing it—does not deter him from bringing forward that evidence. Thus to illustrate the matter with an extreme case, if respondent had been convicted of committing a crime in Colombo on a certain day and could now bring forward evidence which was not brought before the Court convicting to prove conclusively that he was not in Colombo on that day but at a distance from it the rule so framed would not prevent this Court from considering that evidence or from holding if satisfied with that evidence that the respondent was not guilty of that crime or offence whereof he had been convicted as stated in the rule."

Mr. Wikramanayake also relied on the Indian case of *In re Durga Charan* [1] where a pleader who had been convicted of cheating and whose conviction and sentence affirmed in appeal was brought up before the High Court in the exercise of the special jurisdiction conferred on it under the Letters Patent " to remove or to suspend from practice on reasonable cause an advocate or vakil whose name is borne on the rolls of the Court ". On respondent's Counsel submitting that if he was permitted to go behind the conviction he could show that his client committed no offence at law the Chief Justice observed that he was entitled " to go behind it in order to show that ", and it would appear that Counsel was then heard on the question whether on the evidence adduced at the trial the act of the pleader amounted in law to the offence of cheating. But, as pointed out by the learned acting Solicitor-General, the procedure adopted in that case was expressly disapproved by the Privy Council in the case of *In re Rajendro Nath Mukerji* [2] where a vakil who was convicted of the offence of using as genuine a forged document was struck off the roll on the ground that the offence of which he was convicted was of such a nature as to render him unfit to remain on the roll. In the proceedings for his removal before the High Court it was held that the propriety in law or in fact of the conviction could not be questioned, and this ruling was made the principal ground of appeal to the Privy Council. Their Lordships, in dismissing the appeal, stated, in regard to the earlier case, that they did not agree with the Chief Justice where he says that the pleader's Counsel was entitled to go behind the conviction in order to show that he had committed no offence at law.

We were also referred by the Solicitor-General to the local case of *In re Jayatilleke* [3] where the respondent, in showing cause against a rule issued on him for his removal from the office of a Proctor on the ground that he had been convicted of certain offences, filed an affidavit in which he traversed the correctness of his conviction. This Court held (without, however, considering the ruling in the case of *In re Kandiah* (*supra*)

[1] *1885 I. L. R. 7 Allahabad 290.* [2] *1899 I. L. R. 22 Allahabad 49.*
[3] *(1933) 35 N. L. R. 376.*

which, though an earlier decision, does not appear to have been brought to its notice) that the respondent could not be heard to question the correctness of his conviction in those proceedings.

In South Africa power is given to the Supreme Court under the Charter of Justice to remove an attorney from his office upon reasonable cause. The procedure adopted there is stated thus in Van Zyl's Judicial Practice (4th edition) page 42 : " The Court has a wide discretion in these matters and although there is a conviction against an attorney, if he is able to put such facts before the Court as to raise strong ground for thinking the conviction was wrong, the Court may make fresh inquiry and even examine all the witnesses afresh. " He cites two cases in support of this statement, *Incorporated Law Society v. Seme* [1] and *Incorporated Law Society v. Levin*.[2] In the former case the respondent, who was an attorney, had been convicted of the offence of theft and sentenced to one year's imprisonment with hard labour. Apparently no appeal was filed against the conviction and sentence. The submission of Counsel who appeared for the Law Society in support of the application for the removal of the respondent from the roll of attorneys was that the conviction was conclusive and that while the law provides certain remedies of which a convicted person may avail himself, the Court was not entitled to constitute itself a Court of appeal from the circuit Court by considering the merits of the case. For the respondent it was submitted that on the evidence adduced before the circuit Court he should have been acquitted. It was held that " a conviction for an act which renders an attorney unfit to remain on the roll will entitle the Court to strike him off in the absence of any reason for doubting the correctness of the conviction ". The Court then proceeded to consider the evidence which had been adduced at the trial and came to the conclusion that on that evidence the charge against the respondent had not been proved and he should have been acquitted. According to these two decisions the discretion of the Courts to enquire afresh into the guilt of the respondent in regard to the offence of which he was convicted is not limited to a case where new evidence is available, as stated by Macdonell, C.J., in *Kandiah's* case (*supra*).

The evidence said to be available to prove that the respondent in the present case is not guilty of the first offence of which he was convicted is set out in his affidavit, according to which on the 11th December, 1952, he was not in Colombo at the time when, as alleged by the Rev. Nandasena, he was given the sum of Rs. 550. The respondent has also filed an affidavit from Mr. H. A. de Abrew, Proctor and Notary Public, and a Justice of the Peace, the gist of which is that the respondent came with his wife and family to Mr. de Abrew's house in Kalutara South at about 7 a.m., on the 11th December, 1952, and did not return to Colombo till the afternoon of the same day. If this is true the evidence given by the Rev. Nandasena that he went to the respondent's house at about 8 a.m. on that day and handed him the money cannot also be true. But as Kalutara is less than an hour's run by motor car from Colombo the possibility that the Rev. Nandasena gave the respondent the money on that day, though earlier than 8 a.m. and that the respondent thereafter

[1] *S. A. L. R. (1927) T. P. D. 857.* [2] *S. A. L. R. (1928) T. P. D. 229.*

went to Kalutara but reached there later than the time stated by Mr. de Abrew has, however, not been eliminated. The crucial point is the time of the respondent's arrival at Kalutara, and there is only Mr.de Abrew's statement as regards that. His affidavit is dated the 10th October, 1957, which is nearly five years after the alleged visit, and there is nothing in the affidavit to show that Mr. de Abrew's recollection after the lapse of such period may not be incorrect when he puts the time of the respondent's arrival at Kalutara as 8 a.m. These matters, could, no doubt, have been gone into at the trial had it been put to the Rev. Nandasena in cross-examination that at the time when he says he gave the Rs. 550 to the respondent the latter was away in Kalutara, and had Mr. de Abrew also been called as a witness on behalf of the respondent. Not only was the Rev. Nandasena not cross-examined on this basis but Mr. de Abrew was also not called as a witness. The affidavit of the respondent is silent as to why this evidence was not adduced at the trial. Even in the evidence given by the respondent there was nothing said about his having been away from Colombo on the morning of the 11th December, 1952.

Moreover, the fresh evidence said to be available relates only to the entrustment of the sum of Rs. 550 and does not touch the case for the prosecution in regard to entrustment of the sum of Rs. 230, which was by the Rev. Wijesiri and took place on the 8th October, 1952.

Although Mr. Wikramanayake stated that he had fresh evidence to prove that the respondent is not guilty even of the second offence of which he was convicted, the affidavit filed by the respondent does not indicate that any such evidence is available. The affidavit deals with certain items of the evidence led at the trial relating to that offence, but an examination of the points raised discloses nothing more than a reiteration of the respondent's innocence and that the evidence does not support the conviction.

Even if we have a discretion to embark on a fresh enquiry—whether on the evidence adduced at the trial or on new evidence—into the question of the respondent's guilt as regards either of the offences of which he was convicted, we were of the opinion that on the material placed before us in the affidavits no grounds were made out for permitting such a course in the present case. We, accordingly, refused Mr. Wikramanayake's application and stated that we would hear him only on the question whether there are any mitigating circumstances. The reasons for our refusal are now set out.

In view, however, of the conflicting decisions to which I have referred, the correct procedure to be adopted in proceedings such as these is by no means clear, and it might be necessary to have the position reconsidered by a fuller Court in an appropriate case.

SANSONI, J.—I agree.

SINNETAMBY, J.—I agree.

Respondent's application refused.