ON APPEAL TO THE VISITORS

TO THE INNS OF COURT

Royal Courts of Justice

Strand

London WC2A 2LL

6th February 2012

DEVANDRANATH HURNAM

v

BAR STANDARDS BOARD

JUDGMENT

DEVANDRANATH HURNAM appeared in person

JOHN EIDINOW appeared on behalf of THE BAR STANDARDS BOARD

THE VISITORS

Introduction

1. The petitioning barrister, Mr. Hurnam ('the appellant'), who has practised for many years as a barrister in Mauritius, appeals against a decision of a Disciplinary Committee of the Council of the Inns of Court made on 8 March 2011 when the Tribunal found him guilty of professional misconduct on charge 6 of the charge sheet in that he:

> 'engaged in conduct which was dishonest and discreditable to a barrister contrary to paragraph 301(a)(1) of the Code of Conduct

of the Bar of England and Wales (8th Edition) in that on or about 30th January 2008 having been convicted by the Intermediate Court of Mauritius on 11th August 2003 of the offence of conspiracy to do an unlawful act (namely to hinder police in an enquiry regarding a larceny committed at the Grand Bois State Bank on 4th May 2000 by fabricating an alibi for his client Soobashing Bholah to mislead the enquiring officers) his name was ordered by the Supreme Court of Mauritius to be erased from the Roll of Barristers admitted to practise in Mauritius.'

The Tribunal disbarred the appellant and ordered that he pay the costs of the Bar Standard Board in the sum of £1,286.

2. The appellant did not appear before the Tribunal, having requested an adjournment which was refused by the Tribunal. He complained about the shortness of notice of the hearing and the fact that he was appearing as a litigant in person before the Supreme Court in Mauritius on the day of the Tribunal hearing. The Tribunal, however, decided that, in view of the lengthy history of the matter, there should not be any further delay and that it was essential in the interests of justice that a decision in the proceedings should be taken.

Appellant's conviction

3. Before turning to the lengthy history of the matter, we should first refer briefly to the facts relating to the appellant's conviction which gave rise to his disbarment.

4. On 4 May 2000 there was an armed robbery at the State Commercial Bank in Grand Bois, Mauritius. Two brothers were arrested. On 5 May 2000 the appellant was instructed on behalf of one of them, whom we will refer to as Bholah. Bholah's evidence was that he told the appellant that he had taken part in the robbery but that the appellant told him to lie and to tell the police that he and his brother had gone together to have a lorry tested at the time of the robbery, thereby creating a false alibi. The appellant denied having told Bholah to fabricate a false alibi. His case was that Bholah had told the police about his alibi on 4 May 2000 so that the appellant could not have fabricated it on 5 May 2000.

5. The appellant was charged with conspiracy to do an unlawful act, namely to hinder the police in their enquiry by fabricating an alibi for his client to mislead the enquiry officers. His trial took place before 3 Magistrates in the Intermediate Court of Mauritius. It lasted many days, during which Bholah was cross examined for 5 days. On 11 August 2003 the appellant was convicted and he was sentenced to 6 months imprisonment which he has served. That conviction, which ultimately caused the appellant to be disbarred, occurred over 8 years ago. The reason why it has taken so long to get to this stage is that the appellant, who has a tendency to take a great many points, embarked on a course of litigation which even to-day appears not to have terminated.

History of litigation

6. The most important part of the history of the litigation is that which ensued directly from his conviction by the Intermediate Court. On 7 April 2004 his conviction was quashed by the Supreme Court of Mauritius on a point of law relating to the required intent for the offence of conspiracy. The Supreme Court, however, expressly stated that it found no warrant to

disturb the findings of fact of the Intermediate Court. The Director of Public Prosecutions appealed to the Judicial Committee of the Privy Council ('the Privy Council') which, on 25 April 2007, reversed the Supreme Court's decision on the point of law, allowed the appeal and restored the conviction. In doing so, the Privy Council considered a number of factual aspects and concluded that a sufficient case had not been made out to disturb the findings of fact. In particular, the Privy Council considered a signed statement by Bholah dated 10 March 2007 which was alleged to show that he initially fabricated the false alibi when he was arrested, that is to say before he had spoken to the appellant, but the Privy Council, for the reasons that it gave, declined to draw any such inference from the statement.

7. The appellant then applied to the Supreme Court to re-open his criminal case on the basis of the evidence in Bholah's statement of 10 March 2007 and in another similar statement by Bholah made on 20 March 2007. On 18 May 2007 the Supreme Court refused the appellant's application to re-open the criminal case and, on 20 June 2007, it refused leave to appeal to the Privy Council against that decision.

8. Next came the disciplinary proceedings against the appellant in the Supreme Court in Mauritius. Initially, the appellant was charged under the Law Practitioners Act but, after hearing argument on the point in interlocutory proceedings in October 2007, the Supreme Court decided on 20 October 2007 to invoke its inherent jurisdiction, the charge being based on the Appellant's conviction. In its judgment dated 30 January 2008, the Supreme Court found that there were no exceptional circumstances which would justify the Court going behind the appellant's conviction which had been restored by the highest court in the land. It found that the appellant's conduct fell within the range of the most serious professional misconduct and ordered that his name be erased from the Roll of Barristers admitted to practise in Mauritius.

9 Finally on this aspect of the litigation, on 5 March 2008 the Privy Council rejected a petition by the appellant for special leave to appeal against the Supreme Court's decision of 30 January 2008.

10. Coming back briefly to this country before returning to Mauritius, in June 2009 the appellant was charged with 6 charges of professional misconduct under paragraph 901.7 of the Code of Conduct of the Bar of England and Wales. On 9 November 2009 directions for the hearing were given. On 27 November 2009 McFarlane J granted an adjournment of the hearing before the Disciplinary Tribunal pending a decision of the Supreme Court in Mauritius on an application that had been made by the appellant that his constitutional rights had been infringed.

10 Returning then to Mauritius, that application was heard by Judge Devat in the Supreme Court on 1 April 2010 when judgment was reserved. Before judgment was given, on 12 July 2010 the Privy Council dismissed an appeal in a civil action that had been brought by the appellant against the Bholah brothers who had given evidence against him in his criminal trial. On 29 July 2010 Judge Devat dismissed the appellant's claim in the Supreme Court finding there to be no cause of action in law or on the facts.

11 Continuing this saga of litigation, on 4 November 2010, the Supreme Court refused an application made by the appellant to commit the Chief Justice for contempt.

12 On 22 February 2011 there was a hearing before the Supreme Court on an application by the appellant to re-open his criminal case based on a statement made to the police on 4 July 2001 by Mr. Varma (who is now the Attorney General) relating to a letter from the two Bholah brothers dated 17 June 2001. After judgment was reserved on a preliminary issue, the Court decided on 1 July 2011 that the appellant, as a litigant in person, was not entitled to settle the pleadings without the assistance of a solicitor. This aspect of the litigation is, therefore, still ongoing.

13 Finally, it was on 8 March 2011 that, as mentioned previously, the Disciplinary Tribunal here refused an adjournment of the disciplinary proceedings, found the appellant guilty of professional misconduct on charge 6, which was the only charge on which the Bar Standards Board proceeded, and disbarred the appellant.

Application to adduce new evidence

14 The appellant represented himself before us. He first of all sought leave to adduce two documents that were not before the Disciplinary Tribunal, namely the statement by Mr. Varma dated 4 July 2001 and the letter from the Bholah brothers dated 17 June 2001 upon which his present proceedings in the Supreme Court in Mauritius are based.

15 In his statement of 4 July 2001 Mr. Varma, who was then a practising barrister, described how the Bholah brothers came to his office to retain his services relating to their case, stating that they now wanted to speak the truth about the matter and they handed to him their letter of 17 June 2001. They told him that the appellant had represented them. Mr Varma gave them an appointment for the next day and then contacted the appellant and showed him the letter which was photocopied by the appellant. In their letter of 17 June 2001 the Bholah brothers stated that Inspector Goorah had caused them to make a false statement against their barristers under the belief that they would obtain bail and that they would be used as Crown witnesses. They also denied stating that they had paid the barrister with money from the hold-up.

16 The appellant accepted that he had been shown the letter from the Bholah brothers in 2001 but he said that he did not have the original document and that Mr. Varma had said that he would claim professional privilege.

17 In considering whether to allow the appellant to rely on the documents, we have borne in mind Rule 14(6) of The Hearing Before The Visitors Rules 2010 which states that evidence not before the Disciplinary Tribunal may only be given in exceptional circumstances.

18 We note from Mr. Varma's statement that the appellant took a copy of the Bholah brothers' letter in 2001. He accepted that he had not taken any action on it until 2011. We find that quite extraordinary. If the document is to be believed, it would purport to exculpate the appellant, yet there was no attempt by the appellant to put it before the Intermediate Court in 2003 or before the Supreme Court until 2011 despite all the other litigation initiated by the appellant in the intervening 10 years. The first time the Bar Standards Board saw these documents was during the week before the hearing. In those circumstances, we find it quite impossible to conclude that there are exceptional circumstances justifying the introduction of those documents at this late stage. We therefore refuse leave to adduce those documents.

Submissions and discussion

19 Some of the appellant's grounds of appeal related to the refusal of the Disciplinary Tribunal to grant him an adjournment on 8 March 2011. That aspect was not pursued by the appellant as he was present before us and able to pursue his grounds of appeal against the finding of the Tribunal that he was guilty on charge 6 of the charge sheet.

20 His Petition of Appeal against that finding is diffuse and at times repetitive. However, behind it all lies his main point that he was wrongly convicted by the Intermediate Court in August 2003. Many of his arguments relate to subsequent proceedings in which he attempted unsuccessfully, either directly or collaterally, to challenge that conviction.

21 The issue therefore arises whether the appellant should be allowed to go behind his conviction. Mr Eidinow submitted on behalf of the Bar Standards Board that he should not be allowed to do so. He was, and remains, convicted of the criminal offence and he was, and remains, struck off the Mauritian Roll of Barristers on the ground of that criminal conviction. That, said Mr Eidinow, is the existing situation and he should not be allowed to go behind it.

22 In considering that point, we have to bear in mind Rule 14(8) of The Hearing Before The Visitors Rules 2010, which reflects the position derived from the case law, and which provides as follows:

> 'An appellant or defendant (as the case may be) may only challenge before the Visitors a decision of a court of law on which the relevant decision was based in exceptional circumstances and with the consent of the Visitors.'

24 We therefore have to decide whether there are exceptional circumstances which would justify us going behind the appellant's conviction.

25 Some of the points raised by the appellant relate to the proceedings in the Supreme Court and in the Privy Council in connection with his conviction, and some relate to the proceedings of the Supreme Court acting as a disciplinary tribunal. Although we have considered all the numerous points that have been raised, we only propose to deal with what we consider to be the main points.

26 A commonly recurring theme in the appellant's submissions is that the Privy Council, in its decision of 25 April 2007, should not have dealt with the inference to be drawn from the signed statement of Bholah dated 10 March 2007 but should have remitted that aspect to the Supreme Court. Reliance was placed on paragraph 8 of the judgment of the Privy Council in **Stafford v The State [Trinidad and Tobago]** (1998) UKPC 35 where it was stated that, save in exceptional circumstances, the Judicial Committee will not embark upon a rehearing of issues such as the weight which may properly be given to the evidence or the inferences which may properly be drawn from it.

27 It is quite clear from paragraph 23 of the judgment of the Privy Council in Mr Hurnam's case that the Board had that principle well in mind. In paragraph 24, the Board concluded that a sufficient case had not been made out for it to disturb the findings of fact of the two lower courts. Having so concluded, the Board went on to deal with Bholah's statement of 10 March 2007 which had been submitted on behalf of Mr Hurnam (the respondent in the

appeal) after the hearing before the Board but before judgment, with the suggestion that the Board might need to re-open the hearing of the respondent's cross-appeal. Having considered that statement and having declined, for the reasons that it gave, to draw the inference from it suggested on behalf of the respondent, the Board declined to re-open the hearing of the appeal.

28 We can see nothing wrong in the way that the Privy Council dealt with that aspect of matter. The Board was perfectly entitled to deal with it in the manner that it did.

29 Subsequently, the appellant applied to the Supreme Court in Mauritius to re-open his case before the Intermediate Court on the ground of the availability of fresh evidence consisting of Bholah's statement of 10 March 2007 and a further one of 20 March 2007 which simply confirmed what Bholah had said in his statement of 10 March 2007. The Supreme Court rejected that application on 18 May 2007. Before us, the appellant relied on some passages in the transcript of those proceedings which he said showed that the Supreme Court had stated that the alibi was raised on the 4th May 2000 so that he could not have fabricated it on the 5th May 2000. In fact, the passages were simply questions put by the Court during argument and do not constitute a finding of fact on that point by the Supreme Court which stated that it was bound by the finding of the Privy Council.

30 The appellant then applied to the Supreme Court for leave to appeal to the Privy Council against its decision of 18 May 2007 on the basis that it wrongly thought that it was bound by the Privy Council's decision on that point because it was not a decision of the Privy Council but merely a view expressed obiter. Not surprisingly, the Supreme Court refused leave to appeal to the Privy Council.

31 Another point raised before us by the appellant was that he had been convicted of an offence unknown to the law in Mauritius. He submitted that there was a difference between a conspiratorial agreement and advice tendered by counsel to a client suspected of a criminal offence. The latter, he said, could involve breaches of professional misconduct but could not be the basis for a criminal charge of conspiracy. He submitted that the law in Mauritius does not criminalise invoking a false alibi.

32 We do not accept that submission. The offence with which the appellant was charged in the Intermediate Court was conspiracy to hinder the police. The particulars of the conspiracy charge on which he was tried were:

> 'That on or about the 5th of May in the year two thousand at Novelle France in the District of Grand Port, the said Devandranath Hurnam did wilfully and unlawfully agree with another person, to wit Soobashing Bholah to do an unlawful act to wit: to hinder Police in an enquiry regarding a larceny committed at the Grand Bois State Bank on the 4th May 2000 by fabricating an alibi for the said Soobashing Bholah to mislead the enquiry officer.'

33 When appealing to the Supreme Court against his conviction for that offence, the appellant took the point that the information failed to disclose any offence as the particulars did not describe an act which was unlawful under any provisions of Mauritian law. The Supreme Court rejected that submission and, on the appeal to the Privy Council, the Board stated that the Supreme Court was unquestionably correct in its conclusion on that point. As Judge Devat said later on 29 July 2010 when dealing with the appellant's claim that his constitutional rights had been infringed:

'He was charged for a criminal offence of conspiracy to do an unlawful act which is an offence under the Criminal Code (Supplementary).'

34 Another submission by the appellant related to something the Privy Council said in its judgment on 12 July 2010 in the civil action brought by him against the Bholah brothers for allegedly falsely saying that the appellant had told Bholah to lie in order to set up a false alibi. The action was held by the Privy Council to be an abuse of process but the appellant relied on a passage in paragraph 41 of the judgment of Lord Rodger when he stated, as an example, that Bholah could not introduce evidence of the appellant's conviction as evidence that he had committed the offence of which he was convicted. The appellant submitted that if Bholah could not introduce that evidence, the State could not introduce it so that Bholah ought to have been called as a witness.

35 We do not consider that what Lord Rodger said as an obiter dictum in those civil proceedings has any relevance to these proceedings. These proceedings are disciplinary proceedings which are governed by Rules derived from case law, the effect of which is that the appellant cannot go behind his conviction unless there are exceptional circumstances. We do not derive any assistance from what was said in those civil proceedings.

36 Turning to the disciplinary proceedings before the Supreme Court, the appellant relied on section 13(2) of the Law Practitioners Act dealing with disciplinary proceedings which is based on 'an act done by a law practitioner in the exercise of his profession'. The appellant argued that the reference to 'an act done' showed that it was not permissible for the Supreme Court to rely on his conviction and that the Court was required to carry out its own enquiry to be satisfied from the evidence that he had in fact committed the act of misconduct. That would, of course, involve revisiting the evidence covered by the Intermediate Court in 2003, but the appellant pointed out that, as Lord Atkin mentioned in **The General Medical Council v Spackman** HL (1943) 627, convenience and justice are often not on speaking terms.

37 This argument based on 'an act done' in section 13 of the Law Practitioners Act was raised by the appellant in the interlocutory disciplinary proceedings before the Supreme Court in October 2007. However, the Court found it unnecessary to consider the merit of that argument because it decided that the matter was more appropriately dealt with under its inherent jurisdiction relying on the appellant's conviction.

38 The appellant submitted that the Supreme Court should not have proceeded under its inherent jurisdiction because the express provision in the Law Practitioners Act and the inherent jurisdiction cannot co-exist as there is no provision in law that the conviction is prima facie evidence of the offence. He submitted that the inherent jurisdiction cannot be exercised to conflict with the statutory provisions. Indeed, he went further to submit that, in those circumstances, it would be necessary for all the Supreme Court judges to have heard the case.

39 We do not accept those submissions. The Supreme Court, in its judgment in the interlocutory proceedings, expressly stated that it was satisfied that the statutory provisions do not detract from the wider inherent powers of the Supreme Court. Furthermore, we note that section 13(6) of the Law Practitioners Act expressly states that:

'Nothing in this section shall be construed as limiting the

inherent power of the Supreme Court to deal with matters of professional discipline of law practitioners.'

40 The Supreme Court, in its decision in the disciplinary proceedings on 30 January 2008, decided that it would not go behind the appellant's conviction in the absence of exceptional circumstances justifying such a course. The Court found no exceptional circumstances which would justify it going behind the conviction which, as it said, had been restored by the highest court in the land.

41 We consider that the Supreme Court was entitled to proceed under its inherent jurisdiction in the manner that it did and that it was entitled to conclude that there were no exceptional circumstances to justify it going behind the appellant's conviction.

42 We note that the Privy Council subsequently rejected the appellant's petition for special leave to appeal against that decision. The appellant told us that the Privy Council rarely intervene on matters of discipline. Whilst that may be so, we note that, in its interlocutory judgment in the disciplinary proceedings, the Supreme Court stated that the Privy Council will grant leave in disciplinary proceedings in a meritorious case.

43 We have considered all the other points raised by the appellant, including the challenge to two judges of the Supreme Court and the other points raised in the appellant's written representations submitted since the date of the hearing, but we are quite satisfied that none of the matters raised, whether singly or together, amount to exceptional circumstances to justify going behind the appellant's conviction which dates back to 2003.

Conclusion

44 We are satisfied that the appellant's case in its various aspects has been carefully considered on a number of occasions by the Supreme Court and by the Privy Council. The result is that the appellant was convicted on 11 August 2003 of an offence which constituted serious professional misconduct. There are no exceptional circumstances to warrant going behind that conviction. On 30 January 2008 the Supreme Court in Mauritius validly ordered that his name be erased from the Roll of Barristers admitted to practice in Mauritius. The Disciplinary Tribunal was therefore fully entitled to find the appellant guilty of professional misconduct under charge 6 of the charge sheet. Our decision is that this appeal should be dismissed. Our decision is unanimous.