SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

THE LAW SOCIETY OF SOUTH AUSTRALIA v MCKERLIE

[2008] SASC 222

Judgment of The Full Court (*ex tempore*)
(The Honourable Justice Bleby, The Honourable Justice Gray and The Honourable Justice Layton)

12 August 2008

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE

Application by Law Society of South Australia that the defendant's name be removed from the roll of practitioners of the Supreme Court of South Australia - defendant has not practised in South Australia since 1993, and not held a practising certificate since 2000 - in 2004 defendant was convicted of indecent assault and of sexual penetration without consent and sentenced to a term of imprisonment - in the course of his defence, the defendant conducted an unwarranted attack on the character of the complainant - the defendant's conduct both at trial and on appeal precluded any finding of contrition or remorse - in 2007 the defendant's name was removed from the roll of practitioners in Western Australia - whether the defendant should be permitted to remain a member of the legal profession in South Australia.

Held: the name of the defendant be removed from the roll of practitioners of this Court - the defendant's conduct is of a kind that would substantially damage the ability of the defendant to maintain the relationship with other members of the profession that is essential to legal practice - any disciplinary order less than striking off would erode the public confidence in the profession.

Legal Practitioners Complaints Committee v McKerlie [2007] WASC 119; *McKerlie v State of Western Australia (No 2)* [2006] WASCA 274; *Law Society (SA) v Murphy* (1999) 201 LSJS 456; *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253; *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, considered.

Plaintiff: THE LAW SOCIETY OF SOUTH AUSTRALIA Counsel: MR A WARD - Solicitor: D WATKINS
Defendant: COLIN ROBERT MCKERLIE No Attendance
Hearing Date/s: 12/08/2008
File No/s: SCCIV-08-788
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THE LAW SOCIETY OF SOUTH AUSTRALIA v MCKERLIE
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Full Court: Bleby, Gray and Layton JJ

BLEBY J.

1 I agree with the order proposed by Gray J and with his reasons. I merely add a few remarks of my own.

2 The crimes committed by the defendant do not reflect on his personal competence as a lawyer. However, the circumstances surrounding those crimes and the conduct of his defence at the subsequent trial do reflect very seriously on his honesty and integrity. Honesty and integrity are essential prerequisites to the right to practise as a legal practitioner.

3 The defendant's desire for sexual gratification led him to pursue a course of deception and exploitation of the complainant and the commission of very serious criminal offences against her. In the conduct of his defence at the trial his attack on the complainant's character and, as the jury must have found, his lying to the court about the offence in question only compounded the gravity of his conduct.

4 By that conduct he has demonstrated a serious lack of trustworthiness and integrity. He has demonstrated that to such an extent that he has irrevocably compromised the high degree of trust that the public is entitled to expect, and which the court must demand, of those seeking to exercise the great privilege of practising as a legal practitioner.

5 Quite apart from that, the court has power under section 89(6) of the *Legal Practitioners Act 1981*, where a practitioner has been disqualified from practice in another jurisdiction, as the defendant has been, to impose a corresponding disqualification in this jurisdiction. For that reason also disqualification from the right to practise in South Australia is appropriate.

6 In my opinion this Court has no alternative but to accede to the application to remove the defendant's name from the roll.

GRAY J.

7 In these proceedings, the Law Society of South Australia seeks an order that the name of the defendant, Colin Robert McKerlie, be removed from the roll of legal practitioners of this Court. The Law Society seeks to invoke the inherent

jurisdiction of the Court pursuant to section 89(3) of the *Legal Practitioners Act 1981* (SA).[1]

8 The defendant has been served with the proceedings and given notice of this hearing. However, he has not appeared in the proceedings and has not appeared before this Court on the hearing of the Law Society's application.

9 The defendant was admitted and enrolled as a barrister and solicitor of the Supreme Court of South Australia on 17 December 1984. He has remained on the South Australian Roll since that date.

10 The defendant was admitted to practise in the State of Western Australia on 2 June 1993, and has not practised in South Australia since that date. He was, however, last issued with a practising certificate in South Australia on 1 January 1999. That certificate expired on 31 December 2000.

11 By order of the Full Court of the Supreme Court of Western Australia, made on 21 May 2007, the defendant's name was removed from the Roll of Practitioners in Western Australia.[2] The reason for that order was the defendant's convictions on 14 May 2004 by the District Court of Western Australia and his imprisonment for four years and eight months in relation to one count of indecent assault and two counts of sexual penetration without consent. The convictions and sentences imposed were upheld on appeal.[3]

12 Martin CJ, of the Western Australian Supreme Court, when ordering the removal of the defendant's name from the roll of practitioners of that Court, summarised the circumstances of the defendant's misconduct in the following terms:[4]

> The reference I will deal with first is a reference based upon Mr McKerlie's criminal convictions. There are three relevant convictions. The first is for an unlawful and indecent assault which occurred on 7 February 2002 when Mr McKerlie unlawfully and indecently assaulted a female by placing his mouth on her breast.
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> On the same day, Mr McKerlie committed the offence of sexual penetration of the same female without consent by inserting his thumb or finger into her anus and then Mr McKerlie committed his third offence; being, sexual penetration of the same female without consent by inserting his penis in her vagina.
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> He was convicted of all of those offences after a trial before Judge Nisbet in the District Court and a jury and was sentenced to a period of imprisonment of 1 year for the

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1 Section 89(3) of the *Legal Practitioners Act 1981* (SA) provides:
"This Part does not derogate from the inherent jurisdiction of the Supreme Court to discipline legal practitioners."
See *The Law Society of South Australia v Liddy* [2003] SASC 379 at [3] and *The Law Society of South Australia v Rodda* (2002) 83 SASR 541 at [2].

2 *Legal Practitioners Complaints Committee v McKerlie* [2007] WASC 119 at [3]-[6].

3 *McKerlie v State of Western Australia (No 2)* [2006] WASCA 274.

4 *Legal Practitioners Complaints Committee v McKerlie* [2007] WASC 119 at [3]-[6] (Martin CJ, with Simmonds and Blaxell JJ agreeing).

unlawful and indecent assault, 3 years and 6 months imprisonment for the first count of sexual penetration without consent, and 4 years and 8 months imprisonment on the second count of sexual penetration. All sentences were directed to be served concurrently, so that the total term was 4 years and 8 months imprisonment.

Sentence was passed by Nisbet DCJ. His remarks at the time of passing sentence are before the Court. In the course of those remarks, he observed that no only did Mr McKerlie's victim have to endure the physical aspects of his assault upon her, the memory of which she would carry with her for a very long time, but she also had to endure the assault upon her character which he had perpetrated in the running of his defence, a defence which, in his Honour's view, the Crown prosecutor correctly described as a farrago of lies.

13 Martin CJ concluded:

Relevant to the application of those principles [*inter alia* as set out by Kitto J in *Ziems v The Prothonotary of the Supreme Court of New South Wales*] are the extent of premeditation, whether the crime indicates a tendency to vice and lack of probity. All of those circumstances are present in the circumstances that gave rise to Mr McKerlie's conviction. It is also clear from the remarks made by the sentencing Judge that the circumstances of the trial showed a lack of remorse or insight in relation to the commission of his offences, which is of course relevant to the assessment of the risk of further transgressions.

It follows that this Court cannot have the confidence in Mr McKerlie that is required of its practitioners. The circumstances giving rise to the offences and the convictions themselves demonstrate a lack of the personal qualities that are required to enable Mr McKerlie to remain on the Roll.

14 Section 89(5)(b) of the *Legal Practitioners Act* provides:

In any disciplinary proceedings—

...

(b) the Supreme Court may—

(i) receive in evidence a transcript of evidence taken in any proceedings before a court of any State and draw any conclusions of fact from the evidence that it considers proper;

(ii) adopt, as in its discretion it considers proper, any findings, decision, judgment or reasons for judgment of any such court that may be relevant to the proceedings.

In my view, it is appropriate for this Court in its discretion to adopt and act on the decision of the Western Australian Court of Criminal Appeal and the order of the Western Australian Full Court removing the defendant's name from that Court's Roll of Practitioners.[5]

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[5] See also section 89(6) of the *Legal Practitioners Act* which provides:
Where the Supreme Court is satisfied, on the application of the Board, the Attorney-General or the Society, that a legal practitioner is disqualified or suspended from practice under the law of any other

15 The crimes of the defendant do not reflect directly on his capacity to act as a practitioner. Those crimes do not demonstrate a lack of legal competence or a lack of any understanding of the law. The defendant's crimes were wholly personal and unrelated to his conduct as a legal practitioner. However, in disciplinary proceedings the qualities of the person and whether that person is a fit and proper person to practise are to be judged by the circumstances accompanying the criminal conduct.

16 The purpose of disciplinary proceedings is to protect the public against future misconduct by a practitioner. The purpose is not to punish the practitioner. As was pointed out by Doyle CJ in *Law Society (SA) v Murphy*:[6]

> The Court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner, and by demonstrating that the person is, by reason of his or her conduct, not fit to remain a member of a profession that plays an important part in the administration of justice and in which the public is entitled to place great trust.

17 The question of the Court's consideration in disciplinary proceedings, when dealing with personal misconduct as distinct from professional misconduct, was recently addressed in *A Solicitor v Law Society (NSW)*[7] where the High Court observed:

> In *Ziems*, the conduct of the practitioner which resulted in his conviction and prison sentence had nothing to do with his practice as a barrister. Fullagar J said:
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> > Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister ... But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former.

18 The High Court also endorsed the following observation of Kitto J in *Ziems*,[8] observing:[9]

> Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise. And there may be an additional dimension to be considered. It was explained by Kitto J in *Ziems*:
>
> > It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession;

State (whether or not that State is a participating State), it may, without further inquiry, impose a corresponding disqualification or suspension under the provisions of this section.

6 *Law Society (SA) v Murphy* (1999) 201 LSJS 456 at [30] (Doyle CJ, with Millhouse and Prior JJ agreeing).

7 *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253 at [19].

8 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298.

9 *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253 at [20] (footnotes omitted).

> or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

19 The circumstances of the defendant's criminal conduct are outlined in detail in the earlier referred to decision of the Western Australian Court of Appeal. For present purposes it is sufficient to note that those proceedings involved a mature man taking advantage of the immaturity and vulnerability of a younger woman for his sexual gratification. The criminal conduct was aggravated by the manner in which the defendant plied the young woman with alcohol. It is also relevant that in the course of his defence, the defendant conducted an unwarranted attack on the character of the young woman. The defendant's conduct both at trial and on appeal precluded any finding of contrition or remorse. The defendant's criminal conduct can be properly characterised as deplorable. Unsurprisingly it led to an immediate custodial term of imprisonment.

20 Section 5(1) of the *Legal Practitioners Act* defines unprofessional conduct as follows:

> "unprofessional conduct", in relation to a legal practitioner, means –
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> (a) an offence of dishonest or infamous nature committed by the legal practitioner in respect of which punishment by imprisonment is prescribed or authorised by law; or
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> (b) any conduct in the course of, or in connection with, practice by the legal practitioner that involves substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

The defendant committed offences of an infamous nature in respect of which he was sentenced to a term of imprisonment. As a result his conduct was unprofessional conduct within the terms of section 5(1).

21 The question that arises in these proceedings is whether the defects of character and personality revealed by the defendant's conduct, including both his criminal offending and his conduct at trial, are such that the defendant should not be permitted to remain a member of the legal profession. To adopt the words of Kitto J in *Ziems*,[10] does the defendant's criminal conduct "carry such a stigma that Judges and members of the profession may be expected to find it too much for the self-respect to share with the person convicted the kind and degree of association which membership of the [legal profession] entails". In my view the defendant's conduct is of a kind that would substantially damage the ability of

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[10] *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298.

the defendant to maintain the relationship with other members of the profession that is essential to legal practice. Other members of the profession would not place trust and confidence in a practitioner who had engaged in such serious criminal conduct.[11]

22 Of even more importance is the reputation and standing of the legal profession to the public. Public confidence and trust in the legal profession are essential to the effective functioning of the profession. The public rightly expect members of the profession to be of good character and standing. In the present case, any disciplinary order less than striking off would erode the public confidence in the profession.[12]

23 The defendant's personal conduct demonstrates such a lack of integrity that he is not fit to be trusted with the duties and responsibilities of a legal practitioner.[13] The defendant is unfit to remain a member of the profession. I would order that the name of the defendant be removed from the roll of practitioners of this Court.

LAYTON J.

24 I agree with the order proposed by Gray J and with his reasons. I also agree with the additional reasons given by Bleby J.

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[11] *The Law Society of South Australia v Rodda* (2002) 83 SASR 541.
[12] *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467 at [43].
[13] *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467 at [31].