

1952 Present: Rose C.J., Nagalingam S.P.J. and Palle J.

THE SOLICITOR-GENERAL, Appellant, and JAYAWICKREME,
Respondent.

IN THE MATTER OF AN APPLICATION UNDER SECTION 17 OF THE
COURTS ORDINANCE

Advocate—Professional misconduct—Malpractice—Courts Ordinance (Cap. 6), s. 17.

When an Advocate deals directly with a lay client without the intervention of a Proctor he is guilty of professional misconduct amounting to malpractice and thus renders himself liable to the penalties prescribed by section 17 of the Courts Ordinance.

APPPLICATION under section 17 of the Courts Ordinance.

H. W. R. Weerasooriya, Acting Solicitor-General, with *G. P. A. Silva* and *G. F. Sethukavaler*, Crown Counsel, in support.

S. Nadesan, with *C. Manohara*, for the respondent.

E. B. Wikramanayake, Q.C., with *G. E. Chitty* and *G. T. Samarawickreme*, for the Bar Council.

March 4, 1952. ROSE C.J.—

This is the return to a notice issued on the respondent to show cause why he should not be removed from the office of an Advocate.

The Solicitor-General concedes that the matter should be considered on the basis of the facts as admitted in the respondent's affidavit, which

may be summarised as follows: that the respondent entered into discussions with one Seedin Perera, a remand prisoner in the Colombo gaol, as a result of which he undertook to conduct his defence, arranged what his fee should be and received a sum of money in part payment of it, without having been previously instructed by a Proctor.

The question to be decided is whether such conduct amounts to "malpractice" within the meaning of Section 17 of the Courts Ordinance (Cap. 6).

Mr. Nadesan, Counsel for the respondent, contends that an Advocate's duties may conveniently be classified under three heads, his duty to his client, his duty to the Court, and his duty to the fellow members of his profession, and that it is only to breaches of the first two classes of duty that Section 17 of the Courts Ordinance can have any application.

We have had the advantage of hearing learned Counsel on behalf of the Bar Council who informs us that the Bar Council has always assumed that such conduct as is disclosed in the present proceedings is professional misconduct amounting to malpractice.

It is to be noted that the Bar Council in Ceylon is not vested with such disciplinary powers as are entrusted to the Inns of Court in Great Britain, but it appears that from time to time certain questions of professional propriety have been considered by them—in many cases, no doubt, as a result of queries addressed to them—and replies have been given which have taken the form of "rulings" which have themselves been incorporated in a document headed "Principal Rules of Professional Etiquette, Conduct and Practice (Approved by the General Council of Advocates)".

The manner in which these rulings came into existence perhaps explains the lack of uniformity in their draughtsmanship and the absence of a clear distinction between matters which are presumably regarded by the Council as fundamental to the profession and those of lesser basic importance. I find myself in agreement with the view—and the contrary was not submitted on behalf of the Bar Council—that there are several of the Rules—it is unnecessary for the purpose of the present matter to specify which—a breach of which could hardly be held to be professional misconduct at all, and certainly not professional misconduct amounting to malpractice. Moreover, there would seem to be some matters which one would have thought would have been provided for in the Rules—for example, advertising—which are not mentioned at all.

That being so, I am of opinion that the Rules themselves should not be regarded as conclusive in determining whether any particular conduct on the part of an Advocate amounts to malpractice, and that undue weightage need not therefore be given to the actual terms in which any particular Rule is couched.

The Rules which appear to touch the present matter are—

"(f) It is not in accordance with etiquette for an advocate to accept a fee in any civil or criminal matter, or to appear in any civil or criminal trial, inquiry or appeal in any court, otherwise than on the instructions of a proctor, except in the case of—

(a)

Counsel being assigned by court,

(b)

Crown Counsel appearing on behalf of the Crown.

(i) It is a rule of the profession that every advocate should keep a fee book and enter in it every fee paid together with the name of the proctor by whom it was sent.

(m) In all matters connected with his employment an advocate appears for and is concerned with the proctor only and should not deal directly with the lay client.

(o) An advocate should not discuss or arrange for his fees with the lay client, and

(p) It is highly undesirable for counsel to receive his fee or any part of it from any person other than the proctor or a person authorised by him ”.

Quite apart from these Rules, however, it must surely be regarded as a basic assumption that any person who is admitted as an Advocate in Ceylon understands the implications of the division of the legal profession into the two branches of Advocate and Proctor. In any country which recognises and adopts such a division, every Advocate on his admission must, in my view, be taken to have agreed to be bound by the practice and tradition of the profession in this regard, and should not be heard to say that he personally, through lack of thought or percipience, is unaware of them. Moreover, the law itself recognises and underlines the significance of the division of the profession by providing that a lay client on the one hand cannot be sued by an Advocate for his fees and on the other cannot sue the Advocate for their return or for damages for negligence in the event of his affair being mishandled.¹ His remedies and his liabilities are confined to the proctor for the simple and compelling reason that there is in the eye of the law no privity of contract between the lay client and the Advocate.

The basic impropriety of an Advocate dealing directly with a lay client, without the intervention of a Proctor, is thus apparent.

For these reasons, I am of opinion that the respondent has, upon the view of the facts as set out in his own affidavit, been guilty of professional misconduct amounting to malpractice, and has thus rendered himself liable to the penalties prescribed by Section 17 of the Courts Ordinance.

I have anxiously considered whether the public interest and the interests of the profession do not require the imposition upon the respondent of a period of suspension from the office of an Advocate. Having regard, however, to the fact that this is the first case of its kind brought before this Court, and in view of the respondent having tendered an apology, I have come to the conclusion, although not without hesitation, that no penalty need be imposed in the present matter. I would add that it should not be assumed that this Court will take so lenient a view in any subsequent instance of a like malpractice by any other professional man.

I make no order as to costs.

NAGALINGAM S.P.J.—I agree.

PULLE J.—I agree.

Rule made absolute.

¹ *Munasinghe v. Pereira* (1925) 27 N. L. R. 76.