DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.: W-01-49-01/2014

ANTARA

DATO' SRI DR. MUHAMMAD SHAFEE ABDULLAH … PERAYU

DAN

MAJLIS PEGUAM (BAR COUNCIL) … RESPONDEN

[Dalam Perkara Mahkamah Tinggi Malaya Di Kuala Lumpur

(Bahagian Sivil)

Guaman Sivil No.: 17-59-11/2012

Antara

DatoôSri Dr. Muhammad Shafee Abdullah é Perayu / Pemohon

Dan

Majlis Peguam (Bar Council) é Responden]

CORAM:

TENGKU MAIMUN TUAN MAT, JCA

AHMADI HJ. ASNAWI, JCA

VERNON ONG LAM KIAT, JCA

INTRODUCTION

[1] This appeal relates to the decision of the High Court given on 10.1.2014 dismissing the appellant's appeal and upholding the decision of the Disciplinary Board (**DB**) dated 5.10.2012 to impose a penalty of RM5,000.00 on the appellant.

[2] On 23.9.2010, the Bar Council wrote to the DB complaining that the appellant appears to have breached the Legal Profession (Publicity) Rules, 2001 (**2001 Rules**). The complaint is based on an interview given by the appellant which appear in 2 articles in The Star newspaper dated 27.9.2009.

[3] The Disciplinary Committee (**DC**) which conducted an inquiry into the complaint concluded that the appellant had in his interview with the journalist publicised himself and his firm of solicitors in breach of rr 2, 5(1)(b)(vi), 15(2) and 24 of the 2011 Rules, r 48 of the Legal Profession (Practice and Etiquette) Rules 1978 and Ruling 14.01(2) of the Rules and Rulings of the Bar Council 2007. The DC found the appellant guilty of misconduct contrary to s 94(3)(k) and (o) of the Legal Profession Act, 1976 (**LPA 1976**) and recommended a fine of RM5,000.00 be imposed on the appellant.

[4] By a letter dated 15.10.2012, the DB informed the appellant that it had affirmed the finding of liability and recommendation on punishment by the DC and ordered that a fine of RM5,000.00 be imposed on the appellant. The appellant appealed to the High Court against the decision of the DB under s 103E of the LPA 1976.

[5] The first article entitled ñCounsel Rests His Caseò contained the words ñ*high profile lawyer*ò, ñ*top lawyer*ò and ñ*people had no difficulty finding the appellant's office (which had no signboard) because of the appellant's reputation*ò. The learned Judge found that the words in the first article were that of the journalist and not of the appellant.

[6] The second article entitled ñKeeping Within The Letter Of The Lawò contained 2 statements which were made by the appellant. The 2 statements which form the subject of the complaint are:

> ñ*I can tell you that whenever I am a defence counsel, the AG Chambers always send, without a doubt, their best team against me. This is true*.ò
>
> ñ*I am an authority in election law and there are very few of us in this country. I am also one of the world's experts on extradition and mutual assistance cases*.ò

[7] In dismissing the appellantôs appeal, the learned Judge held that the 2 articles contained laudatory remarks and statements about the appellant and his firm which were beyond the scope of ñapproved informationò allowed by the 2001 Rules. The learned Judge also held that the opinion of the Bar Council under r 15(1)(b) of the 2001 Rules is the primary consideration insofar as it relates to the question as to whether what was said at the interview will reasonably give rise to an inference that the appellant is attempting to publicize his practice.

SUBMISSION OF PARTIES

[8] The essence of the appellantôs argument may be summarised as follows:

a) the words contained in the first article were the journalistôs own opinion;
b) he did not publicize himself and his firm; and
c) the 2 statements in the second article are not laudatory statements.

[9] On the first ground, the appellant argued that the words published in the first article were not his statements and as such he could not have been said to have advertised himself and his firm. As such, it was impossible for him to withdraw the first article.

[10] On the second ground, the appellant argued that the word ópublicizeô in r 5 of the 2001 Rules means to make known to the public through any form of advertisement. As r 5 must be read and taken to refer to advertisements made for the purposes of publicity, there must be an advertisement to promote the sale of that which is being advertised. In this instance, the appellant argued that there was no advertisement at all. Merely mentioning that one is a specialist or has expertise in answer to a question by a journalist is not publicity. The appellant also referred to numerous instances to support his argument that no action has been taken by the Bar Council against other advocates and solicitors whose practice and firms are being ólaudedôand praised.

[11] On the third ground, the appellant argued that the 2 statements must be read in the context of the second article as a whole. He submitted that his references to Judges who had presided over his previous cases were given in a neutral, totally non-contemptuous way. The interview was to address certain public perceptions that were wrongly held and generally educational to the general public. The testimony of the journalist was

wholly disregarded by the DC, DB and the learned Judge. In the circumstances, the appellantôs intention is relevant with respect to the fact of what the journalist had asked in her scope of questioning him, what was her purpose of the interview and what was the general message that came out from reading the article.

[12] In reply, learned counsel for the Bar Council argued that the references to previous cases and Judges are irrelevant. The whole point of the 2001 Rules is simply that one cannot say that one is good. It is sufficient to show that the appellant described himself as an authority and an expert; the appellantôs intention is irrelevant. The 2 statements are laudatory remarks uttered by the appellant. In making the statements, the appellant had allowed information beyond the scope of áapproved informationôas defined under r 2 of the 2001 Rules to be publicized with regard to his practice and firm. The said rule expressly prohibits an advocate and solicitor when engaged in an interview with the press, radio or television from divulging information other than the áapproved informationô

[13] Learned counsel for the Bar Council also argued that courts must exercise caution when entertaining an appeal in which the central question is whether a particular conduct is unprofessional and cases meriting curial interference will be rare. It is primarily for the members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession (***Gana Muthusamy v Tetuan Lim Ong & Co [1998] 2 MLRA CA 208, 209***).

DECISION OF THE COURT

[14] Upon perusing the entirety of the 2 articles in question, we are inclined to agree with the appellantôs argument that the statements must be read in the context of the articles as a whole.

[15] In the first instance, we agree with the learned judge that the words describing the appellant as a top and high profile lawyer in the first article were the journalistôs own remarks; as are the journalistôs remarks relating to people finding the appellantôs office (without any signboard) because of the appellantôs reputation. We take the view that the said remarks reflected the journalistôs personal opinion. It was something which the appellant could not have prevented the journalist from expressing. At any rate, we are not satisfied that there is any evidence to show that the appellant solicited the interview or that the appellant wanted to publicize his practice or his firm. In the circumstances, the words in question cannot be ascribed to the appellant as being laudatory and in contravention of r 5 of the 2001 Rules.

[16] We now turn to the 2 statements in the second article. We agree with the submission of the appellant that the statements in question were made with respect to the scope of the journalistôs questions.

[17] It is apparent from a perusal of the second article that the appellantôs views were solicited on a variety of topics including the following:

(i) SUHAKAM, Batu Buruk, inquiries and conflict of interest; and

(ii) high profile cases, the secret to court victories and the AGôs post.

[18] The first statement relating to the AG Chambers always sending their best team against the appellant was made in response to allegations that the appellant won his cases because of shoddy police investigations or weak prosecution. The appellant submitted that he wanted to impress upon the journalist that he did not win cases simply because his opponent played dead; but that the criminal justice system was at its best, at least in his cases. The appellant also submitted that the cases he was involved were controversial and of public interest and that the 2 problems did not exist. The police had investigated well and the best prosecutors were involved in all of his cases to prosecute these cases.

[19] The second statement relates to the appellant being an authority in election law and an expert on extradition and mutual assistance cases. According to the appellant, the statement was made in answer to questions about whether the judiciary was corrupt. He came up with an explanation that though it was at one time, it is no longer the case. In particular, the second statement was in response to the journalistôs remarks that the appellant take on cases ranging from murder, corruption, to defending the underworld ñkingsò, and to the question whether the appellant have a preference. In answer to the question, the appellant alluded to his stint as a prosecutor and to the cases undertaken and the type of work with references to the specialized areas in which he practices including election law and extradition and mutual assistance cases.

[20] We have perused the second article and are of the view that the statements in question are not laudatory remarks within the meaning of r

5 or 15 of the 2001 Rules. The statements were made in the course of an extensive long interview and in response to questions about the criminal justice system and the appellantôs preference insofar as work was concerned. We agree with the appellantôs submission that read in that light, the references to his expertise in election law and extradition law and mutual assistance in criminal matters can to a large extent fall under ñapproved informationòunder r 2(m) and 2(g) of the 2001 Rules.

[21] Disciplinary proceedings are quasi-penal in nature. The DB has the power to impose any one or more of the following penalties or punishments:

i. to be struck off the Roll;
ii. to be suspended from practice for up to 5 years;
iii. to be ordered to pay a fine of up to RM50,000.00; or
iv. to be reprimanded or censured.

[22] In this regard, we do not think that the phrase ñin the opinion of the Bar Councilòin r 15 of the 2001 Rules should be construed narrowly. As stated in ***Gana Muthusamy v Tetuan Lim Ong & Co*** **(supra)** it is primarily for the members of the Bar to decide what amounts to misconduct and this is reflected in the written rules of the legal profession. In this regard, it is for the Bar Council, the DB or DC to interpret the provisions of the rules. The final arbiter on the interpretation of the rules is the Court. In interpreting the provisions of the rules, the Court will apply the objective test. The Court will place itself as far as possible as members of the Bar in order to determine whether there is any breach of the rules.

[23] In other words, the fact that the statements are laudatory in itself does not automatically led to the conclusion that there has been publicity within the meaning of the 2001 Rules. The statements must be read within the context of the entirety of the articles and surrounding circumstances. The other factors which the DC and DB ought to have considered are: (i) the intention of the appellant with respect to the fact of what the journalist had asked in her scope of questioning him; (ii) the intention of the journalist as to the purpose of the interview; and (iii) the general message that came out from reading the articles.

[24] Accordingly, looking at the statements in question objectively and in the context of which they were made, we are of the view that there was no publicity within the meaning of the 2001 Rules. Accordingly the appellant did not breach the 2001 Rules. Therefore, the appeal is allowed. We order that the penalty paid by the appellant to be refunded. We make no order as to costs.

sgd

(VERNON ONG)
JUDGE
COURT OF APPEAL
MALAYSIA

DATED : 23rd July 2015

COUNSEL:

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24.8.2015