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36,1956

No. 39 of 1955.

In the Privy Council.

UNIVERSITY OF LONDON
VIC. I

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA. 20 FEB 1957

ADVANCED
LEGAL STUDIES

BETWEEN

MAHARAJ KRISHAN BHANDARI . . . *Appellant*

46073

AND

THE ADVOCATES COMMITTEE . . . *Respondent.*

Case for the Appellant.

RECORD.

10 1. This is an appeal from a judgment, dated the 11th June, 1955, pp. 123-130.
of the Court of Appeal for Eastern Africa (Nihill, P., Worley, V.-P. and
Corrie, J.), dismissing an appeal from a judgment, dated the 22nd March, pp. 95-112.
1955, of the Supreme Court of Kenya (O'Connor, C.J., and Bourke, J.),
which Court, on consideration of a report laid before it by the Advocates pp. 60-73.
Committee, ordered that the Appellant, an advocate practising in Kenya,
should be admonished for professional misconduct.

20 2. At different stages of the proceedings various charges, with
varying degrees of clarity, were made against the Appellant. The most
important of these, on which in substance the case for and against
the Appellant must turn, was a charge that, when acting as counsel in
certain proceedings before Hooper, J., in the Supreme Court, he had
failed to disclose to Hooper, J., a judgment given in earlier proceedings
before Cram, Ag. J., which should properly have been disclosed. The
Appellant's answer was that he had indeed disclosed it so far as he had
an opportunity to do so, and would have made even fuller disclosure had he
had the opportunity.

30 The Appellant's main complaints are that he was wrongly found to
have failed in disclosure when there was no evidence on which he could
be held to have so failed ; that a wrong standard of proof was applied ;
and that it was wrong to find him guilty when he had given explanations
which were not disproved and were consistent with his innocence.

3. The following are the relevant parts of the Advocates Ordinance, 1949 :—

“ 9. (1) Any application—

(a) by an advocate to procure his name to be removed from the Roll ; or

(b) by any person to strike the name of an advocate off the Roll, or to require an advocate to answer allegations contained in an affidavit,

shall be made to and heard by the Committee in accordance with rules made under the next succeeding section ; 10

Provided that where, in the opinion of the Committee an application under paragraph (b) of this sub-section does not disclose any *prima facie* case, the Committee may refuse such application without requiring the advocate to whom the application relates to answer the allegations and without hearing the applicant ;

(2) On the hearing of an application under paragraph (a) of sub-section (1) of this section the Committee may make an order removing the name of such advocate and may make such other order in relation to the case as it may think fit.

(3) On the hearing of an application under paragraph (b) of sub-section (1) of this section— 20

(i) the Committee shall give the advocate whose conduct is the subject matter of the application an opportunity to appear before it, and shall furnish him with a copy of any affidavit made in support of the application, and shall give him an opportunity of inspecting any other relevant document not less than seven days before the date fixed for the hearing ;

(ii) the Committee on the termination of the hearing shall embody their findings in the form of a report to the Court which shall be signed and filed with the Registrar, and shall be open to inspection by the advocate to whom the application relates and his advocate (if any) and also by the applicant, but shall not be open to public inspection ; 30

(iii) If the Committee is of the opinion that a *prima facie* case for the application, or a *prima facie* case of any misconduct on the part of the advocate charged, has been made out, it shall lay a signed copy of the report before the Court, together with the evidence taken and the documents put in evidence at the hearing ; 40

(iv) the Committee shall have power to make any such order as to payment by any party of any costs or witness expenses as it may think fit.

* * * * *

10. (3) The hearing of an application under section 9 of this Ordinance shall for the purpose of Chapter XI of the Penal Code be deemed to be a judicial proceeding.

11. (1) The powers conferred upon the Court by sections 12, 14 and 15 of this Ordinance shall be exercised by not less than two of the judges of the Court.

(2) If such powers are exercised by two judges and the Court is equally divided, the matter shall be reheard by three judges.

(3) If such powers are exercised by three judges and they do not agree in their opinion the decision of the majority shall be taken to be the decision of the Court.

10 12. The Court may set down for consideration the report of the Committee made under section 9 of this Ordinance. Not less than fourteen days' notice of the date for such consideration shall be given to the Committee and to the advocate charged. The Registrar shall forward with the notice a copy of the report. The notice shall be in such form as may be prescribed.

13. Both the Committee and the advocate charged may be legally represented before the Court.

* * * * *

20 15. (1) The Court, after considering the evidence taken by the Committee and the report and having heard the advocate for the Committee and the advocate to whom the application relates or his advocate, and after taking any further evidence, if it thinks fit to do so, may admonish the advocate to whom the application relates or may make any such order as to removing or striking his name from the Roll, as to suspending him from practice, as to payment by him of a fine not exceeding ten thousand shillings, as to the payment by any person of costs and otherwise in relation to the case as it may think fit.

30 (2) Any person aggrieved by a decision or the order of the Court under this section may, within 30 days of such decision or order, appeal therefrom to the Court of Appeal for Eastern Africa."

4. The case in which the misconduct was alleged to have been committed arose under the Immigration (Control) Ordinance and the Regulations made thereunder. The following are the relevant parts of the Ordinance and the Regulations :—

" 5. (1) The following persons, other than permanent residents, are prohibited immigrants and their entry into or presence within the Colony is unlawful except in accordance with such provisions as may be prescribed—

* * * * *

40 (g) Any person against whom there is in force an order of deportation from the Colony made under the provisions of this Ordinance or any other law.

* * * * *

Provided that, subject to the provisions of sub-section (3) of this section—

- (i) Any person who is in possession of a valid Pass or permit allowing such person to enter the Colony issued under the provisions of any regulations made under this Ordinance shall not, during the period for which such Pass or permit is issued be deemed to be a prohibited immigrant and
- (ii) When such person shall be in possession of a valid permit issued to him under the provisions of sub-section (i) of section 7 of this Ordinance, his name shall be endorsed 10 upon a valid entry permit in accordance with the provisions of section 8 of this Ordinance, he shall cease to be a prohibited immigrant ;

* * * * *

(3) Any person who has entered the Colony whether before or after the commencement of this Ordinance who, at any time before the expiration of four years of such entry, is found by the Principal Immigration Officer to have been a prohibited immigrant under the law in force at the time of his entry shall be deemed to have been one at the time of such entry.

* * * * *

9. (1) The Governor may make an order directing that any 20 prohibited immigrant or any person whose presence within the Colony is, under the provisions of this Ordinance, unlawful, shall be deported from and remain out of the Colony, either indefinitely or for a time to be specified in the Order.

(2) An order made under this section shall be carried into effect in such manner as the Governor may direct.

(3) A person against whom an order under this section is made may, if the Governor so directs, while awaiting deportation and whilst being conveyed to the place of departure, be kept in custody, and whilst so kept shall be deemed to be in legal custody. 30

(4) Where any person is brought before a Court under the provisions of this Ordinance and the Court is informed that an application for an order under this section in respect of him is being made, the Court may direct that such person be detained for any period not exceeding fourteen days.

(5) An order made under this section shall remain in force until such time as it is varied or revoked by the Governor."

Regulations.

"19. (1) The kinds of passes which may be issued to a person entitling such person to enter and remain temporarily 40 within the Colony shall be as follows—

- (a) an In Transit Pass ;
- (b) a Dependant's Pass ;
- (c) a Temporary Employment Pass ;

- (d) a Pupil's Pass ;
- (e) a Special Pass ;
- (f) a Visitor's Pass ;

(2) The issue of any pass of a kind mentioned in this regulation shall be in the absolute discretion of the Principal Immigration Officer.

* * * * *

10 21. (1) A Dependant's Pass may be issued by the Principal Immigration Officer upon application as in Form 9 in the First Schedule hereto by a resident of the Colony in respect of any person as to whom the Principal Immigration Officer is satisfied that—

- (a) such person is a dependant of such resident ; and
- (b) such resident is able to provide and to continue to provide adequate accommodation for such dependant ; and
- (c) such resident has in his own right and at his full and free disposition an assured income sufficient adequately to maintain and to continue to maintain such dependant.

(2) A Dependant's Pass shall entitle the person in respect of whom such Pass is issued to enter the Colony within the period stated in such Pass and to remain therein for such time only as—

- 20
- (a) the resident upon whose application such Pass has been issued remains a resident of the Colony ; and
 - (b) such person remains a dependant of such resident.

(3) Every Dependant's Pass shall be as in Form 10 in the First Schedule hereto.

22. (1) A Temporary Employment Pass may be issued by the Principal Immigration Officer upon application made to him as in Form 11 of the First Schedule hereto to any person, if the Principal Immigration Officer is satisfied after consultation with the Labour Commissioner—

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- (a) that such person is qualified to undertake employment in the trade, business or calling in respect of which the application is made ;
 - (b) that there is not already unemployment in that class of trade, business or calling to an extent which, in the opinion of the Principal Immigration Officer, would make the taking up of such employment prejudicial to the economic interests of the inhabitants generally of the Colony ; and
 - (c) that the taking up of such employment will not be prejudicial to the interest, whether economic or otherwise, of the
- 40

(2) A Temporary Employment Pass shall entitle the holder thereof to enter the Colony within the period stated in such pass and to remain therein for the purpose of engaging in the employment specified in such Pass for such period not exceeding four years as shall be stated in such Pass :

Provided that where, in the first instance, a Pass is issued for a period of less than four years, the Principal Immigration Officer may extend such period, but so that the total period does not exceed four years.

(3) Every Temporary Employment Pass shall be as in Form 12 in the First Schedule hereto.

(4) If the person to whom such Pass was issued fails to take up such employment or does not continue therein, he shall report that fact to the Principal Immigration Officer and, if he fails so to report his Temporary Employment Pass shall become void. 10

(5) The employer or proposed employer of any person to whom a Temporary Employment Pass has been issued shall forthwith report to the Principal Immigration Officer if such person—

- (a) does not take up such employment ; or
- (b) is discharged from or leaves such employment.

(6) Upon receiving any such report as aforesaid the Principal Immigration Officer may, in his absolute discretion, cancel the Temporary Employment Pass, or subject to such conditions as he may impose, permit a holder of Temporary Employment Pass to work for an Employer other than the Employer specified in the Pass, and issue a new or amended Pass, for any period expiring not later than four years from the date of the original Pass.” 20

pp. 34-36.

5. On the 7th June, 1954, the Appellant's firm, acting on behalf of an Indian lady (a British subject) named Mrs. Shantaben, issued a plaint in the Supreme Court of Kenya in proceedings by way of petition of right against the Attorney-General of the Colony, claiming a declaration of her right to remain within the Colony. The proceedings had a reference number No. 675 of 1954, and are sometimes hereinafter referred to as No. 675.

The following allegations were made in the Plaint :—

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p. 34, ll. 18-29.

On the 16th July, 1951, the Plaintiff, being then a widow, entered the Colony on a temporary employment pass, which was still valid and current. In July, 1953, she married a British subject, permanently resident in Kenya. On the 24th July, 1953, her husband applied for a dependant pass for her. On the 24th October, 1953, the Principal Immigration Officer approved this application, but on the 5th November, 1953, he rescinded this decision and refused to issue a dependant pass. The Plaintiff had never been declared a prohibited immigrant, but on the 10th April, 1954 the Acting Governor made a Deportation Order against her, under Section 9 (1) of the Immigration (Control) Ordinance. This order had been unlawfully made, as such orders could only be lawfully made against persons who were either prohibited immigrants or unlawfully within the Colony.

p. 34, ll. 30-33.

p. 35, ll. 1-13.

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p. 35, ll. 30-41.

Accordingly the Plaintiff claimed a declaration that she was not a prohibited immigrant and that her presence in the Colony was lawful.

6. This action was dismissed by Cram, Ag. J., on the 18th November, 1954. The learned Judge held that the action, having been brought as a petition of right, was wrong in form; but he went on to deal with the Plaintiff's claim on the merits. On the merits, he held that the Plaintiff was unlawfully within the Colony, was a prohibited immigrant, and was subject to the Deportation Order, which had been properly made; that her temporary employment pass had expired, and she had never been the subject of a dependant pass: and that the Principal Immigration Officer had acted within his competence in rescinding his decision to issue a
10 dependant pass. pp. 10-29.

7. The Appellant appeared for the Plaintiff in this action and when this judgment had been given he gave notice of appeal on her behalf. At the same time, he made a Motion on Mrs. Shantaben's behalf for orders *nisi* for a writ of mandamus directed to the Principal Immigration Officer, ordering him to issue to her a dependant pass, and for a writ of certiorari directed to the Deputy Governor to show cause why the Deportation Order should not be removed into the Supreme Court and quashed. Whilst it was not at any time suggested that it was in any way wrong on the Appellant's part to launch these proceedings, it may be helpful to see that they were
20 in truth proper proceedings to bring. They were, the Appellant submits, proceedings in which it might well be right for the Court to grant the relief asked; and they were possibly the only proceedings wherein Mrs. Shantaben might get relief if the arguments of law on her behalf were accepted. Cram, Ag. J., had held that proceedings of this nature were the correct procedure, and that it was wrong to proceed by petition of right; and the appeal from his decision on the merits might well have failed on the ground that he had no jurisdiction to decide the merits. These proceedings had a reference number, M.C.A. No. 22 of 1954, and are sometimes hereinafter referred to as No. 22. pp. 136-137.

8. In support of this Motion, the Appellant drew an affidavit, to which Mrs. Shantaben deposed on the 29th November, 1954. In this affidavit she swore as follows:—
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She had entered the Colony on the 16th July, 1951, to work at a School in Nairobi, under a temporary employment pass which was still valid and current. In July, 1953, she had left her work at the School and had reported this to the Principal Immigration Officer through her employers and later by herself personally. She had married, and her husband had applied for a dependant pass, as set out in the Plaint No. 675. She had never been declared
40 a prohibited immigrant, and was informed by her Advocates that the Deportation Order made against her was not valid, as she was not a prohibited immigrant, and her presence in the Colony was not unlawful.

9. This Motion came before Hooper, J., on the 8th December, 1954, the Appellant appearing for Mrs. Shantaben. The question was then raised whether the Motion should have been served on the Attorney-General or whether it should be moved *ex parte*. The hearing was accordingly adjourned for that question to be cleared up. The Appellant submits
p. 31, ll. 14-22.

that it was no part of his duty to mention in the affidavits in No. 22 the judgment of Cram, Ag. J., in No. 675, but that it was his duty to disclose the said judgment to Hooper, J., in the course of the hearing of his Motion. All that had to be shown in the affidavits in No. 22 was the grounds on which Mrs. Shantaben claimed to be entitled to relief. The earlier proceedings were no part of these grounds, but were merely circumstances which were proper to be considered by Hooper, J., in exercising his discretion.

The Appellant submits further that the time for fulfilling this duty of disclosure had not arrived, and in any case had not passed, on this (the first) day of the hearing of the Motion. 10

p. 139.
p. 3, ll. 9-19.

10. It having been ascertained that the Motion should properly be moved *ex parte*, it came before Hooper, J., again on the 10th December, 1954. The learned Judge then pointed out to the Appellant that Mrs. Shantaben's affidavit contained a mis-statement in that it was stated therein that the temporary employment pass was still valid and current, whereas it was clear from the pass itself, which was exhibited to the affidavit, that it had expired. The Appellant said that this was a mistake, and he would file a supplementary affidavit to correct it.

p. 3, ll. 27-30.

The question also arose on this hearing as to how Mrs. Shantaben was still in the Colony, after a Deportation Order had been made against her. The Appellant stated that the operation of the Order had been suspended, and undertook to produce correspondence showing this to be so. 20

p. 5, ll. 24-36.

At this hearing, the Appellant (who, it must be remembered, has been found guilty of gross negligence amounting to professional misconduct in failing to disclose to Hooper, J., in the proceedings of No. 22 the judgment of Cram, Ag. J., in No. 675) stated to Hooper, J., that Cram, Ag. J., had already given a long judgment, in which he ruled that the correct procedure was by way of prerogative writ. Hooper, J., answered that he had not time to read the judgment then, and adjourned the Motion for the supplementary affidavit to be filed. 30

The Appellant submits that the time for fulfilling his duty to disclose to Hooper, J., the judgment of Cram, Ag. J., in No. 675 had still not arrived, and had certainly not passed. Nevertheless, the Appellant, as just stated, had already mentioned the existence of that judgment, an action which is surely, at the least, inconsistent with his having any intention of concealing (which must in any event have been impossible of achievement) the existence and terms of the said judgment.

p. 30, l. 44- p. 31,
l. 2.

(It should be added that the mistake as to the currency of the pass was one that could quite easily be made, since temporary employment passes were at the time commonly granted for four years, and not for three, as had actually been done in the case of Mrs. Shantaben. Moreover, the mistake was of no importance, since the pass had been still current at the time when the Deportation Order was made. Hooper, J., nevertheless treated the mistake—which was later regarded as of no importance—as a somewhat serious matter in his memoranda hereinafter mentioned). 40

pp. 3-7.

pp. 36-37.

11. Mrs. Shantaben deposed to the said supplementary affidavit on the 14th December, 1954. In it, she swore that her temporary employment

pass had expired on the 16th July, 1954, but that it had been valid when the Deportation Order had been made, which she considered to be the material time. She expressed regret for the mistake in her original affidavit. Mrs. Shantaben added in this affidavit that, to the best of her knowledge and belief, the Governor had agreed to suspend the operation of the Deportation Order to enable her to institute proceedings with a view to establishing her right to remain in the Colony. (It was at one stage made a matter of complaint against the Appellant that he had added this paragraph to the affidavit ; but this complaint also disappeared). p. 37, ll. 10-15.

10 12. The Motion came before Hooper, J., for the third time on the 15th December, 1954. p. 139.

The Appellant informed Hooper, J., that he had been unable to find the correspondence mentioned in paragraph 10 hereof, establishing that the operation of the Deportation Order had been suspended, but that if Hooper, J., would send for the file in No. 675 he would find all the papers relating to the matter. The hearing was then adjourned once again, to enable Hooper, J., to study the file. p. 3, ll. 30-36.

20 Correspondence showing that the operation of the Deportation Order had been suspended was in existence ; and, if the Appellant had any intention (or any hope) of concealing the judgment of Cram, Ag. J., in No. 675 from Hooper, J., he would presumably have taken the trouble to have it available, instead of referring the learned Judge to the file which inevitably involved his seeing the whole judgment of Cram, Ag. J.

The Appellant submits that the time for fulfilling his duty to disclose the judgment to Hooper, J., had still not arrived, and had certainly not passed ; the Motion had still not been heard—indeed, had not begun to be heard—on the merits. Nevertheless, the Appellant had already taken a step which involved for certain full disclosure of the judgment and all its terms.

30 13. The Motion came on for hearing again, for the fourth and last time, on the 17th December, 1954. pp. 139-140.

The Appellant might well have expected that now, with the judgment of Cram, Ag. J., before the learned judge, the application would be heard on the merits, and that he would have been able to submit that the procedure by way of prerogative writ being the correct procedure, his client was entitled to the Order *nisi* which she sought in spite of the judgment of Cram, Ag. J., this procedure being the best, and very likely the only available, to test whether the view of Cram, Ag. J., that the Deportation Order was valid was good or bad in law.

40 However, Hooper, J., who had in fact read the judgment of Cram, Ag. J., cut the matter short. He began by asking the Appellant why it was that, knowing that Cram, Ag. J., had declared the pass to be invalid, he had produced an affidavit saying that it was valid, and why he had not explained the whole position ; and he at once dismissed the Motion with costs (although it is not clear what costs there could be payable to the Crown, the application being *ex parte*). p. 4, ll. 37-42.
p. 6, ll. 19-33.

p. 4, ll. 35-36. The Appellant submits that there is no foundation for complaining of this affidavit, still less for describing it as "patently false," as Hooper, J., did in his Memorandum hereinafter mentioned. The effect of the affidavit was merely to assert the validity of a pass which validity was a matter of conclusion of law, on which the Appellant and his client were entitled to put forward the view that it was valid. He submits that the circumstances called for disclosure of the judgment of Cram, Ag. J., and nothing more.

(This accusation of falsity later disappeared from the proceedings against the Appellant.) 10

p. 1. 14. Hooper, J., thereupon brought the matter of the Appellant's alleged misconduct to the notice of the Acting Registrar of the Supreme Court, and on the 24th December, 1954, the Acting Registrar made an application to the Advocates Committee (the Respondent herein) under the Advocates Ordinance that the Appellant should be required to answer the allegations contained in the affidavit accompanying the application.

p. 2.
pp. 3-7. The affidavit did not in itself contain any allegation, but it exhibited, among other documents, two Memoranda of Hooper, J., dated respectively the said 17th December and the 20th December, 1954. The latter of these formulated three charges or possible charges, viz. :— 20

p. 6, l. 37-p. 7, l. 6.

(1) non-disclosure of the fact that Cram, Ag. J., had already adjudicated on the matter dealt with in No. 22.

(2) attempting to give Hooper, J., the impression that in making the application No. 22 the Appellant was acting on the "injunctions" of Cram, Ag. J., or in virtue of his judgment to that effect ;

(3) supporting the application No. 22 "by an affidavit he himself drafted which was false in a material particular, namely, that the temporary employment pass was still valid, and which, in view of Cram, J.'s, judgment, he must have known was not true." 30

pp. 29-33.
p. 30, l. 38-
p. 31, l. 13.

p. 32, ll. 20-23. 15. On the 12th January, 1955, the Appellant swore an affidavit in answer. As regards the temporary employment pass, he said he had included in the draft affidavit the statement that it was still valid because such passes were normally valid for four years, and he did not realise that this particular pass was valid for three years only. The pass had been at the time of his drafting the affidavit in the custody of the Court as an exhibit in No. 675, so that he had not been able to check the matter. After getting the pass released from the Court, he had attached it to the affidavit as an exhibit, but had not scrutinised it. He said that on the 17th December, 1954, he had tried to explain to Hooper, J., that he had not had the opportunity to lay all the facts before him, because up till then the Motion had not been heard on its merits. It had always been his intention to refer to the earlier action and to argue that in spite of it Mrs. Shantaben was entitled to the prerogative writs. He had thought that it would be more convenient to refer to the earlier proceedings in argument than to set them out in the affidavit. 40

p. 32, ll. 23-27.

p. 32, ll. 42-46.

16. The matter came before the Advocates Committee, consisting of the Attorney-General, the Solicitor-General and two practitioners, on the 29th January, 1955. It was stated at the outset that Hooper, J., considered it incompatible with his position to give evidence and submit himself to cross-examination. Accordingly, both sides agreed that the two memoranda, submitted by the learned Judge to the Acting Registrar, should be accepted as evidence of facts, any expressions of opinion or inference in those memoranda being excluded from consideration. The Acting Registrar gave formal evidence, and the Appellant gave evidence in accordance with his affidavit.

p. 38, l. 31-
p. 39, l. 17.

pp. 40-60.

17. The Committee made their report on the 3rd February, 1955. After setting out the history of the case, they said that there were two allegations against the Appellant: First, that he had procured Mrs. Shantaben to swear, and had filed in Court, the affidavit of the 29th November, 1954, knowing that its contents were false; secondly, that he had failed to disclose to the Court matters most material to the case. In answer to these allegations, various defences had been set up. The Appellant said that when he allowed Mrs. Shantaben to swear that the temporary employment pass was still valid, he thought the material time was the date of the Deportation Order, i.e., the 10th April, 1954. The Committee said that even if that were so, Cram, Ag. J., had decided that the pass had become void in June, 1953, and the Appellant had included no reference to this decision in either of Mrs. Shantaben's affidavits. The Appellant had contended that the truth of the statement in the affidavit was a matter of law. The Committee thought that, nevertheless, after the decision of Cram, Ag. J., the Appellant should not have made the unqualified statement that the pass was valid, without any reference at all to this decision. The Appellant had further contended that it was not necessary to mention Cram, Ag. J.'s judgment in the affidavit, but the Committee thought that it was necessary to mention at least the substance of it in order to avoid creating a misleading impression. The most important issue in the case, they said, was raised by the Appellant's contention that he had no intent to deceive or mislead the Court. It had been urged on his behalf that he had given an assurance to this effect to Hooper, J., and had repeated it in his affidavit and in his oral evidence. The Committee held that this assurance had little value because it had been given after the learned Judge had discovered the inaccuracies in the affidavit. Secondly, it had been argued on the Appellant's behalf that he had actually mentioned Cram, Ag. J.'s judgment to Hooper, J., on the 10th December, and on the 15th December had given the learned Judge the number of the earlier action and suggested that he should send for the file. The Committee held that the Appellant's purpose in mentioning the judgment on the 10th December had been merely to justify his proceedings by way of prerogative writ; and the fact that, when Hooper, J., said that he was not going to read the judgment, the Appellant did not tell him the substance of it, was evidence that the Appellant never intended to disclose the substance of the judgment. Dealing with the hearing on the 15th December, the Committee found that the events of that day confirmed their opinion that the Appellant endeavoured throughout to mislead the Court, because he mentioned the number of the earlier action only when Hooper, J., insisted on seeing the documents to explain why

pp. 60-73.

pp. 60-67.

p. 67, ll. 18-33.

p. 67, l. 34-

p. 68, l. 22.

p. 68, ll. 25-31.

p. 68, l. 42-

p. 69, l. 7.

p. 69, ll. 17-27.

p. 70, l. 22-

p. 71, l. 17.

p. 71, ll. 35-40.

p. 71, ll. 18-25.

p. 71, l. 41-

p. 73, l. 15.

p. 71, ll. 26-28.

p. 73, ll. 16-20.

p. 73, ll. 27-30.

Mrs. Shantaben was still in the Colony. The Appellant had said that he not only intended to disclose the earlier proceedings at a later stage but would have been obliged to do so ; but the Committee considered this did not excuse his " repeated failures " to do so in the proceedings which had taken place. The Committee found that it was fully established that the Appellant had intended to deceive and to mislead the Court, and that a *prima facie* case of disgraceful and dishonourable conduct had been made out.

18. The Appellant submits that the Respondent Committee were wrong in their view that the Appellant should have made the necessary disclosure in the affidavit, and were wrong in all their strictures on the Appellant in relation to the affidavit ; and further that they were wrong in their view that the Appellant had no intention of disclosing the judgment of Cram, Ag. J., and had not disclosed it. The Committee, he submits, drew inferences of guilt against him which were quite unwarranted and were inconsistent with the application of a proper standard of proof. 10

19. The Committee laid their report before the Supreme Court for its consideration, under Section 9 (3) (iii) of the Advocates Ordinance (set out above, in paragraph 3).

pp. 95-112.

pp. 96-105.

p. 100, ll. 16-25.

The report came on for consideration before O'Connor, C.J., and Bourke, J., on the 7th and 8th March, 1955. The judgment of the Court was delivered on the 22nd March, 1955. The learned Judges first set out the history of the proceedings. In dealing with Mrs. Shantaben's affidavits, they referred to the duty of a person holding a temporary employment pass to report to the Principal Immigration Officer any change of employment, and said that the duty was to make a report within fourteen days. They said it was obvious Mrs. Shantaben's pass had expired in July, 1953, because she had left her employment on the 24th June, 1953, and had not made the required report. The learned Judges were wrong in thinking that Mrs. Shantaben's duty had been to make the report in fourteen days. 30
The provision limiting the time for making the report to fourteen days had been introduced by a subsequent amendment, and at the material time no specific period had been laid down, so that the relatively elastic requirement of reporting within a reasonable time was all that lay upon Mrs. Shantaben.

The Appellant submits that much of the reasoning in the judgment of the Supreme Court was vitiated by this unfortunate error.

pp. 101-104.

In dealing with the proceedings before Hooper, J., on the Motion, No. 22, the learned Judges set out the whole of his Memoranda, including his statements of impression and opinion, in spite of the agreement between the parties that these Memoranda should be considered only in so far as they stated the facts. This was a particularly unfortunate error, for perusal of the Memoranda demonstrates, in the Appellant's submission, that Hooper, J., had unfortunately received a number of unfavourable impressions (and drawn a number of unfavourable inferences) which the facts did not justify. 40

- Coming to the allegations against the Appellant, the Court first dismissed the allegation arising out of the mis-statement in the affidavit that the employment pass was still valid. They held that in this matter the Appellant had no intention to deceive. The main charge against the Appellant, however, in their view, had been that he wilfully concealed the judgment of Cram, Ag. J., from Hooper, J. The learned Judges held that Hooper, J., should have been informed of the earlier judgment. The prerogative writs were, they said, discretionary remedies, and in deciding whether to grant them it was essential for the Judge to know that another Judge of the Supreme Court had recently given a judgment in the case, which judgment was under appeal. It had, they said, been the Appellant's duty to put before Hooper, J., all the relevant facts, including the existence and the nature of the judgment of Cram, Ag. J. The Appellant had said that he had always intended to do this ; but when first he mentioned Cram, Ag. J.'s judgment to Hooper, J., he had given the impression that the judgment dealt only with procedure, and he had never told the learned Judge that the decision of Cram, Ag. J., was against him on all the points which he was then raising, and was still subject to appeal. The Court came to the conclusion that the affidavits drawn by the Appellant were deliberately misleading, that he had misrepresented the effect of Cram, Ag. J.'s judgment and refrained from disclosing its full contents, and had postponed, until he could no longer do so, the mention to Hooper, J., of the reference which enabled the learned Judge to discover for himself the contents of that judgment.

p. 105, ll. 6-23.

p. 105, ll. 24-26.

p. 107, l. 23-

p. 111, l. 8.

p. 111, ll. 16-28.

p. 111, ll. 29-42.

20. The Appellant submits that the reasoning of the learned Judges of the Supreme Court is not only vitiated by the two errors already mentioned, but it is still more unsatisfactory in ignoring that the Appellant, even before the hearing of the Motion on the merits had begun, had in fact made disclosure to Hooper, J., of the judgment of Cram, Ag. J.
- 30 21. The Supreme Court inflicted upon the Appellant only the penalty of admonition, realising that the finding of itself entailed serious consequences for him. It is, of course, for this reason that the Appellant—feeling that he has been not rightly condemned—brings this appeal.

p. 112, ll. 7-11.

pp. 114-117.

pp. 123-130.

22. From this judgment, the Appellant appealed to the Court of Appeal for Eastern Africa, his memorandum of appeal being dated 4th April, 1955. The appeal was argued on the 1st, 2nd and 3rd June, 1955, and the judgment of the Court was delivered by Nihill, P., on the 11th June.
- 40 The Court said that there were two matters in which the Supreme Court had gone a little wrong, but they considered these matters to be unimportant. First, there had been the mistaken statement that at the material time the period for reporting a change of employment had been fourteen days. It had been conceded that at that time the report had to be made within a reasonable period, so this mistake did not really affect the findings of the Supreme Court. Secondly, the Supreme Court had referred to an "impression" of Hooper, J., contrary to the agreement between the parties ; but they had gone on "to refer also to what is a

p. 124, ll. 37-39.

p. 124, l. 40-

p. 125, l. 29.

p. 125, l. 30-

p. 126, l. 2.

fact, because it is stated by Mr. Justice Hooper in his memorandum that he is sure that at no time was he told directly or indirectly, or in any way whatsoever by the advocate that another Judge of the Supreme Court had already ruled against his client on all the points on which he was asking Mr. Justice Hooper to rule in her favour. It is clear, therefore," the Court of Appeal concluded, "that the lapse made by the Court in referring to an 'impression' is quite immaterial."

p. 126, ll. 3-43.

The whole issue in the appeal, the Court said, was whether the inferences drawn from the facts by the Advocates Committee and the Supreme Court were reasonable and correct. Counsel for the Appellant had argued that the standard of proof in such a proceeding was the same as in a criminal case, and that, since the Appellant's explanation was not impossible or improbable, the Committee and the Court, even if not sure that it was true, ought not to have rejected it. The Court held that the standard of proof required was not that applicable in criminal proceedings, but the standard required to establish fraud in civil proceedings. The Committee had understood that the case turned on the issue of intention, and had applied correct principles in reaching their decision. Apart from the two minor matters mentioned, there had been no misdirection on the evidence. The question was, therefore, whether the inferences drawn from the facts were so clearly unjustifiable that the Court should intervene. A decision in such a case by the Committee should carry, the Court said, no less weight than a decision on a matter of fact by a Judge sitting at first instance, and the function of the Supreme Court in considering the report was akin to a confirmatory jurisdiction. Secondly, the Court of Appeal was practically in the position of a second appellate tribunal, and would not interfere with the concurrent findings of the two lower tribunals unless they had distinctly erred. Assuming that Counsel for the Appellant had been right in arguing that the Appellant, whilst under a duty to disclose the earlier judgment in argument before Hooper, J., was under no duty to disclose it in the affidavits, the Court held that, not having disclosed it in the affidavits, he was under a heavy responsibility to bring the whole judgment of Cram, Ag. J., to Hooper, J.'s attention at the first opportunity. It was clear, the Court said, on the agreed facts that he had not done this. Two tribunals had come to the conclusion that he did not intend to make a full disclosure to Hooper, J., if he could help it, and the Court found it impossible to say that this inference was unreasonable. Both the lower tribunals had given their reasons for holding that it was not for any lack of opportunity that full disclosure had never been made, and this finding, too, was not unreasonable. The appeal was therefore dismissed.

p. 126, l. 44-
p. 127, l. 4.

p. 127, l. 10-
p. 128, l. 18.

p. 128, l. 19-
p. 129, l. 3.

p. 129, ll. 3-32.

23. The Appellant submits that the Court of Appeal were wrong in treating the errors of the Supreme Court as of little importance, and above all were wrong in assuming that the Appellant had not disclosed, and did not intend to disclose, the judgment of Cram, Ag. J. It is, he submits, unhappily typical of the misunderstanding of the case through all its stages, not merely that Hooper, J., could write, but also that the Court of Appeal itself could repeat, that "at no time . . . directly or indirectly or in any way whatsoever" did the Appellant inform Hooper, J., of the effect of the judgment of Cram, Ag. J., when it is clear beyond

p. 125, l. 41-
p. 126, l. 1.

dispute that on the 15th December he, perhaps "indirectly," but in a very effective "way," drew the attention of Hooper, J. to the whole of the facts.

The Court of Appeal, the Appellant submits, was further wrong in acting on the view that the degree of proof required in this case was less than that required in criminal cases. The Appellant submits that this view is wrong, and the very serious consequences of a finding of professional misconduct cannot be visited upon a practitioner if the evidence amounts to less than proof beyond reasonable doubt. It is quite uncertain what
 10 decision the Courts below would have reached had they applied this correct standard of proof. Secondly, the Appellant submits that the Court of Appeal was not justified in basing its judgment upon concurrent findings of the Committee and the Supreme Court, but should have made a full examination of the evidence for itself. In consequence of the failure of the Court of Appeal to do this, the Appellant has been deprived of part of the protection to which he is entitled.

24. The Appellant submits that the short and conclusive answer to the charge of failure to make disclosure is that he did make disclosure—and that very effectively—before any argument on the merits of the
 20 Motion had begun. Further, if it be suggested that he had a duty to make disclosure not merely effectively by referring to the file of No. 675 but also expressly orally by stating to Hooper, J., the effect of the judgment in No. 675, there is nothing whatever to show that he did not intend to do so, and would not have done so on the 17th December, 1954, had Hooper, J., not then been already fully seized of the facts as a result of the Appellant's reference to the file. The Appellant has stated throughout the proceedings that it was his intention to make full disclosure when he came to argue his application before Hooper, J. He respectfully submits that there is nothing in the evidence which would justify the rejection of this contention. On
 30 the contrary, there are a number of features in the evidence which go far to indicate that he never had any intention of misleading the Court. On the 10th December, he mentioned the judgment to Hooper, J., at a time when it was not essential for him to do so. On the 15th December, he gave the learned Judge the reference to the earlier proceedings, although it would have been perfectly possible for him himself to obtain the necessary documents showing why Mrs. Shantaben was still in the Colony and to hand them to the Judge. Furthermore, the Appellant had started the proceedings, to which the Attorney-General was a necessary party, and before an order absolute could be obtained the Attorney-General would
 40 inevitably have appeared and the whole story of the earlier proceedings would have come out. The Appellant respectfully submits that, quite apart from the evidence that in fact he had no intention to deceive, no sane person could have started proceedings of this sort with the intention of concealing from the Court the existence of the earlier proceedings.

25. The Appellant respectfully submits that, in view of the absence of anything in the evidence to show the falsity of his own evidence set out above, there was nothing to justify a finding against him. The proceedings before Hooper, J., contained nothing to indicate, much less to prove, that the Appellant intended to withhold anything from the Court.

26. The Appellant respectfully submits that the judgments of the Court of Appeal and of the Supreme Court were wrong and should be reversed and that this Appeal should be allowed for the following among other

REASONS

- (1) BECAUSE there was no evidence that the Appellant committed any professional misconduct ;
- (2) BECAUSE the Appellant made full disclosure of the judgment of Cram, Ag. J., and its effect ;
- (3) BECAUSE there is nothing from which an inference 10 could be drawn that the Appellant intended to conceal that judgment or its effect ;
- (4) BECAUSE there is nothing from which an inference could be drawn that, had Hooper, J., not read the file to which the Appellant had referred him, the Appellant would not have informed him of the judgment of Cram, Ag. J., and its effect ;
- (5) BECAUSE both the Court of Appeal and the Supreme Court, upon whose judgment the Court of Appeal relied, applied the wrong standard of proof ; 20
- (6) BECAUSE the Court of Appeal failed to examine the evidence and attached undue weight to the findings made by the Advocates Committee.

D. N. PRITT.

J. G. LE QUESNE.

HERBERT OPPENHEIMER, NATHAN & VANDYK,
 20 Copthall Avenue,
 London Wall,
 London, E.C.2,
Solicitors for the Appellant.

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In the Privy Council.

ON APPEAL

from the Court of Appeal for Eastern Africa.

BETWEEN

MAHARAJ KRISHAN

BHANDARI . . . Appellant

AND

THE ADVOCATES

COMMITTEE . . . Respondent.

Case for the Appellant.

HERBERT OPPENHEIMER, NATHAN & VANDYK,

20 Copthall Avenue,

London, E.C.2,

Solicitors for the Appellant.