[2018] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 6/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**OSWEST SENIOR-SMITH**	**APPELLANT**
AND	**GENERAL LEGAL COUNCIL**	**1ST RESPONDENT**
AND	**LISA PALMER HAMILTON**	**2ND RESPONDENT**

Bert Samuels, Mrs Denise Senior-Smith and Miss Bianca Samuels instructed by Oswest Senior-Smith & Company for the appellant

Michael Hylton QC and Miss Melissa McLeod instructed by Hylton Powell for the 1st respondent

John Vassell QC and Miss Trudy-Ann Dixon-Frith instructed by DunnCox for the 2nd respondent

30 November, 1 December 2017 and 9 November 2018

PHILLIPS JA

[1] In this appeal, Mr Oswest Senior-Smith (the appellant and an attorney-at-law) challenges the decision of the Disciplinary Committee (the Committee) of the General Legal Council (GLC), delivered on 24 September 2016, wherein the Committee found that no complaint had been made out against Mrs Lisa Palmer Hamilton (an attorney-

at-law and the 2nd respondent). The appellant alleged that comments made by the 2nd respondent about him amounted to professional misconduct and therefore the Committee erred when it *inter alia*: failed to properly apply the provisions of law applicable to its deliberations; failed to hold hearings before arriving at its decision; failed to give the appellant an opportunity to respond to the 2nd respondent's affidavit in response to his complaint; outsourced its obligations by relying on the verified shorthand notes of the court proceedings; and had no regard to his status as an attorney-law.

Background

[2] On 1 February 2016, the appellant was appearing in the Supreme Court before G Smith J and a jury in the ongoing murder trial **Regina v Bertram Clarke and Another**, where he was representing the then accused. The 2nd respondent, a Senior Deputy Director of Public Prosecutions, had conduct of the prosecution. In the course of the day's hearing, while an objection was being taken by the 2nd respondent, the following exchange between counsel and the bench occurred, which was recorded in the transcript of the hearing for that day:

> "MRS. L. PALMER HAMILTON: I am objecting, because that is not the evidence. He was not an accused before the circuit court when he gave that statement. He was - he had already pleaded guilty and was to be sentenced.
>
> MR. O. SMITH: So, if you plead guilty and you are not sentenced, you are an accused.
>
> MR. O. SMITH: You are [not] a convict.

MR. O. SMITH: M'Lady, as far as I am aware, until the person is sentenced, m'Lady, with the greatest of respect...

HER LADYSHIP: I am not going there. I made a comment, but I am not going to add to that quite at this time. I am not going to enter into any legal dissipation.

MR. O. SMITH: The Court cannot deny a plea and [sic] be withdrawn under the right circumstances.

HER LADYSHIP: Mr. Senior Smith, I am fully aware of that. I have [allowed] you to do that on several occasions before this Court. Mr. Newland was fully before the St. Ann Circuit as an accused to be sentenced, m'Lady.

MRS. L. PALMER HAMILTON: M'Lady, do you see, Counsel's posture, m'Lady.

HER LADYSHIP: Mrs. Palmer Hamilton.

MRS. L. PALMER HAMILTON: No, I am appalled, that's why I am bringing it - counsel bore down on me awhile ago.

HER LADYSHIP: Mrs. Palmer Hamilton you can't - please.

MRS. L. PALMER HAMILTON: I felt assaulted.

HER LADYSHIP: Mrs. Palmer-Hamilton, we have come thus far, whatever has a beginning will always have an end. And, I am saying I am busily trying to write. Trying to control this court, which is not the easiest thing at this stage. All I ask is, that, everybody be composed, and I appeal to everybody in the case. Once I again, I say to you, you are all senior counsel at the bar. If I had any idea that it was not a court of law I was sitting in, then I would come prepared in my other type of combat. Mr. Senior Smith, thank you very much, sir, could you take your seat at this time, let me finish make the notes as to what was said..

MR. O. SMITH: I will finish the submission, ma'am. And it is on your record that my friend was assaulted. I just wish to correct that if it is my friend is making reference to. I did not assault my learned friend.

> And, I think that it is my right to correct the record, because when counsel...
>
> HER LADYSHIP: You know one of the things you know, Mr. Senior Smith, and I ask you just to take your seat and you're still standing. Let me just say once and for all. That no matter what you may think, [I] am still in charge of the court. No matter what any of you, all sitting down may think, I am still in charge of the court. I asked you to take your seat and you continued as if I hadn't said it. I do not wish to be stretched beyond a certain limit. I have appealed to you all as counsel of senior years to conduct yourselves in a manner which is befitting of counsel of senior years. And I once again appeal to you all, and say that I expect a certain standard of behaviour from you all. It is 10 minutes past 4:00. Maybe we should take this adjournment. We will continue tomorrow morning at 10 o'clock. Thank you very much."

[3] Thereafter the learned trial judge gave the jurors the usual admonition; extended the bail of both accused until the following morning; and bound over a witness to attend court the following day to give evidence. The court adjourned at 4:16 pm.

[4] On the following morning, 2 February 2016, the front page of the Gleaner carried a headline which read as follows: "Deputy DPP Accuses Defence Lawyer Of Assaulting Her During Murder Trial". In the article relating to that headline, the author stated that the 2nd respondent had accused the appellant "of assaulting her" during the hearing of the murder trial. The report stated that the appellant had stated that he wished to correct the record and had told the court that he had "never assaulted" the 2nd respondent. The article noted that the learned trial judge had requested that both counsel should conduct themselves in a manner befitting counsel of senior years from

whom she expected a certain modicum of behaviour. The article also noted that the appellant had told the Gleaner that he had been "saying something to the prosecutor and he went close to her so that his voice would not be heard by the jury".

[5] When the matter resumed that morning, the learned judge addressed counsel and the jury on what had transpired the day before, acknowledging that the matter had been reported in the Gleaner published that day. It may be prudent to set out the comments between the Bench and the Bar in their entirety, as reported in the transcript for that part of the day's proceedings, particularly given how the matter subsequently unfolded:

> "HER LADYSHIP: Madam Foreman, ladies and gentlemen of the jury, and all other persons having business in this court, first of all, let me apologize to you all for the prolonged delay in the start of court today.
>
> Madam Foreman and members of the jury, we are all aware that there were some exchanges between Counsel for the Prosecution and Counsel for the Defence late yesterday afternoon just before we took the adjournment for the day. There has been a report in one of our newspapers referring to what allegedly took place in the court. I have had the opportunity to check the official records of the court and I must indicate that what was reported in the press does not accurately reflect what actually took place in the court. I am, however, confident that Counsel, all senior at the Bar, will proceed with the trial in a professional and respectful manner to the conclusion of this case. Thank you very much. At this stage let us now continue with the trial of this case.
>
> MRS. PALMER-HAMILTON: Might it so please you, m'Lady, before the announcement for the records, if Your Ladyship would so permit me, just in line with the what Your Ladyship had made mention of, I just wish to reiterate the position that I, in no way, yesterday during that exchange, accused Counsel, Mr. Senior-Smith, of assaulting

me. My words used were, 'I felt as if I was being assaulted', and I did so in a very lighthearted way in which, in fact, from what I observed generated some amount of laughter from the jurors and also in the courtroom. As those who are experienced in the adversarial system and trial and advocacy are aware there are times when these light moments are interjected to relieve the stress of the cut and thrust of the adversarial system and I think it is a little unfortunate that the report placed it in that manner which seemed to have caused a lot of discomfort and distress to those involved. Certainly, I would not have expected that that friendly banter, as I saw it, would have been taken out of context, and so I just wish to ensure that the records accurately reflect that I did not accuse Counsel of assaulting me; might it so please you.

MR. O. SENIOR-SMITH: May it please your Ladyship, may I firstly say, ma'am, that I apologize to the jurors for the obvious dislocation from this morning. And the fact that they have sat around, basically, waiting around for this matter to resume at this time. You know, ma'am, I am not the best at Jamaican-isms but I believe there is one which says-- I think they said is, 'Frog say what is joke to you is death to me,' ma'am.

HER LADYSHIP: I think I am aware of it, Mr. Senior-Smith.

MR. O. SENIOR-SMITH: I hope I am right. My learned friend Mrs. Palmer-Hamilton, has characterized what took place yesterday as 'friendly banter and light', I must confess for me, I did not receive it that way yesterday, perhaps I misunderstood what was taking place. I did not see it that way and I thought that, especially as a lawyer saying that someone has assaulted you, that it carried a particular meaning, suggesting a criminal act on my part.

HER LADYSHIP: Mr. Senior-Smith, as I have indicated, having looked at the records….

MR. O. SENIOR-SMITH: Yes, ma'am.

HER LADYSHIP: …I don't think that was an accurate representation. And as I have said, I am confident that -- all of you are senior Counsel at the Bar you will

> proceed in a professional and respectful manner and let bygones be bygones. For me it was a very sad situation which I wish did not happen but which has already taken place and as I said, I hope we can let bygones be bygones and move on. If and when we get to a particular point, certain warnings can be given by the court in relation to certain things that might have transpired. So at this time I am going to ask all of us to try to get on with the business we are here for and carry on with this trial. We have come a long way and the whole purpose is to try and have the matter dealt with in the best way possible, and trying to be professional at all times and trying to be respectful of each other, thank you."

[6] Later that day, the headline of the Gleaner was updated to read as follows: "UPDATE: Defence Lawyer Reports Deputy DPP to General Legal Council". That article indicated that the appellant had made the complaint to the 1st respondent as he had stated that the allegation of assault made by the 2nd respondent was without reason, had sullied his character, and the 2nd respondent should be called upon to account for her irresponsible and reckless comments in the court. The article stated that the 2nd respondent told the court that she had said "I feel as if I were being assaulted", and that it was unfortunate that the report published had caused discomfort and distress, as it had been taken out of context, since she had not accused the appellant of assaulting her. The rest of the article attempted to capture what was recorded in the transcript of the day's hearing relative to this matter as set out above.

[7] Also on 2 February 2016, the appellant sent a letter to the 1st respondent setting out his concerns. He stated that the 2nd respondent's statement that he had assaulted

her had been made in court during a murder trial before the jury, without any reason. He indicated that:

> "This deliberate falsehood maliciously levelled against me in the presence of the Jury and in the face of the Court could only have been calculated by Mrs. Palmer-Hamilton, a senior Practitioner, to cause injury, embarrassment and damage to my reputation and ultimately, my livelihood".

He pointed out how important an attorney's reputation is generally, and to the nature of his practice. The appellant further maintained that the "unsubstantiated accusation has ascribed immoral, dastardly and criminal behaviour" to him. He therefore invited the Committee to examine the circumstances of this incident particularly as it had occurred while court was in session.

[8] The appellant explained the situation as it had unfolded in court. He stated that he had made an application to the court and the 2nd respondent had objected to the same. The issue related to whether a statement which had been taken previously from a witness, who was then giving evidence in court, but who had been before the Saint Ann Circuit Court and pleaded guilty, had been an accused at the material time. It was the position of the 2nd respondent that as he had pleaded guilty he was not an accused. It was the position of the appellant that as he had not been sentenced, he was still an accused, as a plea can be withdrawn with the leave of the court. The appellant indicated that as the court appeared to be giving the objection some favourable consideration, he said to the 2nd respondent from where he was in counsel's bench, "Lisa you must stop taking the judge into error", to which she had responded, "why are you doing that?". He understood that statement to mean that he had been speaking in

a manner that would be heard by the jury, and so in order to avoid that, he had pulled closer to her, leant down, and repeated his statement.

[9] The appellant complained that it was in those circumstances that the 2nd respondent had jumped to her feet and declared that he had assaulted her. He contended that that claim had sullied his character and integrity in a professional capacity. The appellant noted that when the judge chastised the 2nd respondent and directed that she compose herself, she had smiled and then said that she felt assaulted. The appellant stated that the 2nd respondent should therefore be called upon to set out the fear that she could have been experiencing which would have led her to make those reckless comments to the court. The appellant indicated that those comments were in effect an "outlandish claim", made without concern for the interests of his client. He also stated that the 2nd respondent would have been aware that a reporter from one of the leading national newspapers was in court covering the trial, as details of the trial had been published in that newspaper by that particular reporter. He stated that as a result it was likely, which indeed occurred, that there would have been wide coverage of the allegations made by the 2nd respondent in court, which were then published globally throughout the worldwide web, and through social media.

[10] In the circumstances, the appellant asked the Committee for "early audience in this very extraordinary situation".

[11] The 2nd respondent responded to this letter from the appellant to the Committee by way of letter dated 24 March 2016. She set out her version of the facts. She

indicated that when the appellant addressed her with the query "why are you leading the judge into error?", she said that it had been made audibly while turning his face to the jury in whose direction she sat. She said that in response, she had turned her face away from the jury and said, "why are you doing that? Don't do that". She said she responded in that way as cross-talk between counsel should not be heard by the jury so as to influence them in any way. The 2nd respondent said that the appellant then stretched over from the bench behind her, and across defence counsel who was beside him on the bench, and leaned towards her in a confrontational manner which she found both offensive and intimidating. She said further that she was "so shocked and dismayed" she stood up and brought what had occurred to the attention of the learned trial judge, so that the matter would be contained in the presence of the jury. The 2nd respondent stated that her remarks to the learned judge were:

> "***Mi Lady do you see Counsel's posture towards me? I am appalled, that's why I am bringing it to your attention- Counsel bore down on me awhile ago!"*** **I felt as if I was being assaulted.**" (Emphasis as in original)

[12] In support of this, the 2nd respondent enclosed the transcript produced by the court reporter as set out above. She also indicated that the transcript had been reviewed in chambers by the learned trial judge, who, she said, pointed out to the appellant that his allegations were not supported by the transcript. She also reiterated that she had never accused the appellant of assaulting her. As a consequence, she stated that she was "perplexed and astonished" that the appellant was seeking to

pursue the matter with the 1st respondent. She further indicated that the relevant pages of the transcript that were attached showed the judge's pronouncement in court, and confirmed that her position with regard to what had occurred was correct.

[13] The 2nd respondent explained the statements made by her in this way:

> "...my utterances in court were in keeping with the professional code of conduct in an adversarial trial. I made the statement in a light-hearted manner so as to ensure that the jury was not adversely affected by what was transpiring. The spirit in which it was said and done was done in the presence of the jury and evoked laughter from them."

[14] It was therefore her contention that she had said that she felt that she was being assaulted, which is distinct from saying that the appellant had assaulted her. She enclosed a statement from Mr Malike Kellier, her intern, whom she stated had been present in court with her at the material time.

[15] Mr Kellier indicated that at the material time he was an intern assigned to the 2nd respondent and was present in court with her and her junior, Miss Natalie Malcolm, representing the Crown in the murder case. He stated that the incident occurred about 4:00 pm when the appellant had been addressing the presiding judge, G Smith J, with regard to the tendering of exhibit 13 (Emmanuel Newland's statement) into evidence, to which the 2nd respondent had objected. Having done so, Mr Kellier said that the 2nd respondent took her seat. It was his further recollection that thereafter the appellant:

> "...with a smirk on his face and using a quick step approach walked close behind [the 2nd respondent] in his bench and

> stated in a deep low voice 'Lisa, you didn't hear what I...' to which the [2nd respondent] replied by alerting the judge, 'Mi' Lady did you just see counsel's posture a while ago?' to which the judge replied in a strong tone 'Mrs Palmer-Hamilton'.
>
> [The 2nd respondent] then replied 'no I am appalled! mi' Lady did you see how counsel just bore down on me? I felt like I was being assaulted then she proceeded to take her seat and repeat to me 'no, did you just see that, I felt like I was being assaulted!' which [the appellant] overheard and then stated to the judge 'mi lady I wish that the records are corrected to indicate I did not assault my learned friend and if it is my friend is making reference to me it is my right to make sure that the correct record is reflected'."

[16] Mr Kellier then stated that the learned trial judge requested that counsel take their seats, and warned them that she had tried to be calm and tolerant throughout the trial. She also reminded them that she was in charge of the court proceedings, admonished both counsel, and entreated them to act in a professional manner as was expected of them, both being senior members of the Bar.

[17] In a letter dated 11 April 2016, the Committee wrote to the appellant enclosing the letter dated 24 March 2016 from the 2nd respondent with enclosures, namely, the relevant pages of the transcript in relation to the proceedings which took place in the Supreme Court on 1 and 2 February 2016, with the declarations verifying the transcript of the shorthand notes dated 21 March 2016 and duly signed by the shorthand writers, together with the statement of Mr Malike Kellier.

[18] On 26 May 2016, the appellant responded to the letter from the Committee which attached the letter from the 2nd respondent with its enclosures. He indicated that

he had read all the documentation that had been sent to him. He stated that he wished to refute the version of events set out by the 2nd respondent and Mr Kellier (who he described as a surrogate seeking employment from the Office of the Director of Public Prosecutions). He also queried why Miss Natalie Malcolm, who was not an intern, but a fully qualified attorney-at-law and counsel from the Office of the Director of Public Prosecutions had not given a statement. He stated that the transcripts had not accurately captured what had occurred on the relevant days, but he stated that that was not uncommon.

[19] He explained that he had been submitting to the court that the 2nd respondent was wrong in law when she had submitted that a person who had pleaded guilty but who had not yet been sentenced, was a convict, as opposed to still being an accused, since such a person could withdraw their guilty plea under the right circumstances. He indicated that the learned judge appeared to be aware of the position that he had been taking. It was while he awaited the judge making her note of their respective submissions, that he had spoken to the 2nd respondent from the far left-hand area of the second bench of counsel telling her "Lisa, you must stop taking the judge into error". He said that his reference to the 2nd respondent by her given first name was an indication that he had been addressing her personally. The 2nd respondent's response to him asking him "why are you doing that?", led him to approach her closely so that the jurors would not hear what he was saying, and he repeated his earlier statement.

[20] As a consequence, the appellant was very surprised, and stated that it was "to [his] horror" that the 2nd respondent had swiftly jumped to her feet and stated aloud to

the judge "My Lady, my Learned Friend has assaulted me!". He contended that the judge entreated counsel to compose and calm herself, which then brought about the comment from the 2nd respondent that, "but My Lady, I feel as if I was assaulted", which he said was delivered with a little laugh of embarrassment. He therefore tried to make the record reflect that he had not assaulted her. He queried why he would have made that request if the allegation had not been made. He underscored that by virtue of the 2nd respondent's statements, the Gleaner reporter had asked the 2nd respondent what she intended to do about the assault.

[21] His real concern, however, was that by the evening of the same day, he was receiving calls from a retired judge of the Court of Appeal, members of his family, friends, colleagues, and acquaintances who were extremely concerned with his alleged behaviour, namely that of an assault on the 2nd respondent. Even his wife had not been spared embarrassment.

[22] The appellant also recounted that on the morning following the incident in court, the judge summoned counsel to her chambers. He was represented by counsel, and the Director of Public Prosecutions also attended. He said that when he asked the 2nd respondent what was it that he had said which had triggered the events of the day before, her response was that she could not remember.

[23] On 29 July 2016, the appellant sent the form of application and form of affidavit comprising the official complaint duly completed, to the Committee, pursuant to section 12 of the Legal Profession Act (LPA). In the application, he formally requested that the

2nd respondent be required to answer allegations contained in the affidavit accompanying the application. The ground set out in the application was that the matters stated in the affidavit constituted conduct unbecoming of the 2nd respondent in her capacity as an attorney-at-law. In the affidavit, he deposed that the 2nd respondent had falsely accused him of assaulting her in counsel's bench during a murder trial when no such assault had taken place, and she could not have reasonably or otherwise apprehended any such assault. He said that she had knowingly and deliberately told an unjustified lie and falsehood against him, a fellow attorney-at-law, which was intended to deceive, and calculated to savage and bring his character into utter disrepute. He further deposed that as an attorney-at-law, the 2nd respondent had intentionally engaged in an overt act of dupery in order to, and which had traduced his reputation, generally, and as a practising member of the legal profession.

[24] On 25 August 2016, the 2nd respondent swore to an affidavit in response to the complaint lodged by the appellant. She stated essentially what she had indicated in her letter to the Committee. She explained that when she had addressed the appellant with the query, "why are you doing that?" and remonstrated with him stating "[d]on't do that", it was because the cross-talk between herself and the appellant ought not to be heard by the jury for fear that it may influence their decision. She said that it was after she made that statement that the appellant moved over towards her in a confrontational manner, which she found offensive and intimidating. That was why, she stated, being shocked and dismayed, she stood up and brought the appellant's behaviour to the attention of the judge, so that the matter would not have escalated in

the presence of the jury. In paragraph 7 of her affidavit, she stated that this is what she had said:

> "That my remarks to the Learned Trial Judge were 'mi lady, do you see Counsel's posture towards me? I am appalled that's why I am bringing it to your attention - counsel bore down on me awhile ago!' 'I felt as if I was being assaulted'."

[25] The 2nd respondent again attached the transcripts relevant to the two days pointing out that it had been reported that the appellant had stated in court that he had not assaulted her. She also stated that on the day after the incident, the learned trial judge, in chambers, had pointed out to the appellant that his allegations were not supported by the transcript, and that she (the 2nd respondent) had confirmed in that meeting that she had not accused him of assaulting her. The 2nd respondent stated that in open court, the learned judge had indicated that she had an opportunity to review the official records of the court, and what had been reported in one of the newspapers did not accurately reflect what had taken place in court.

[26] She indicated that after the judge had spoken, she reiterated that she had not accused the appellant of assaulting her but had used the words, "I felt as if I was being assaulted". She said that she had done so in a light-hearted way which she stated had generated some amount of laughter from the jurors. This, she said, she had done to ensure that the jury was not adversely affected by what had been transpiring.

[27] She attached again the statement of Mr Malike Kellier, her intern, who she said was seated closest to her on counsel's bench.

[28] On 13 September 2016, the Committee sent a copy of the 2nd respondent's affidavit, sworn to on 25 August 2016, to the appellant.

[29] On 5 October 2016, the Committee wrote to the appellant indicating that his complaint had been considered on 24 September 2016, and "was dismissed as no prima facie case of professional misconduct had been made out against the [2nd respondent]". The formal order of the Committee was enclosed therein and read as follows:

> "**UPON THE APPLICATION** dated 29th July, 2016, made under section 12(1)(a) of the Legal Profession Act and coming on before the meeting of the Disciplinary Committee on the 24th September, 2016
>
> **AND UPON** the Committee having perused the Form of Application against the Attorney and the Affidavit along with the documentary evidence presented by the [appellant] and [the 2nd respondent]
>
> **AND UPON DUE CONSIDERATION** of the decision of the members of the Disciplinary Committee
>
> **THE COMMITTEE FINDS THAT:**
>
> (a) The Complaint has not been made out against [the 2nd respondent].
>
> **PURSUANT TO THE FOREGOING FINDINGS THE COMMITTEE UNANIMOUSLY HEREBY ORDERED THAT:-**
>
> Pursuant to s 12(4) of the Legal Profession Act:
>
> The Application be dismissed.
>
> Signed Walter Scott
>
> CHAIRMAN OF THE DISCIPLINARY COMMITTEE
>
> Date 5th October, 2016." (Emphasis as in original)

[30] That was the extent of the ruling of the Committee, no further reasons were given.

[31] It seems that letter from the Committee was not hand delivered or certainly not delivered to the appellant on that date or immediately thereafter, as on 12 October 2016, the appellant wrote to the Committee complaining that he had been trying to contact the Secretary of the Committee for eight days without success. He was particularly concerned, as he seemed to have received some information about the meeting held by the Committee on 24 September 2016. He therefore requested information directly, so that he could be "fully apprised officially" rather than, as he put it, "anecdotally", of any developments in the matter. He later obviously had sight of the decision of the Committee as the notice of appeal was duly filed on 17 November 2016.

[32] In addition to filing an appeal from the decision of the Committee, the appellant also sued the Gleaner Company (Media) Limited (the Gleaner) in the Supreme Court. His claim was filed on 11 May 2017 and was designated Claim No 2017 HCV 00031.

The appeal

[33] The notice of appeal dated 15 November and filed 17 November 2016, contained six grounds of appeal which are set out below:

> "1. That the Disciplinary Committee of the General Legal Council erred in fact and in law as their approach was respectfully perfunctory and bereft of the competence contemplated by the Legal Profession.

2. That given the manner of the decision-making adopted by the Disciplinary Committee of the General Legal Council its capacity was unwittingly outsourced to the reported notes of evidence of the Court Reporting Department and/or the Court Reporting Department singularly and to that extent it erred in fact and/or in law and/or wrongfully exercised its discretion in dismissing the complaint.

3. That implicit in the decision is the absence of any belief and/or alternative view by the Disciplinary Committee of the General Legal Council that the notes of evidence as purported by the Court Reporting Department could have been inaccurate, wrong, erroneous, and/or otherwise and to this extent the Disciplinary Committee wrongfully exercised its discretion to dismiss the complaint.

4. That the Disciplinary Committee of the General Legal Council erred in law when it acted ultra vires the Legal Profession Act when it failed to afford a fair hearing and/or any hearing to the Appellant/ Complainant.

5. That the Disciplinary Committee of the General Legal Council erred in law and/or wrongfully exercised its discretion when it acted with demonstrably injudicious haste in arriving at a decision, as it failed to allow the Appellant/Complainant sufficient time to respond to the substantive Reply of the 2nd Respondent.

6. That the Disciplinary Committee of the General Legal Council failed to consider the status of the [appellant] as a fellow Attorney-at-Law and the resultant damage to reputation, integrity, character and esteem inter alia both locally and internationally among family members, colleagues, the Judiciary, clientele and potential clients, caused by the objectionable utterances of the 2nd Respondent and to that extent erred in fact and/or in law or wrongfully exercised its discretion to dismiss the complaint."

[34] Based on these grounds the appellant sought an order setting aside the Committee's order, with costs to him.

[35] Just before the date fixed for the hearing of the appeal, on 24 October 2017, the appellant filed an application to adduce fresh evidence, namely the defence of the Gleaner Company in his claim against it. The court heard submissions from the parties and made its ruling on 30 November 2017. The court decided to admit the defence as fresh evidence. It held that the defence had not been available prior to the decision of the Committee, had been verified by a certificate of truth, and could be treated as evidence at the preliminary prima facie stage of a committee hearing. Also, it may have been able to assist the Committee in its deliberations as to whether a prima facie case had been established, as the words used in the article in the Gleaner reported by Miss Barbara Gayle, who had been present at the hearing, were capable of belief.

[36] The defence essentially admitted that the Gleaner had published the article titled "Deputy DPP Accuses Defence Lawyer of Assaulting Her During Murder Trial", but denied that the words in the article were false, malicious, or defamatory (paragraph 5(c)). The defence pleaded that the Gleaner reasonably believed that the article was a publication on a matter of public interest, published on an occasion of qualified privilege. The particulars of that plea included a statement that the attorneys were involved in a murder trial, and while in court, the 2nd respondent had accused the appellant of assaulting her (paragraph 6(d)). It was stated that the article was a report of what had occurred at court, and was balanced and fair, as it included the appellant's denial of assaulting the 2nd respondent, and his explanation of what had occurred

between them. The defence further denied that the words were calculated to disparage the appellant personally in his professional and/or personal capacity, nor were they intended to cause him any damage. The certificate of truth at the end of the document was duly signed.

[37] The court also received a copy of the redacted minutes of the Committee's meeting in which the Committee decided to dismiss the appellant's application.

The appellant's submissions on appeal

[38] Counsel for the appellant, Mr Bert Samuels, argued that it was incumbent on the Committee to exercise its discretion judicially and that it had failed to do so in many respects. He argued that a hearing should have been held in the light of the parties' competing versions, and the defence submitted by the Gleaner indicating the stance of the reporter, Mrs Barbara Gayle, who was present in court (see **Lloyd Brooks v The Director of Public Prosecutions and Another** (1994) 31 JLR 16). This hearing, he submitted, ought to have been conducted by a specially constituted panel given the seniority of the parties. Mr Samuels contended that the Committee's failure to hold a hearing deprived the appellant of an opportunity to test evidence adverse to his case, and betrayed the principles of procedural fairness and natural justice.

[39] Mr Samuels also contended that the transcript should not have been accepted "without more, as the untrammelled record of what had transpired", since, where there has been an obvious mistake, so that the court would feel satisfied that the printed record does not represent what transpired at the trial, the court would not be bound by

the shorthand note (see **R v Herman Spence** (1971) 12 JLR 556). He therefore posited that the Committee's acceptance of the transcript, amounted to an acceptance of the rendition of the court reporters, and fettered the exercise of the Committee's discretion.

[40] It was counsel's contention that the Committee had violated the principles of fairness by failing to require the submission of information and/or documentation from the appellant pursuant to the LPA and the Legal Profession (Disciplinary Proceedings) Rules (the Rules). Indeed, he argued that the Committee, in its letter dated 13 September 2016, appeared to be inviting further information from the appellant when the 2nd respondent's affidavit 25 August 2016 and the accompanying documents were sent to him. It was therefore incumbent on the Committee to give the appellant a reasonable time to respond, particularly, to Mr Malike Kellier's statement, before concluding their deliberations on the question as to whether a prima facie case had been made out.

[41] Counsel urged this court to accept that the Committee's failure to give reasons had serious implications for the fairness of the proceedings (see **Elma Stennett v The Attorney General** (unreported), Supreme Court, Jamaica, Claim No 2003 HCV 00790, judgment delivered 11 November 2005; **R v Civil Service Appeal Board ex parte Cunningham** [1991] 4 All ER 310; and **Brian Alexander v Land Surveyors Board of Jamaica** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 13/2008, judgment delivered 2 July 2009). Counsel noted also that the redacted minutes of the deliberations of the Committee, submitted to the court, lead to the

inexorable conclusion that a due inquiry by the Committee also had not been carried out. Moreover, the dearth of material in relation to the proceedings suggested that little if any reasoned appraisal of the appellant's complaint had been undertaken.

[42] In all these circumstances, Mr Samuels urged this court to allow the appeal, set aside the decision of the Committee, with costs of the appeal to the appellant.

The 1st respondent's submissions on appeal

[43] Counsel for the 1st respondent, Mr Michael Hylton QC, reminded the court that the criminal standard of proof is applicable to disciplinary proceedings (see **Campbell v Hamlet** [2005] UKPC 19). He also posited, in reliance on **Julius Libman v General Medical Council** [1972] AC 217, that an appellate court will be slow to set aside a decision of a disciplinary body unless it can be shown that the decision was plainly wrong. Queen's Counsel further contended that that position is even more difficult when the court is asked to interfere in circumstances where the disciplinary body has decided whether an act constituted professional misconduct (see **Re A Solicitor** [1974] 3 All ER 853).

[44] Queen's Counsel argued that on any version of facts, it was "highly doubtful" that the words spoken by the 2nd respondent could have amounted to professional misconduct. Additionally, it was unlikely that the Committee could properly have concluded beyond a reasonable doubt, in the circumstances of this case, that the 2nd respondent had accused the appellant of having committed a criminal offence. There was no actual physical assault on any case, and even on the appellant's case, the 2nd

respondent had gone on to say that she "felt like" she had been assaulted. Queen's Counsel argued that reputational damage or hurt feelings did not amount to professional misconduct. Accordingly, the Committee's decision could not therefore be said to be plainly wrong.

[45] Mr Hylton also submitted that rule 4 of the Rules had been amended on 4 August 2014 to the effect that that rule had been deleted and replaced. The amended rule provides that *inter alia* the Committee **may (not must)** require a complainant to supply further documents relating to the allegations as the Committee thinks fit. An attorney against whom a complaint has been made, has 42 days to respond and must do so by way of affidavit. Upon the expiration of the 42 day time period, the Committee shall consider the application and the response (if any). The amended rule also provides that where no prima facie case has been shown, the Committee may dismiss the allegation without requiring the attorney to answer the allegation. Queen's Counsel also noted that the amended rule states that where no prima case is shown, a formal order shall be drafted to that effect if required by either party.

[46] In the light of the amendment to rule 4 of the Rules, Queen's Counsel submitted that the appellant had completely misconstrued the statutory scheme, as it did not require the Committee to have a hearing to decide whether a prima facie case had been made out. There was also no need to constitute a special panel as the Committee would have been aware that both parties are attorneys-at-law, and in any event, that fact was irrelevant to whether there was prima facie case of professional misconduct.

[47] The Committee was required to establish whether there was a prima facie case on the basis of the allegations and the evidence placed before it. One such piece of evidence before the Committee was the transcript of proceedings which counsel submitted was "an accurate representation" of the events that had transpired. The statement of Mr Malike Kellier also supported the version of events stated in the transcript. Mr Hylton also argued that the appellant's submission that he was deprived of an opportunity to respond to the 2nd respondent's affidavit was without merit as the 2nd respondent's affidavit made the same explanations contained in her letter dated 24 March 2016; the appellant had already responded in detail to those statements; and the appellant has also commented on Mr Kellier's statement. Indeed, in all the circumstances, Queen's Counsel submitted that the Committee had reviewed all the material placed before it, and it could not be said that the Committee was plainly wrong to come to the view that it did.

The 2nd respondent's submissions on appeal

[48] Counsel for the 2nd respondent, Mr John Vassell QC, referred to **Campbell v Hamlet**, and noted that in all the circumstances, there was no proof beyond reasonable doubt, that there was professional misconduct. He submitted that on the appellant's case alone, both statements had been made, and whichever statement was accepted, it was questionable whether one could reasonably conclude that there was an allegation of actual assault.

[49] Mr Vassell accepted that the Committee had not given detailed reasons for its decision, but indicated that the ruling meant either of two things: (i) that they were not

satisfied that the 2nd respondent had made the statement that she had been assaulted by the appellant; or (ii) that even if she had done so, in its opinion, that act would not amount, in all the circumstances, to professional misconduct by the 2nd respondent. Queen's Counsel submitted that either or both of these lines of reasoning would have been correct, and as a consequence, the decision of the Committee could not be faulted. Moreover, the obligation to give reasons pursuant to section 15(1) of the LPA is with respect to findings where a hearing has been conducted, and not in respect of a determination as to whether there was a prima facie case.

[50] Mr Vassell set out in detail the statutory framework with particular reference to section 12(3) of the LPA and the amended Rules. The amended Rules, he submitted, gives the attorney an opportunity to respond within a specific time, and also empowers the Committee to consider this response. The Committee is not required to make any definite finding of fact or to determine any issue of credibility. However, if there are matters introduced by the attorney, the Committee would be impelled to take that information/evidence into consideration at the prima facie stage. An aggrieved party, he submitted, is only entitled to a hearing if a prima facie case is shown. So, the Committee's dismissal without a hearing as no prima facie case was shown, was not ultra vires the LPA or the Rules.

[51] Mr Vassell rejected the appellant's assertion that the Committee had acted in injudicious haste and failed to give him an opportunity to respond, as rule 4 of the Rules does not envisage a response to the affidavit in response by the attorney against whom a complaint is made. The attorney is given 42 days to respond and thereafter the

Committee considers the application. Queen's Counsel indicated that no principles of natural justice had been breached as both parties had been served with all the documentation, and both parties were aware of the allegations. Mr Vassell also rejected the argument that the redacted minutes demonstrate that no due enquiry had occurred, as he submitted that the minutes were intended to show the outcome of, and not the discussions which took place at the meeting.

[52] Queen's Counsel submitted that the verified transcript of the shorthand notes of the relevant days' proceedings on 1 and 2 February 2016, which the Committee would have had in its deliberations, would have been very persuasive evidence. This is so since the notes themselves have been accorded status pursuant to section 16 of the Judicature (Supreme Court) Act, and rule 3.7 of the Court of Appeal Rules (CAR). Mr Vassell also referred to statements by the learned trial judge in the transcript, in which she had indicated that: she had taken note with regard to the 2nd respondent's statement; those notes were the official record of the court; and after reading them, she indicated that what had been reported in the press did not accurately reflect what had taken place in court. Queen's Counsel submitted that as the learned judge had treated the notes as the official record of the proceedings, the Committee was also entitled to do so. Mr Vassell posited further that the Committee was not bound by the strict rules of evidence, as section 7(3) of the third schedule of the LPA, permits the Committee to regulate its own proceedings. Accordingly, it was a matter entirely for the Committee, counsel submitted, as to the use the Committee would make of the verified transcript of the court proceedings.

[53] Mr Vassell posited that a further point of significance was that counsel ought to be free from fear of disciplinary proceedings in relation to what he may feel compelled to say in the course of an adversarial trial. This, Queen's Counsel stated, is in the public interest. It is also, he said, in the public interest that counsel is immune from civil suit for defamatory words used by him in the course of a trial (see **Munster v Lamb** [1881-85] All ER Rep 791). He stated that it would be different if counsel acted dishonestly or deceptively as sanctions would be expected to be imposed in those circumstances, but that is not what had occurred in the instant case. The 2nd respondent cannot be held accountable for a report in the newspaper, which may itself be inaccurate, and which may cause discomfort, embarrassment and hurt feelings. A Committee taking this view, Queen's Counsel argued, would not be acting unreasonably.

[54] Queen's Counsel submitted that this court would not interfere unless it could be shown that the Committee had made some error in its proceedings on the proper approach that the appellate court should take with regard to this matter (see **Re A Solicitor** and **Libman**). However, Queen's Counsel submitted that appellate courts would always give a certain measure of respect to the decision from disciplinary bodies (see **Dr Purabi Ghosh v The General Medical Council** [2001] UKPC 29). Queen's Counsel submitted that, in all the circumstances of this case, the Committee had determined unanimously that the appellant had not shown that a prima facie case of professional misconduct had been made out against the 2nd respondent. The Committee had conducted a proper inquiry and made a proper finding based on the material

presented to it. Accordingly, Mr Vassell posited that there was no basis whatsoever to interfere with the position taken by the Committee and urged this court to dismiss the appeal.

Discussion and analysis

[55] In my view, on a review of the grounds and all the submissions, I have concluded that essentially there are four main issues to be determined on this appeal:

(1) What is the true and proper construction of the provisions of the LPA and the Rules applicable to the deliberation/determination of the Committee in order to arrive at a decision as to whether a prima facie case has been made out? (ground 1)

(2) Did the Committee comply with the said provisions?

(i) Did it act perfunctorily and bereft of the competence contemplated by the LPA and the Rules, and/or did it act with injudicious haste?

(ii) Was there any obligation for the appellant to be permitted an opportunity to reply to the 2nd respondent's affidavit?

(iii) In all the circumstances of the case was there a denial of fairness or breach of the principles of natural justice?

(grounds 4 and 5)

(3) Did the Committee outsource its obligations by relying on the verified shorthand notes, and were the notes reliable in any event? (grounds 2 and 3)

(4) Ought there to be a special Committee constituted to hear the application by an attorney-at-law against another attorney-at-law, bearing in mind the potential reputational loss and embarrassment which could be suffered by the attorney making the complaint? (ground 6)

Issues (1) and (2) - The true and proper construction of the applicable provisions of the LPA, and whether there has been compliance with these provisions (grounds 1, 4 and 5).

[56] Section 12(1) of the LPA indicates that persons who are aggrieved by an act or default of professional misconduct, or by misconduct in any professional respect, or any criminal offence, committed by an attorney-at-law, may apply to the Committee (established under section 11 of the LPA). That attorney may be required to answer the allegations deponed in an affidavit by the said person aggrieved. The application is to be heard by the Committee in accordance with Rules mentioned in section 14 of the LPA. Section 14(1) empowers the Committee to make rules regulating the presentation, hearing, and determination of applications to the Committee before it, and section 14(2) states that rules set out in the fourth schedule to the LPA (the Rules) shall be in force until varied or revoked.

[57] Rule 3 of the Rules states that the application to require an attorney to answer allegations contained in an affidavit referred to in section 12(1) of the LPA, shall be in writing in a certain form (form 1 of the schedule to the Rules). That application shall be sent to the secretary accompanied by an affidavit (in accordance with form 2 of the schedule) setting out the facts on which the applicant relies to ground his application. Rules 4 and 5 of the Rules are very important and relevant to the matter before the court. Rule 4 is especially important as it was amended on 4 August 2014. Prior to the amendment rule 4 read as follows:

> "Before fixing a day for the hearing, the Committee may require the applicant to supply such further information and documents relating to the allegations as they think fit, and in any case where, in the opinion of the Committee, no *prima facie* case is shown the Committee may, without requiring the attorney to answer the allegations, dismiss the application. If required so to do, either by the applicant or the attorney, the Committee shall make a formal order dismissing such application."

After the amendment it reads thus:

> "(1) Before fixing a day for the hearing of any application under rule 3, the Committee -
>
> (a) may require the applicant to supply such further documents or information relating to the allegations as the Committee thinks fit; and
>
> (b) shall serve on the attorney against whom the application is made a copy of the application and the affidavit in support thereof, together with all other relevant documents and information.

(2) An attorney who is served under paragraph (1)(b) shall, within forty-two days of such service, respond, in the form of an affidavit, to the application.

(3) Upon the expiration of the period mentioned in paragraph (2), the Committee shall consider the application and the response thereto (if any), and if the Committee is of the opinion that-

(a) a *prima facie* case is shown, the Committee shall proceed in accordance with rule 5;

(b) no *prima facie* case is shown, the Committee may dismiss the application without requiring the attorney to answer the allegation.

(4) Where the Committee dismisses an application pursuant to paragraph 3(b), the Committee shall make a formal order to that effect if required to do so by the applicant or the attorney against whom the application is made."

[58] It seems clear to me that the regime has changed. Previously, the Committee may require the applicant to supply further information relating to the application and the allegations as they thought fit, before the day fixed for hearing. Thereafter, the Committee had to determine, if in its opinion, a prima facie case was shown. If none was shown, then it would dismiss the application without requiring the attorney to answer the allegations.

[59] Subsequent to the amendment, the Committee may still require further information from the applicant, but the next step is to serve the attorney against whom the application was made with a copy of the application and affidavit in support, together with all other relevant documentation or information. The attorney must then,

within 42 days of such service, respond to the allegations made through material/documentation and must do so in the form of an affidavit. On the expiration of the said 42 days the Committee must consider the application and the response of the attorney (if any). If in the Committee's opinion a prima facie case has been shown, then it must fix a date for the hearing of the matter, and serve notice of that date on the appellant and the attorney at least 21 days before the hearing pursuant to rule 5 of the Rules. If, however, in the opinion of the Committee a prima facie case has not been shown, then the Committee shall dismiss the application.

[60] In this case, the chronology of events is clear and has been set out and referred to in detail herein. The appellant wrote his letter to the Committee on 2 February 2016; the 2nd respondent responded on 24 March 2016 with enclosures; and the appellant responded by way of letter dated 26 May 2016. He then filed his application with affidavit (the official complaint) on 29 July 2016. In keeping with the Rules, the application and the affidavit had been served on the respondent and she had responded within the 42 days as prescribed by the Rules, by way of affidavit sworn to on 25 August 2016. Pursuant to the Rules, after the specified time, the next step was for the Committee to consider the application, which it did. There was no requirement for any further request for information from the appellant after receipt of the affidavit from the 2nd respondent within the 42 day period permitted under the Rule. The formal order stated clearly that the Committee had "perused the Form of Application against the Attorney and the Affidavit of the Applicant along with the documentary evidence presented by the [appellant] and the Attorney", and having given all of that due

consideration, found that "the Complaint has not been made out against the Attorney". It therefore ordered, pursuant to rule 4 of the Rules, that "the Application be dismissed".

[61] Accordingly, the Committee had sent the application and affidavit to the 2nd respondent. The 2nd respondent had been given a specified time within which to respond, and had responded by way of affidavit. The Committee had considered the correspondence and documentation submitted to it, together with the application, the affidavit in support, and the attorney's response after the specified time had passed. In my view, there was no demonstration of any injudicious haste. There had been strict compliance procedurally with the Rules.

[62] The Committee gave its decision. The redacted minutes showed that 12 members of the Committee had been present and had deliberated on all the material related to this matter. It is evident that it was the intention of the Committee not to set out in any detail the discussion of the members of the Committee when the application was before it. Pursuant to the Rules, what was noted and available for publication to the parties, if necessary, or required, was whether the prima facie case had been shown, and if so, that the matter would proceed to have a date fixed for hearing. If no prima facie case was shown, the application would be dismissed as was the case here. The minutes cannot be said to demonstrate that no proper enquiry had taken place. I reject that proposition.

[63] The next issue of importance therefore, would be the principles derived from the authorities relating to the question as to whether, inherent in the Committee's findings, they were correct in their conclusion on the issue of professional misconduct.

[64] The Halsbury's Laws of England, 2012, volume 32, in paragraph 597, makes the following statement on absolute privilege:

> "No claim lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. [**Munster v Lamb**] The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings, or where it has no reference at all to the subject matter of the proceedings."

[65] The utterances which were said in the instant case were definitely spoken in the cut and thrust of the litigation by advocates representing the defence on the one hand, and the prosecution on the other. Although in disciplinary proceedings the focus is the oversight of ethical and dishonest conduct of attorneys-at-law, the protection given to counsel for words spoken in the cut and thrust of a trial remains the same, and is subject to absolute privilege, save and except (for instance) if the words are spoken dishonestly with the intent to deceive the court. The words used in this case, in the well of the court, are protected by absolute privilege. It must also be remembered, and is of

significance, that the standard of proof in disciplinary proceedings is the criminal standard of proof beyond a reasonable doubt (see **Campbell v Hamlet**). As a consequence, since the statements made in this case, in the well of the court, must be assessed within the context of proof beyond a reasonable doubt, and in any event are protected by absolute privilege, in my view, they would not give rise to a prima facie case of professional misconduct.

[66] **Re A Solicitor** was described by Widgery CJ as a case in which a complaint was made against two solicitors, who had prepared wills for two elderly women under which the solicitors and their families stood to benefit considerably. This was done without observance of the requisite rules with regard to ensuring that their clients had received independent legal advice, before giving the gift to them. The disciplinary committee of the Law Society held (as stated in the head note at page 854):

> "(i) that a solicitor in whose favour a client wished to make a will, was bound to tell her that she must be separately advised and if she refused to go to another solicitor, it was his duty to forego the benefit;
>
> (ii) as [the other solicitor] and the appellant had failed to comply with that standard of conduct they were guilty of the offence and would be struck off the Roll of Solicitors."

[67] The appellant appealed contending that the Committee had imposed too strict a standard and that the penalty was too severe, but Widgery CJ stated at page 859 that:

> "It has been laid down over and over again that the decision as to what is professional misconduct is primarily a matter

> for the profession expressed through its own channels, including the disciplinary committee. I do not, therefore, for one moment question that if a properly constituted disciplinary committee says that this is the standard now required of solicitors that this court ought to accept that that is so and not endeavour to substitute any views of its own on the subject".

The court went on to state that the Committee should ensure that the standard was known and accepted within the profession at the time the sentence was imposed, and that the court would only alter the sentence if there were extenuating circumstances affecting the solicitor, which could explain his failure to comply with the requisite standard. The decision of the Committee was upheld.

[68] In the instant case, the Committee considered all the evidence and documentary material before it, particularly, the correspondence with annexures; the affidavits; transcripts; and the statement of Mr Malike Kellier, and found that there was no professional misconduct. A finding in respect of which, based on the above authority, we ought not to interfere, as such a finding is a matter for the profession expressed through its own channels that should not be questioned by the court.

[69] In **Leslie L Diggs-White v George Dawkins** (1976) 14 JLR 192, this court endorsed the principle that it is for the Committee to make findings as to whether the facts alleged in the charge have been proved, and whether those facts support a finding of professional misconduct or misconduct in a professional respect. However, the court pointed out that although the Committee may justifiably make findings on the evidence presented, it is clear that an appeal could yet succeed if the findings were related to matters where no charge had been proffered. So the issue was what was professional

misconduct? The court recognised that that question did not admit to a ready answer. Graham-Perkins JA on behalf of the court, referred to and endorsed the judgment of Darling J in **Re A Solicitor Ex parte The Law Society** [1911-13] All ER Rep 202, where Darling J adopted and applied the definition of professional misconduct stated in **Allinson v General Council of Medical Education and Registration** [1894] 1 QB 750. That definition was:

> "'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'.'"

Graham-Perkins JA also quoted the authoritative work, Cordery's Law Relating to Solicitors, 6th edition, at page 514, which states that:

> "Professional misconduct will include dishonourable conduct on the part of a solicitor in the course of his employment towards his client, the court or third persons, including his opponent in litigation, though it is not misconduct to take a bad point unless it is done knowingly and deceives the court.
>
> If it is shown that a solicitor, in pursuit of his profession, has done something with regard to it which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the Disciplinary Committee to say that he has been guilty of professional misconduct."

[70] Graham-Perkins JA acknowledged that members of the law society are very good judges of what is professional misconduct on the part of a solicitor, just as the medical

council is a good judge of what is professional misconduct on the part of a medical man. I would say right away that members of the Committee (the successor to the Law Society) are equally good judges of what would constitute professional misconduct here in Jamaica. Graham-Perkins JA in **Diggs-White** also pointed out that there are true standards and practice by reference to which members of the profession should be judged when complaints were made by lay complainants to the Committee. He endorsed Lord Esher MR's statements made in **Re Cooke** (1889) 5 TLR 407 which, bearing in mind the issues in this case, I find instructive. Lord Esher MR, in distinguishing between the issue of negligence and that of professional misconduct, stated:

> "But in order that the court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he were a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client… If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of course resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable."

[71] In the instant case, based on the account in the transcript or that given by both parties, the words spoken were "I felt assaulted", or "I felt as if I was being assaulted",

or "I was assaulted". It is alleged by the 2nd respondent that the words spoken were triggered by real shock or intimidation due to what may have appeared to her to have been an aggressive confrontation in the well of the court, although she did later say that she had tried to make light of it before the jury, and even referred to the exchange as "friendly banter". That notwithstanding, the question one must therefore ask, regardless of which statement was made, and how and why it was made, would be, whether the words spoken, in the circumstances described, amounted to disgraceful or dishonourable conduct on the part of the 2nd respondent. In **Sloan v General Medical Council** [1970] 2 All ER 686, a case from the Judicial Committee of the Privy Council relied on by the appellant, Lord Guest on behalf of the Board stated clearly at page 688 that:

> "...There are no closed categories of infamous conduct and in every case it must be a question for the committee to decide first whether the facts alleged in the charge have been proved and second whether the appellant was in relation to those facts guilty of infamous conduct in a professional respect..."

[72] In this case, the matter was not decided after a trial on the merits, but by the Committee after consideration of all material before it, at a preliminary stage. The members of the Committee would have been expected to be very familiar with the facts and all the material before it, which would either lend support to, or not, as the case may be, the description of disgraceful or dishonourable conduct equating to professional misconduct. For my own part, I must say, that on whichever version of facts was accepted by the Committee, it would not support a finding of professional

misconduct against the 2nd respondent. The complaint in the instant case could not support an action for negligence or want of skill; or a breach of a duty to maintain a proper professional attitude towards her colleague; nor could it be described as infamous conduct, or action that was disgraceful to the appellant or the profession, especially since the matter was clarified in open court by the appellant, the 2nd respondent and G Smith J, and since the Gleaner had issued an update shortly thereafter. As a consequence, this court would hesitate before interfering with the decision of the Committee that no prima facie case had been made out.

[73] **Sloan**, however, goes on to state that certain circumstances would require the Board to take a comprehensive view of the evidence on a whole. This would allow the Board to form its own conclusion as to whether a proper enquiry had been held, and a proper finding made, having regard to the rules of evidence on which the Committee's proceedings are regulated. This statement was made on the basis, the Board commented, that no reasons had been given for the Committee's decision. I will deal with the issues as to whether reasons ought to be given in the particular circumstances of the instant case at the prima facie stage of the proceedings later. It is important to note, however, that no evidence had been taken before the Committee, so the question as to whether any due enquiry had occurred must be considered within the context of rules 4 and 5 of the Rules. No *viva voce* evidence was adduced or was expected to have been elicited at the preliminary stage of the proceedings, pursuant to these Rules.

[74] This issue of whether a decision was made "without due enquiry" arose in the case of **Fox v General Medical Council** [1960] 3 All ER 225, relied on by the

appellant to support such a contention in the instant case. In that case, a finding was delivered without more "that the committee have determined that the facts alleged... in the charge have been proved to their satisfaction". These words appear to be similar to the findings made in the instant case although the contrary decision was made. However, the difference is that the finding in **Fox**, was made after a trial and evidence having been heard. The Privy Council's concern in **Fox** was that from that simple statement, it was not possible to tell, except by inference, what weight the committee had given to certain items or aspects of the evidence, or what considerations of fact or law, had proved the determining ones, that had led the members to arrive at their decision. It was in those circumstances, that the Board stated, that that sort of consideration may lead it to take a comprehensive view of the evidence, to form its own conclusion as to whether a proper enquiry was held, and proper findings made, having regard to rules of evidence.

[75] In my view, **Fox** is to be distinguished from the instant case where no evidence was taken in this case as this was not a requirement under the Rules. So, there was no obligation placed on this court to review tested testimony as one would do in a trial, but instead this court ought to pursue a 'rehearing' pursuant to section 16 of the LPA, in an effort to ascertain whether the decision arrived at by the Committee in their deliberations, within the context of rule 4 of the Rules, was plainly wrong.

[76] The appellant has contended that there was no due enquiry, in breach of the principles of natural justice, since he was not afforded an opportunity to respond to the affidavit of the 2nd respondent sworn to on 25 August 2016, and no hearing on the

matter was held. I must say that I agree with counsel for the 2nd respondent in that, the Rules aside, the appellant had had an opportunity to respond in detail to the position taken by the 2nd respondent set out in her letter of 24 March 2016. This letter enclosed the statement of Mr Malike Kellier and the verified shorthand notes. No additional information was referred to by the 2nd respondent in her affidavit. Additionally, the appellant has not to date, as commented by learned Queen's Counsel for the 2nd respondent, provided any additional information which he contends the Committee ought to have had, when conducting its deliberations, but which had not been submitted in time, by him (save and except the defence of the Gleaner which was filed after the decision of the Committee was given).

[77] So, in my view, one could not say that the Committee had arrived at their conclusion without considering new and relevant material in their meeting, which could lead me to say that the meeting had been conducted without due enquiry of all relevant material, and therefore contrary to the principles of natural justice. I reiterate that there was no additional material available which has been provided. Tucker LJ in **Russell v Duke of Norfolk and Others** [1949] 1 All ER 109 elaborated on the principles of natural justice relevant to deliberations of matters such as that of the Committee. He stated on page 118 that:

> "...There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the

> definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. I think from first to last the plaintiff did have such an opportunity..."

[78] In my view that was also the situation in this case. The appellant was given the opportunity and took advantage of putting forward his case to the Committee. The circumstances were as previously explained an enquiry as to whether a prima facie case had been made out, and the Rules were clear as to the process to be adopted and they had been followed. There was no evidence therefore of the actions of the members of the Committee being bereft of competence, or acting in injudicious haste, or in breach of the principles of natural justice.

[79] The appellant relied on several cases challenging the Committee's finding that the "complaint had not been made out against the attorney", on the basis that no reasons had been provided. Counsel for the appellant submitted that the issues in the instant case related to matters of credibility. He relied on the statement made by Woolf LJ in **Lloyd Brooks v DPP**, that "[q]uestions of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case". In that case, although there was ample evidence for the learned Resident Magistrate to find that there was a prima facie case for the appellant to have been committed for trial, she had not done so, and that would have to have been based on lack of credibility of the prosecution witnesses, which as Woolf LJ said, except in the clearest of cases, generally credibility ought not to result in a finding that there was no prima facie case.

That, Woolf LJ said, was usually left to be determined at the trial. But in my opinion, this case was not really one based on credibility.

[80] As Queen's Counsel Vassell stated, and I agree with him, the versions stated by the appellant and the 2nd respondent with regard to what occurred in court are not very far apart. The defence filed by the Gleaner and accepted as fresh evidence of appeal would not therefore in my view have assisted the Committee in its deliberations as to whether the 2nd respondent's conduct constituted conduct unbecoming of an attorney-at-law, or professional misconduct, or misconduct in a professional respect. As a consequence, the Committee could have relied on either or both versions, and their result, in my view, would undoubtedly be the same, given the meaning of professional misconduct, and the standard of proof required of the Committee, namely, the criminal standard, beyond a reasonable doubt (see **Campbell v Hamlet**).

[81] In **Elma Stennett v The Attorney General**, also relied on by the appellant, Beswick J endorsed the principle stated by Lord Donaldson MR in **R v Civil Service Appeal Board ex parte Cunningham**, that fairness required sufficient reasons for a decision to be given in order for the parties to assess if the tribunal had acted lawfully. However, in that case, in my view, the court was really focusing mainly on the fairness in the course of a conduct of a trial. The issues of fairness which arose related to the requirement of the party to know the evidence it is about to meet; that the relevant material should be disclosed; and that the tribunal should not hear evidence of one side behind the back of the other; that all parties should be given an opportunity to prove

that the information being laid against them was wrong and to comment on the same, and the law which had been applied thereto.

[82] The learned trial judge was therefore dealing with fairness particularly as it related to the principles of natural justice. That is not so in the instant case, as the documentation submitted to the Committee by the appellant was sent to the 2nd respondent, both by correspondence initially, and subsequently by complaint, and she had the opportunity to respond, and had done so. There was no question that the 2nd respondent knew the charge she had to meet, or that any aspect of the matter had been conducted behind the back of either the appellant or the 2nd respondent. All the information that had been laid before the Committee had been disclosed to both parties.

[83] In **Brian Alexander v Land Surveyors Board of Jamaica**, another case on which the appellant relies, Smith JA commented on the fact that if a person has a right of appeal from the decision of an administrative body (as is the situation in this case), then fairness dictated that reasons for the decision should be provided, and that a failure to do so may provide grounds for a challenge to the decision. However, he recognised that there was no statutory requirement in that case to give reasons (which is similarly so, in the instant case, at the preliminary stage of the proceedings). Additionally, at common law there is no general duty either to give reasons, and being subject to a requirement for fairness does not automatically suggest that reasons are required. In my opinion, this is so particularly, if the circumstances are such, that both parties were aware of the information which had been placed before the Committee,

and the options open to it (for instance, whether a prima facie against the 2nd respondent had been established), and what must have been accepted given the particular ruling.

[84] Indeed, in a case in which the solicitors' disciplinary tribunal merely stated that the complaint was "dismissed on the ground that there was no prima facie case revealed", Kennedy LJ said in **Lucas v Millman; Practice Note** [2003] 1 WLR 271 at paragraph 52 that there was no need to say more:

> "Where in the opinion of the Solicitors Disciplinary Tribunal a complainant has failed to establish a prima facie case, the tribunal is in general, in my judgment, fully entitled to say simply what was said in this case. The complainant knows how his or her case has been presented and he or she can, if they choose, exercise a right of appeal. Neither the complainant's rights nor those of the solicitor are in any way infringed by a brief decision of the tribunal. In some cases more may be required, but generally, the position seems to me that which I have outlined."

I agree with that assertion. There was no further statement required in the instant case. The facts stated therein, whichever version was accepted, simply did not amount, in the opinion of the Committee, to conduct equating to professional misconduct. I see no reason for this court to interfere with that finding.

[85] Section 15(1) of the LPA is not applicable to the preliminary findings of the Committee at the prima facie stage. On any reading of the section it is clear that it is referring to the order made by the Committee, after a hearing of the complaint made under section 12, which may result in any of the consequences set out in section 12(4). It is those orders which ought to be filed with the Registrar of the Supreme Court

(section 15(2)); are enforceable as any judgment of the Supreme Court; are subject to any directions given by the Committee; and which must be published by the Registrar in the Gazette. It would be highly undesirable, and entirely unfair to an attorney for there to be any publication, whatsoever, of a complaint which has resulted in the decision of the Committee that "no complaint has been made out against the attorney". That being the case, after a hearing of a complaint on the merits, the Committee is required to give a statement of its findings of facts. It is not, in the instant case, at the preliminary stage of the proceedings, required by statute to give reasons for its decision.

[86] As in the case of a trial by a judge sitting alone, then even more so at the preliminary stage, once the Committee has acted in compliance with its Rules, has acted fairly and not in breach of the principles of natural justice, the appellate court, in my opinion, ought not to reverse the findings of the Committee. The appellate court ought only to reverse a view of the facts taken by the Committee, if on examination, the Committee has misread the evidence so much so that they were not entitled to make such a finding on the evidence or the material before it (see **Libman**). Indeed, Lord Millet so stated on behalf of the Board in **Ghosh**. **Ghosh** was a case on appeal from the disciplinary committee of the General Medical Council, dealing with an order (after detailed consideration and continuous monitoring of derelict conduct on the part of Dr Ghosh) of guilt of serious professional misconduct in relation to the standard of care provided by Dr Ghosh, which the Committee had found fell short of the standard

expected of a registered medical practitioner. Lord Millet made the following statements in paragraph 34 of the judgment:

> "It is true that the Board's powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the case of appeals against sentence. But their Lordships wish to emphasise that their powers are not as limited as may be suggested by some of the observations which have been made in the past. In *Evans v General Medical Council* (unreported) Appeal No 40 of 1984 at p. 3 the Board said:
>
> > 'The principles upon which this Board acts in reviewing sentences passed by the Professional Conduct Committee are well settled. It has been said time and again that a disciplinary committee are the best possible people for weighing the seriousness of professional misconduct, and that the Board will be very slow to interfere with the exercise of the discretion of such a committee. … The Committee are familiar with the whole gradation of seriousness of the cases of various types which come before them, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. This Board does not have that advantage nor can it have the same capacity for judging what measures are from time to time required for the purpose of maintaining professional standards.'
>
> For these reasons the Board will accord an appropriate measure of respect to the judgment of the Committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the Committee's judgment more than is warranted by the circumstances."

[87] The Board in **Ghosh** therefore reviewed all the material provided on appeal, and upheld the ruling of the Disciplinary Committee. Equally, in the instant case, this court

ought to accept the fact that the members of the Committee are the best persons to weigh the seriousness of professional misconduct. As such, this court should be very slow to say that the decision of the Committee was plainly wrong, and therefore I would not interfere with a finding by the Committee, that a complaint against an attorney for professional misconduct has not been made out.

[88] As a consequence, I am of the view, that with regard to issue 1, the Committee acted in compliance with the provisions of the LPA and its Rules. Additionally, it cannot be said that on any version of events, the 2nd respondent would have been guilty of professional misconduct. With regard to issue 2, it cannot be said that the Committee acted with injudicious haste, bereft of any competence, and failed to act with fairness or in breach of the principles of natural justice. Grounds 1, 4 and 5 therefore fail.

Issue 3 - Use and reliability of verbatim shorthand notes (grounds 2 and 3)

[89] The complaint in this case relates to matters which took place in the well of the court, in the course of a trial, in the "cut and thrust" of litigation in the Supreme Court. The Supreme Court is a court of record, and so evidently, there are records of what transpired on 1 and 2 February 2016.

[90] Section 16(2) of the Judicature (Supreme Court) Act states that:

> "(2) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment in the Supreme Court, and a transcript of the notes or any part thereof shall-
>
> (a) on any appeal or application for leave to appeal be made and furnished to the Registrar if he so directs; and

(b) be made and furnished to any party interested upon the payment of such charges as may be fixed by rules of court whether the person tried was or was not convicted, or in any case where the jury were discharged before verdict."

[91] Rule 3.7(1) of CAR reads:

"For the purpose of this rule '**the record**' means -

(a) the indictment or inquisition and the plea;

(b) the verdict, any evidence given thereafter and the sentence;

(c) notes of any particular part of evidence relied on as a ground of appeal;

(d) any further notes of evidence which the registrar may direct to be included;

(e) the summing up or direction of the judge in the court below; and

(f) copies of any undertakings given pursuant to rules 3.14 or 3.21."

[92] As stated by Fox JA in **R v Herman Spence** it is clear that the shorthand notes are the official records of the proceedings in court. In this case, the learned judge accepted the shorthand notes as the official record of the court. It would, in my view, therefore, clearly be reasonable for the Committee to accept those notes as being an authentic record of the proceedings in the Supreme Court, and prefer what was recorded in the verified shorthand notes, as against what was allegedly heard, reported, and believed to be true by the veteran reporter Barbara Gayle in the Gleaner, as set out in the defence of the Gleaner.

[93] However, in any event, as indicated previously, even if the 2nd respondent had said that she had been assaulted, it is difficult to conclude that she had said so, as the verified shorthand notes do not capture that fact, but that she said that she 'felt' assaulted. Moreover, even if an assault had been confirmed by both the appellant and the 2nd respondent, the 2nd respondent would have resiled from the original statement made by her, claimed by the appellant, shortly thereafter, certainly by the following day, in the morning in the judge's chambers, and later in open court before the jury.

[94] I reject therefore the claim by the appellant that the Committee had outsourced its responsibilities and obligations at law, and had determined the complaint by simply relying on the verified shorthand notes without more. There was other material before the Committee, namely, the correspondence; the complaint; the affidavits in support and in response; the statement of Mr Kellier; and relevant portions of the transcripts of the proceedings, which fell to be considered by the Committee before it had arrived at its decision. The decision of the Committee was clearly not based solely on the verbatim shorthand notes. The formal order itself referred to all material being considered. Additionally, there was no indication, as happened in **R v Herman Spence**, that there was an obvious mistake in the shorthand writers' notes. Indeed, they had been accepted by the learned trial judge and relied on by the 2nd respondent as accurately representing what had transpired in the proceedings in court. There was nothing to allow the Committee or this court to reject the notes.

[95] As a consequence, the contention by the appellant that the Committee had outsourced its obligations under the Rules to arrive at its decision is without basis, and I

reject that contention entirely. I prefer to rely on the statements made by Lord Millet in **Libman** that this court would give credence to the determination of the Committee, consisting as it does of attorneys-at-law in good standing who have been in practise for 10 years or more (section 11(1)(d) of the LPA). Grounds 2 and 3 must also fail.

Issue 4 - The Committee's use of a specially constituted panel (ground 6)

[96] I am not of the view that the fact that the complainant is an attorney-at-law, making a complaint against another attorney-at-law, required that a special committee ought to be constituted, or that any special considerations are brought to bear. The responsibility of the Committee remains the same. The Committee is obliged in all circumstances, as it was in this particular case, to take all facts, including the fact that both parties are attorneys-at-law, into consideration. The fact that embarrassment, hurt feelings, and stigma may be greater in the particular circumstances, should not influence the Committee's decision as to whether that attorney-at-law had acted with conduct unbecoming of the profession, or was guilty of professional misconduct. However, if the facts had disclosed a prima facie case, then the Committee in its deliberations may disclose in its findings such matters, as they may have particular significance when considering the order it intends to make pursuant to section 12(1) of the LPA, and the sanctions it intends to impose pursuant to section 12(4). Ground 6 is therefore without merit.

Costs

[97] The appellant submitted that the 1st respondent should bear the costs of the proceedings below as well as of the appeal. He argued that it was the arbitrary,

wrongful, and unsubstantiated exercise of the Committee's discretion, which entity was comprised of senior fellow colleagues, which had forced him to have to seek relief at this hearing on appeal. This, counsel said, was a clear case in which the 1st respondent should bear the costs.

[98] Counsel accepted that no blame could be placed on the 2nd respondent, and he was not pursuing costs against her, as she had been "a mere passenger in an unruly vehicle". I must say that I agree that costs ought not to be ordered against the 2nd respondent personally as she has been brought before the Committee and the court, and she has not operated in any manner to mislead the court, nor has she put forward points which were utterly unarguable (see **Abraham v Jutsun** [1963] 2 All ER 402, at 404).

[99] Counsel for the appellant's submissions on costs also related to the order in respect of costs attendant on the application to adduce fresh evidence. Counsel stated that although the appellant did not have to seek corroborative evidence which was in the form of the "defence" adduced as fresh evidence to support his position on appeal, nonetheless, he had felt impelled to pursue that course because of the wrong ruling by the Committee of no prima facie case against the attorney. That application, he said, was not frivolous and had been successful and effective, and was directly as a result of the action taken by the 1st respondent.

[100] Queen's Counsel for the 1st respondent posited that costs ought to follow the event. If the appellant succeeds, he should get his costs on appeal and also in relation

to the fresh evidence application. If he does not, however, Queen's Counsel submitted, then all costs should be ordered against him. He contended that it is only in circumstances where the court could conclude that the Committee had acted arbitrarily and without any basis whatsoever that the court should order costs against it.

[101] Queen's Counsel for the 2nd respondent submitted that if the 2nd respondent was successful, she should have her costs before the Committee, on the application for fresh evidence and on the appeal.

[102] The instant case found its genesis on comments made by counsel in the course of a trial. As indicated above, whichever version of those comments were accepted, it would not support a finding that the 2nd respondent was guilty of professional misconduct. In all the circumstances, the appeal ought to be dismissed. The order on the fresh evidence application indicated that costs were reserved for the determination of the appeal. As a consequence, I find no basis to deviate from the general principle that costs should follow the event, and in my view, an order ought to be made awarding costs of the appeal and on the fresh evidence application to 1st and 2nd respondents to be taxed if not agreed.

Conclusion

[103] There is no doubt that on a true and proper construction of the LPA and the Rules applicable to the Committee that the Committee, in the instant case, acted lawfully and in full compliance therewith. The appellant had every opportunity to lay his complaint and all relevant material before the Committee; and the 2nd respondent to

state her case in response. The Committee considered the information before it and ruled accordingly. The decision was that no complaint was made out against the 2nd respondent. The complaint was therefore dismissed. No further statement or reasons was required. The verified shorthand notes could reasonably have been accepted and relied on by the Committee as the official record of the proceedings in court. Based on the recorded account of the 2nd respondent's statements therein, it was within the competence of the Committee, made up as it is of senior attorneys, to conclude that those statements did not amount to dishonourable or disgraceful conduct, equating to professional misconduct, or misconduct in a professional respect, or to any criminal activity.

[104] The appellant has not demonstrated that the Committee had at any stage failed to give proper consideration to the material before it. The appellant has also failed to demonstrate that the Committee had acted without due enquiry, failed to act fairly and or in breach of the principles of natural justice, applicable to the particular and peculiar circumstances relative to the material at hand, namely, the complaint of one senior attorney being brought against another senior attorney.

[105] Although the circumstances maybe considered unfortunate, they have been resolved appropriately within the context of the legal profession's governing statute, the LPA and its Rules.

[106] In the light of all the foregoing, in my opinion, the appeal must be dismissed, the decision of the Committee affirmed, with costs of the appeal and on the fresh evidence application to the 1st and 2nd respondents to be taxed if not agreed.

SINCLAIR-HAYNES JA (AG) (DISSENTING)

[107] I unfortunately am not persuaded by the reasoning and finding of my learned sister in respect of grounds 1 and 6. These are my reasons for arriving at a contrariant view.

[108] Phillips JA has correctly set out the issues relative to grounds 1 and 6.

Analysis and law

Ground 1

Issue: was a prima facie case made out?

[109] Section 3(1) of the Legal Profession Act (LPA) states that:

> "There shall be established for the purposes of this Act a body to be called the General Legal Council which shall be concerned with the legal profession and, particular-
>
> (a) …
>
> (b) **with upholding standards of professional conduct**." (Emphasis supplied)

The question therefore is, whether the Disciplinary Committee of the General Legal Council had properly determined whether *prima facie,* the 2nd respondent's conduct fell below the requisite standard. A consideration of that issue will determine whether there

is any justification in the appellant's complaint that the matter was dealt with perfunctorily and without the competence contemplated by the legal profession. It is unnecessary for me to restate the facts as they have been comprehensively set out by Phillips JA. I will therefore only restate the aspects pertinent to my discussion of grounds 1 and 6.

[110] The following exchange, which is recorded in the transcript, can be considered as the root of the matter as it forms the basis of the appellant's complaint against the 2nd respondent to the 1st respondent.

> "MRS. L. PALMER HAMILTON: **M'Lady, do you see, Counsel's posture, m'Lady.**
>
> HER LADYSHIP: Mrs. Palmer Hamilton.
>
> MRS. L. PALMER HAMILTON: **No, I am appalled, that's why I am bringing it - counsel bore down on me awhile ago.**
>
> HER LADYSHIP: Mrs. Palmer Hamilton you can't - please.
>
> MRS. L. PALMER HAMILTON: **I felt assaulted**
>
> HER LADYSHIP: Mrs. Palmer-Hamilton, we have come thus far, whatever has a beginning will always have an end. And, I am saying I am busily trying to write. Trying to control this court, which is not the easiest thing at this stage. All I ask is, that, everybody be composed, and I appeal to everybody in the case. Once again, I say to you, you are all senior counsel at the bar. If I had any idea that it was not a court of law I was sitting in, then I would come prepared in my other type of combat. Mr. Senior Smith, thank you very much, sir, could you take your seat at this time, let me finish make the notes as to what was said.
>
> MR. O. SMITH: I will finish the submission, ma'am. **And it is on your record that my friend was**

assaulted. I just wish to correct that if it is my friend is making reference to. I did not assault my learned friend. And, I think that it is my right to correct the record, because when counsel…

HER LADYSHIP: You know one of the things you know, Mr. Senior Smith, and I ask you just to take your seat and you're still standing. Let me just say once and for all. That no matter what you may think, am still in charge of the court. No matter what any of you, all sitting down may think, I am still in charge of the court. I asked you to take your seat and you continued as if I hadn't said it. I do not wish to be stretched beyond a certain limit. I have appealed to you all as counsel of senior years to conduct yourselves in a manner which is befitting of counsel of senior years. And I once again appeal to you all, and say that I expect a certain standard of behaviour from you all. It is 10 minutes past 4:00. Maybe we should take this adjournment. We will continue tomorrow morning at 10 o'clock. Thank you very much." (Emphasis supplied)

[111] From the comments of the learned trial judge it appears she was busily writing and might not have heard or seen what had transpired between the parties. The learned trial judge's statement the following day seems also to support the view that she did not hear what was said. She placed reliance on the transcript. Page 4 of the portion of the transcript dated 2 February 2016, reads:

"HER LADYSHIP: Mr. Senior-Smith, **as I have indicated, having looked at the records…**

Mr O Senior-Smith: Yes, ma'am.

HER LADYSHIP: …**I don't think that was an accurate representation.** And as I said, **I am confident that—all of you are senior Counsel at the Bar you will proceed in a professional** and respectful manner and let bygones be bygones. For me it was a very sad situation which I wish did not happen but which has already taken place and as I said, I hope we can let bygones be bygones and move on. If and when we get to a particular point, certain warnings can

> be given by the court in relation to certain things that might have transpired. So at this time I am going to ask all of us to try to get on with the business we are here for and carry on with this trial. We have come a long way and the whole purpose is to try and have the matter dealt with in the best way possible, and trying to be professional at all times and trying to be respectful of each other, thank you." (Emphasis supplied)

The stenographer however recorded that the appellant complained that she "felt assaulted". As already pointed out by Phillips JA, by virtue of section 16(2) of the Judicature (Supreme Court) Act, the transcript is the official record of the proceedings.

[112] The fact that the official record further revealed that the appellant immediately insisted that he did not assault her, *prima facie* supports the appellant's contention that the 2nd respondent's allegation was in fact not made in jest and might have been made in the presence of the jury. The appellant's further adamantine stance in his response to the learned judge's instruction that he should take his seat, as stated in the transcript, is *prima facie* indicative that the statement might not have been made in a good natured manner.

[113] Not only did the court's official record state that the 2nd respondent had made the accusation, the following day the front page of The Gleaner Newspaper, which paper is widely read, not only in Jamaica, but also overseas, was headlined "Deputy DPP Accuses Defence Lawyer Of Assaulting Her During Murder Trial". The report also stated that the appellant told the court that he had not assaulted the 2nd respondent and that he wished to correct the record.

[114] During any trial, more so a murder trial, if defence counsel, particularly male counsel, had in fact adopted a posture which caused the prosecuting counsel to be so appalled, because male counsel "bore down on her" to the extent that she felt assaulted, so much so that she was constrained to "[bring] it" to the judge's attention, such conduct, in my view, would have been not only unbecoming of counsel, but also criminal. And if such an allegation was deliberately and falsely made, especially in the presence of a jury, such behaviour would equally constitute behaviour unbecoming of counsel.

[115] The 2nd respondent's and the learned trial judge's statements to the court, the following day, are in my view of significance.

> "HER LADYSHIP: Madam Foreman and members of the jury, we are all aware that there were some exchanges between Counsel for the Prosecution and Counsel for the Defence late yesterday afternoon just before we took the adjournment for the day. There has been a report in one of our newspapers referring to what allegedly took place in the court. **I have had the opportunity to check the official records of the court and I must indicate that what was reported in the press does not accurately reflect what actually took place in the court.** I am, however, confident that Counsel, all senior at the Bar, will proceed with the trial in a professional and respectful manner to the conclusion of this case. Thank you very much. At this stage let us now continue with the trial of this case.
>
> MRS. PALMER-HAMILTON: Might it so please you, m'Lady, before the announcement for the records, if Your Ladyship would so permit me, just in line with what Your Ladyship had made mention of, **I just wish to reiterate the position that I, in no way, yesterday during that exchange, accused Counsel, Mr. Senior-Smith, of assaulting me. My words used were, 'I felt as if I was being assaulted'**, and I did so in a very light-hearted way

in which, in fact, from what I observed generated some amount of laughter from the jurors and also in the courtroom. As those who are experienced in the adversarial system and trial and advocacy are aware there are times when these light moments are interjected to relieve the stress of the cut and thrust of the adversarial system and **I think it is a little unfortunate that the report placed it in that manner which seemed to have caused a lot of discomfort and distress to those involved.** Certainly, **I would not have expected that that friendly banter, as I saw it, would have been taken out of context,** and so I just wish to ensure that the records accurately reflect that I did not accuse Counsel of assaulting me; might it so please you.

MR. O. SENIOR-SMITH: May it please your Ladyship, may I firstly say, ma'am, that I apologize to the jurors for the obvious dislocation from this morning. And the fact that they have sat around, basically, waiting around for this matter to resume at this time. You know, ma'am, I am not the best at Jamaican-isms but I believe there is one which says-- I think they said is, 'Frog say what is joke to you is death to me,' ma'am.

HER LADYSHIP: I think I am aware of it, Mr. Senior-Smith.

MR. O. SENIOR-SMITH: I hope I am right. My learned friend Mrs. Palmer-Hamilton, has characterized what took place yesterday as 'friendly banter and light', I must confess for me, I did not receive it that way yesterday, perhaps I misunderstood what was taking place. I did not see it that way and I thought that, especially as a lawyer saying that someone has assaulted you, that it carried a particular meaning, suggesting a criminal act on my part.

HER LADYSHIP: Mr. Senior-Smith, as I have indicated, having looked at the records….

MR. O. SENIOR-SMITH: Yes, ma'am.

HER LADYSHIP: …I don't think that was an accurate representation. And as I have said, I am confident that -- all of you are senior Counsel at the Bar you will

> proceed in a professional and respectful manner and let bygones be bygones."

[116] Although the 2nd respondent would have sought, the following day, to remove or downplay any serious implications of her statement, as reported in the official record, of having "felt assaulted" by regarding what had transpired as a mere jocular diversion, her statements on the fateful day belie any interpretation of light heartedness.

[117] In my view, whether the statement complained of was, "I felt as if I was being assaulted" or "I felt assaulted", it would not diminish the effect on counsel's (the appellant) standing. Whichever conduct is accepted, in light of what is expected of a "gentleman's profession" or indeed any other profession would have been the same, unbecoming.

[118] Although the learned trial judge apparently did not wish to ascribe blame to any particular counsel, her admonition that they "proceed in a professional and respectful manner and let bygones be bygones" suggests that their behaviour was unprofessional and unbecoming.

The proceedings before the 1st respondent

[119] The appellant, by way of letter dated 2 February 2016, complained to the 1st respondent that the 2nd respondent had falsely accused him in the presence of the jury that he had assaulted her. The letter stated:

> "This deliberate falsehood maliciously levelled against me in the presence of the Jury and in the face of the Court could only have been calculated by Mrs. Palmer-Hamilton, a senior

Practitioner, to cause injury, embarrassment and damage to my reputation and ultimately, my livelihood...

The unsubstantiated accusation has ascribed immoral, dastardly and criminal behaviour to me and as a result must attract the scrutiny of the Disciplinary Committee particularly given that the circumstances unfolded in Counsel's bench while Court was in session: I had made an Application to the Court to which Mrs. Palmer-Hamilton had offered an objection. This prompted the Court to require a response from me to the objection. As part of my submission in response, I was intimating to the Court that a statement was taken from the Witness (who was at the time giving evidence) at a stage when he was still an accused before the St. Ann Circuit Court as he had pleaded guilty but had not yet been sentenced. Mrs. Palmer-Hamilton rose during this my assertion and indicated that once the plea was given even if not sentenced then he was not an accused at the time. The Bench appeared, in my view, to have been accommodating to this position of my Learned Friend to which I requested the Court to consider that a guilty plea could be withdrawn with the leave to the Court; so therefore the status must be still of an accused. From where I was in Counsel's bench, I said to Mrs. Palmer-Hamilton, 'Lisa, you must stop taking the judge into error.' Her immediate reaction to me was 'why are you doing that?' which I took to mean that she was saying that I was speaking in a way which could carry to the Jury. In order to avoid that kind of manoeuvring, I pulled closer to her and leant down and repeated 'Lisa, you must stop talking the judge into error.'

It is in these premises, that Mrs. Palmer-Hamilton has traduced, and sullied my character and integrity in a professional capacity when she thereupon jumped to her feet and declared to the Judge that I had assaulted her. Even when the Judge told her to compose herself she said, with an accompanying smile, that she felt assaulted.

Learned Counsel, who is a Minister of Justice must account for what fear she could have apprehended in those circumstances and which led to her to make those irresponsible, reckless, unbecoming, besmirching comments to the Court. Prejudice to my client ought to have been considered by Mrs. Palmer-Hamilton when she made the outlandish claim.

> Mrs. Palmer-Hamilton was also fully aware that a Reporter from one of the leading national daily newspaper was there in Court and that there has been ongoing coverage of the Trial by this national newspaper through this particular Reporter. Indeed within an hour, the allegations were published far and wide over the worldwide web through social media including Facebook, and were attracting various sentiments."

[120] The 2nd respondent responded by letter dated 24 March 2016, to the 1st respondent, in the following manner:

> "On the 1st day of February, 2016, during the course of the murder trial of **Regina v. Bertram Clarke and Arthur Robinson**, I made an objection to which Mr. Senior-Smith was responding. While responding to the objection I made before the Learned Trial Judge, Miss Justice Gloria Smith, the Senior Puisne Judge, he proceeded to audibly say to me while turning his face to the jury, in whose direction I sat, **'why are you leading the judge into error**?' I responded, while turning my face away from the jury **'why are you doing that? Don't do that.'** I did so because the cross-talk between Defence Counsel and myself should not be a matter for the jury to hear or to be influenced by. Whereupon, Mr. Senior-Smith repeated his statement and then moved over from where he stood (which was to the extreme side away from me in the bench behind me and stretched over the other Defence Counsel) **and then leaned over towards me in a confrontational manner which I found not only offensive but also intimidating.**
>
> **At this juncture, I was so shocked and dismayed that I stood up and brought it to the attention of the Learned Trial Judge so that the matter would not have gotten out of hand/ escalated in the presence of the jury.**
>
> My remarks to the Learned Trial Judge were **'Mi Lady, do you see Counsel's posture towards me? I am appalled, that's why I am bringing it to your attention- Counsel bore down on me awhile ago!' 'I felt as if I was being assaulted.'** In support of my

> statement as to what was said by me, I attach hereto pages 24-29 of the transcript produced by the court reporter and referring particularly to the highlighted section on page 25. Mr. Senior-Smith responded by indicating that he did not assault me (please see transcript, supra.)
>
> Further, that on the following day in Chambers the transcript was reviewed by the Learned Trial Judge who pointed out to Mr. Senior-Smith that his allegations were not supported by the transcript and I also reiterated that at no time did I accuse Counsel of assaulting me.
>
> I am therefore perplexed and astonished that Counsel is seeking to pursue this matter before the General Legal Council where the evidence does not support his complaint.
>
> I have attached the relevant pages of the transcript in relation to the proceedings on February 2nd, 2016 which reflect the judge's pronouncement in court and the accuracy of my statement.
>
> It should be noted that my utterances in court were in keeping with the professional code of conduct in an adversarial trial. I made the statement in a light-hearted manner so as to ensure that the jury was not adversely affected by what was transpiring. The spirit in which it was said and done was done in the presence of the jury and evoked laughter from them.
>
> Finally, I state here again that what I said then was that I felt as if I was being assaulted which is distinct from saying that Mr. Senior-Smith assaulted me.
>
> Please also find attached hereto a statement of Malike Kellier who was my Intern present in court at the relevant time." (Emphasis added)

[121] The 2nd respondent's letter to the 1st respondent makes it palpable that the appellant's behaviour was unbecoming. Indeed, the behaviour ascribed to the appellant in her letter to the 1st respondent certainly could not be categorized as a "friendly banter" in the "cut and thrust" of a trial as she had earlier said it was. There certainly

was nothing "friendly" about the behaviour which she described in her response. The appellant not only bore down on her, she plainly stated that she was not only shocked and dismayed, but that she found the "confrontational manner" in which he had leaned over to be "intimidating" and "offensive".

[122] An interpretation could reasonably be ascribed to the language used by the 2nd respondent that she was assaulted. The 2nd respondent was at the material time a senior deputy director of prosecutions. The legal definition of assault is the apprehension of the immediate use of unlawful violence. Her account of what transpired would have constituted an assault. The use of the verb "felt" does not diminish the assault which she described. In fact, the use of the word "felt", in my view, puts it out of the reach of doubt that she in fact apprehended fear. Such behaviour, if true, would have been not only unbecoming, but criminal. Conversely, if false, would have been not only unbecoming, but also defamatory and would therefore warrant a hearing from the 1st respondent which body is tasked with the responsibility of ensuring that attorneys conduct themselves in a professional manner.

[123] It is true that an attorney ought not to be fearful of expressing himself during the course of an adversarial trial as statements are made in the cut and thrust of trial. However, the Legal Profession (Canons of Professional Ethics) Rules and the LPA demand that attorneys conduct themselves in a professional manner. The 1st respondent is invested with the power to ensure that attorneys conduct themselves in a professional manner. Therefore, whilst the attorney might be immune from civil proceedings, he or she might, depending on the statement, be disciplined by the 1st

respondent. In my view, the cases of **Re Cooke** (1889) 5 TLR 407 and **Leslie L Diggs-White v George Dawkins** (1976) 14 JLR 192 are distinguishable on the facts.

[124] It is also arguable whether the allegation by the 2nd respondent, that the appellant's behaviour caused her to have "felt assaulted", was made in the cut and thrust of proceedings. The learned authors of Halsbury's Laws of England, 2012, volume 32, paragraph 59, state that statements which are uttered which have "no reference at all to the subject matter of the proceedings" will not be protected. It is arguable whether the 2nd respondent's statements can properly be regarded as having had any reference to the subject matter of the proceedings or whether they arose from what she described as his intimidating posture and language.

Mr Kellier's statement to the 1st respondent

[125] Mr Kellier's (who was an intern at the office of the DPP), statement to the 1st respondent reads:

> "...with a smirk on his face and using a quick step approach walked close behind [the 2nd respondent] in his bench and stated in a deep low voice 'Lisa, you didn't hear what I...' to which the [2nd respondent] replied by alerting the judge, 'Mi' Lady did you just see counsel's posture a while ago?' to which the judge replied in a strong tone 'Mrs Palmer-Hamilton'.
>
> Mrs. Palmer-Hamilton then replied 'no I am appalled! mi' Lady did you see how counsel just bore down on me? I felt like I was being assaulted then she proceeded to take her seat and repeat to me 'no, did you just see that, I felt like I was being assaulted!' which Mr. Senior Smith overheard and then stated to the judge 'mi lady I wish that the records are corrected to indicate I did not assault my learned friend and

> if it is my friend is making reference to me it is my right to make sure that the correct record is reflected'."

[126] By that statement it is arguable whether the appellant bore down on the 2nd respondent in a manner to put her in fear. In fact, on his statement, the appellant was not allowed to complete what he was about to say as the 2nd respondent complained to the judge before he had completed his statement. By that statement it is arguable that what she complained of would have been a statement which had emanated from the proceedings.

[127] It was the appellant's submission that it was telling that the 2nd respondent did not provide a statement from Ms Nadine Malcolm who was a confirmed member of the Director of Public Prosecutions' chambers and was seated closer to him during the incident but sought instead to have an intern who was seeking employment at the office to provide a statement.

[128] Mr Kellier's statement was, in my view, not at variance with the appellant's version. It was the appellant's statement that whilst he had been seated in the far left hand side of the second bench, he had drawn close to the appellant (she would have been seated in the front bench to the right) and had told her to stop taking the judge into error. Whereupon, the 2nd respondent asked him why he "was doing that". He consequently drew closer to her so as to be out of the hearing of the jury and repeated the question. He was surprised and horrified when she quickly stood and told the judge that he assaulted her. Upon the judge's plea for calm, she told the judge that she felt assaulted.

[129] In **Sloan v General Medical Council** [1970] 2 All ER 686, it was made clear by Lord Guest, at page 688, on behalf of the Judicial Committee of the Privy Council, that:

> "There are no closed categories of infamous conduct and in every case it must be a question for the Committee to decide first whether the facts alleged in the charge have been proved and second whether the appellant was in relation to those facts guilty of infamous conduct in a professional respect."

[130] The learned author of Cordery's Law Relating to Solicitors, 6th edition, at page 514, dealt with dishonourable conduct on the part of a solicitor in the course of his employment towards his client, the court or third persons as "professional misconduct". Consequently, "dishonourable conduct" toward opposing counsel is also "professional misconduct". Lord Esher MR's statement in **Re Cooke**, whilst addressing the exercise of the court's penal jurisdiction over a solicitor, as to whether an attorney was liable in "negligence or want of skill", is germane. The learned Master of the Rolls enunciated:

> "It must be shown that the solicitor had done something which was dishonourable in his profession, A professional man, whether a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client."

Although his statement was in respect of the court's jurisdiction, it is my view that it is equally applicable to the Disciplinary Committee of the 1st respondent, which body is charged with the responsibility of determining whether an attorney has acted contrary to the ideals of this noble profession. If therefore the 2nd respondent's accusation was indeed false, the fact that it was made in the presence of the jury, in a murder trial and with the knowledge that a reporter from a widely read newspaper both locally and

overseas was present or likely to have been present in court, such behaviour, in my view, would have constituted dishonourable conduct. Whether deliberately made or recklessly uttered this would in my view not have been conduct expected of senior counsel who ought to have been cognizant of the likely effect on counsel's reputation.

[131] In my view, had the Disciplinary Committee conducted a proper inquiry on the material which was before it, it would have found that *a prima facie* case had been made out.

Ground 6

> "That the Disciplinary Committee of the General Legal Council failed to consider the status of the Complainant as a fellow Attorney-at-Law and the resultant damage to reputation, integrity, character and esteem inter alia both locally and internationally among family members, colleagues, the Judiciary, clientele and potential clients, caused by the objectionable utterances of the 2nd Respondent and to that extent erred in fact and/or in law or wrongfully exercised its discretion to dismiss the complaint."

[132] In the above stated letter to the 1st respondent, the appellant drew to the attention of the 1st respondent the fact that the 2nd respondent was aware that the trial had been receiving "ongoing coverage" by a reporter from one of the leading papers and that the reporter had been present in court. The Gleaner's reporter had also asked the 2nd respondent what she intended to do about the assault. The consequential publication which was carried as aforesaid ought to have been contemplated by the 1st respondent.

[133] He complained that within an hour of the newspaper's report, the behaviour attributed to him by the 2nd respondent had received wide coverage globally throughout the worldwide web and through social media. The report attracted various sentiments from retired judges of appeal, and various persons who were concerned about the allegation.

[134] A person's reputation is among his or her most valuable possessions if not the most valuable. Reputation is especially important to an attorney. In choosing an attorney, many persons consult the internet to investigate the character of their prospective attorney. The negative publicity the appellant received on the internet could have negatively affected his reputation as he complained.

[135] It is for the forgoing reasons I am constrained to differ from my learned sisters. In the circumstances, the appellant's appeal in respect of grounds 2 and 6 should succeed.

STRAW JA (AG)

[136] I have read in draft the reasons for judgment of my learned sister Phillips JA. I agree wholeheartedly with her reasoning and conclusion, and have nothing further to add.

PHILLIPS JA

ORDER

By majority (Sinclair-Haynes JA dissenting)

1. Appeal dismissed.

2. The decision of the Committee made on 24 September 2016 is affirmed.

3. Costs of the appeal and on the fresh evidence application to the 1st and 2nd respondents to be taxed if not agreed.