IN RE AMARASINGHE ATTORNEY-AT-LAW

SUPREME COURT,
WEERARATNE, J., SHARVANANDA, J. AND
VICTOR PERERA, J.,
S. C. RULE NO. 3/81,
NOVEMBER 3, 1981.

Attorney-at-law — Malpractice or deceit — 42(2) of Judicature Act — Removal of page from record when acting as judicial officer — Was record falsified ? — Doctrine of nunc pro tunc — Standard of proof.

It was clear that the respondent had not falsified the record but only amplified it and that he had acted honestly.

The writing of a page on one date and attributing it to another date is not a falsification or malpractice, or deceit where there was no dishonesty. Such action is justified by the doctrine of *nunc pro tunc.* This doctrine applies to acts done after the time when they should be done with a retrospective effect. *Nunc pro tunc* is an entry made now of something actually previously done to have effect of a former date, not to supply omitted action, but to supply omission in record of action really had, but omitted through inadvertence.

Both malpractice or deceit import an element of dishonesty which was absent in this case. There was no material to show dishonesty. The standard of proof required is proof beyond reasonable doubt.

Cases referred to:

(1) Sinnatangam v. Sinnen (1895) 1 NLR 220.
(2) In the Matter of an Attorney I L.R. 41 Cal.113.
(3) Bhandari v. Advocates Committee 1956 3 All. E. R. 742.

In the matter of a Rule under s. 42(2) of the Judicature Act.

A Mampitiya with N. Jacolyn Seneviratne, N. Devendra, G. G. Mendis and Gamini Iriyagolla for Respondent.
S. N. de Silva, Deputy Solicitor-General with S. Marsoof, State Counsel for Attorney-General.
George Candappa with Everard Ratnayake for the Bar Association of Sri Lanka.

Cur. adv. vult.

December 11, 1981.

WEERARATNE, J.

This is a proceeding by way of a Rule under Section 42(2) of the Judicature Act No. 2 of 1978 for the suspension or removal from office, of the Respondent -- an Attorney-at-Law who, at the relevant times held judicial office, on the ground that he has been guilty of conduct which makes him liable to be dealt with under the provisions of the said Act.

This Rule sets out that the Respondent, when functioning as the District Judge and Magistrate of Homagama on the 12th February 1981, in respect of the accused in case No. 43866 M.C. Homagama, when the latter appeared for sentence on a verdict of guilty being entered against him, imposed a sentence of six months rigorous imprisonment after a plea in mitigation by Mr. P. Gunawardena, his Attorney-at-Law. Then after the Court adjourned for the day Mr. U. Senaratne, Attorney-at-Law met the Respondent in Chambers and the Respondent varied the sentence already imposed to one year's imprisonment, suspended for five years, and a fine of Rs. 500/-, by making an alteration in the Journal Entry of that date. On the 17th February 1981, the Supreme Court called for the record of the case by telegram and on the Respondent making an order that the record be sent, it was prepared for despatch to the Supreme Court. On that same day, after the proceedings were adjourned, the record was brought to the Respondent's residence by the Interpreter, accompanied by the Binder attached to the said Court, in a Motor Car driven by Mr. U. Senaratne, Attorney-at-Law, whereupon the Respondent caused the page of the said record which contained the Journal Entry of 12th February 1981 to be removed, and substituted in its place, a fresh page purporting to contain the Journal Entry of 12th February 1981.

It is stated that by such act he has thereby sought to represent to the Supreme Court that the entry made by him on the 17th February 1981 at his residence was a Journal Entry made in Court on the 12th February 1981, thus causing the said record to be falsified and forwarded to the Supreme Court, and that he is thereby guilty of malpractice or deceit within the meaning of Section 42(2) of the Judicature Act.

There is, annexed to the Rule *inter alia,* the record in M.C. Homagama case No. 43866, a page of the original case record contained in the Journal Entry of 3.2.81 and 12.2.81, and a letter dated 25.2.81 sent by the Respondent to the Chairman of the Judicial Service Commission.

The Respondent appeared before us to show cause and submitted an affidavit sworn by him which substantially sets out the facts revelant to his defence. Senior Counsel for the Respondent at the very outset, stated that the recitals of the facts in the Rule are substantially admitted by the Respondent in the affidavit filed before the Court, and in his letter of resignation dated 25.2.81 to the Judicial Service Commission. Counsel submitted that the gravamen of the charge is that the Respondent had

removed a page from the record containing the Journal Entry of the 12th February 1981 and substituted in its place, a fresh page purporting to contain the Journal Entry of 12th February 1981, but which Journal Entry was in fact made on the 17th February 1981 and that he thereby falsified the record. Counsel submitted that the removal of the page and the substitution of another are admitted in the affidavit and letter of resignation, but that the allegation of falsification of the record is denied. Counsel stated that the substituted page and the page extracted, both contain the altered sentence which the Respondent imposed on the accused in the Homagama case No. 43866.

Counsel submitted that the essence of the charge is whether the Respondent has falsified the record, and that the facts contained in the affidavit and in the letter of resignation aforesaid clearly reveals that he had no intention of falsifying the record, in which event there could be no malpractice or deceit within the meaning of Section 42(2) of the Judicature Act No. 2 of 1978.

In the circumstances, it would be necessary to set out in some detail, the relevant facts pleaded in the affidavit and in the letter of resignation. The petitioner stated that on the 20th January 1981, the first date of trial, the accused was charged on two counts of criminal breach of trust and retention of stolen property valued at Rs. 12,000/- and that the prosecution conducted by the police as well as the defence, represented by Mr. U. Senaratne, Attorney-at-Law, wished to compound the case having the charge altered to one of criminal misappropriation. The Respondent states that he indicated to the parties that following his normal policy in the matter of sentence, if the accused admits his guilt, and if he had no previous convictions, he would impose a suspended sentence on him. The accused pleaded guilty on both counts and the case was put off for identification and sentence. Then on the 12th February 1981, the case came up before the Respondent on the roll of calling cases and, although Attorney-at-Law Mr. P. Gunawardene appeared for the accused, he did not advert to the circumstances in which the plea of guilt was tendered, and the Respondent sentenced the accused to six months rigorous imprisonment on each count. On this day itself, when the Respondent was in Chambers, Mr. U. Senaratne, having explained his absence from Court earlier, stating that he was held up in another Court, and had asked Mr. P. Gunawardene to look after the case, reminded the Respondent of the circumstances in which his client had tendered his plea. Then, since the accused was a young man with no previous convictions, and as the complainant admitted that he had recovered the property in full, the Respondent states

that he varied the sentence to one year's imprisonment on each count, the sentences to run concurrently, and suspended the punishment for five years and imposed a fine of Rs. 500/-.

On the 17th February 1981 when the Respondent received a telegram from the Supreme Court calling for the record of this case, he made order that it should be despatched. It then occurred to him that the Supreme Court may have called for the record to revise the sentence and examine the propriety of his order and he thought it better that a reviewing Court should be in full possession of all the facts that led him to vary the order. As his car was not available, he sent word to the Interpreter of the Court to bring the record to his bungalow, if it had not been despatched earlier. Later, both the Interpreter and the Binder attached to the Court came to his residence. He then had the folio which contained the Entry of that date taken out and wrote out a fresh page containing further details of all that transpired on the 12th February 1981 and inserted this folio in the record which was despatched.

The Respondent states that what he recorded on that new page was in amplification and not in suppression of the scanty order he had made which would have been of little assistance to a reviewing Court. He retained in his custody, the folio which he had removed. The Respondent states that when he learnt that the Judicial Service Commission was investigating this matter, he submitted his resignation together with the original folio, since it was embarrassing to him to continue in the circumstances as a Judge. The Respondent, in denying that he has falsified the record states that he had not prepared a new document containing false information, and that the information supplied in the new document is truthful and is in accordance with the information available in the original folio on the material points. He further states that he had, at no time made a false statement of an existing fact and that he never had an intention to practise a deceit or any malpractice.

What is attributed to the Respondent in the Rule as involving a falsification or deceit is the act of causing the Journal Entry of 12th February 1981 and the substitution of a fresh page purporting to contain the Journal Entry of 12th February 1981 and representing thereby that the entry made on 17th February 1981 at his residence was a Journal Entry made to Court on 12th February 1981. An examination of the record reveals that the Judicial Acts of the Respondent on 20.1.81, 3.2.81 as well as 12.2.81, up to the point when he imposed a sentence of six months rigorous imprisonment for each charge to run concurrently, bear no irregularity. In regard to what is recorded under the word "Later", on 12.2.81,

where the Respondent refers to the Attorney-at-Law Mr. Senaratne drawing his attention to the assurance given by the Respondent that a suspended sentence would be imposed in the event of the accused tendering a plea of guilt, provided he had no previous convictions, cannot also be found fault with even though he varied the sentence to fall in line with the earlier assurance given by him. A close scrutiny of the record, which is a production in the case, in the Journal Entry (in Sinhala) of the 12th February 1981 shows an alteration from six months rigorous imprisonment for each count to run concurrently to one year's rigorous imprisonment on each count to run concurrently "sentence suspended for five years. Impose a fine of Rs. 500/- on the accused." In this connection, Counsel submitted that the Respondent sought to do justice by the accused in regard to whom he had already given an assurance of a suspended sentence in the event of his having no previous convictions. A perusal of the substituted page and the extracted page does reveal that the substituted page was written in amplification and not in suppression of the scanty order which the Respondent made on the 12th February 1981. The Respondent has given in his affidavit, the reason for amplifying the said order.

Falsify means "to render false." Consequently a new document containing false information is correctly described as a false document, and the act of preparing such a document is called the falsification of the document.

Counsel submitted that in any event the writing of the page on 17th February 1981, but attributing it to 12th February 1981 was not a falsification, malpractice, or a deceit in that such a writing on the 17th February 1981, and attributing it to 12th February 1981, was justified under the well-known doctrine of *nunc pro tunc*. He referred to Black's Law Dictionary at page 1218 which defines it as a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect i.e., with the same effect as if regularly done. *Nunc pro tunc* is an entry made now of something actually previously done to have effect of a former date, not to supply omitted action, but to supply omission in record of action really had, but omitted through inadvertence.

In the case of **Sinnatangam v. Sinnen* 1 NLR 220[1] where after a Revision Application the case was called for by the Supreme Court and after the perusal of the record, the Supreme Court sent the case back for an explanation by the Magistrate, and in forwarding it again to the Supreme Court the Magistrate had

made certain alterations in the original Journal Entries, which charges were alluded to by Withers, J. in his judgment, Bonser, C. J. remarks (at page 222) .—

" . . . Certainly there are interpolations in the record in different coloured ink.The Magistrate should be called upon for an explanation as to whether he did make any alterations in the record, for if he did, that act, his act, was quite irregular. If he did make any alteration, he should have a note in the margin initialled by him to show when the alterations or addition was made."

It will be observed that even in a case such as the one detailed above, the Supreme Court was not prepared to call the alteration of the record anything more than an irregularity. In the present matter the Respondent in his affidavit has stated that by inadvertence he has failed in the course of his judicial functions to authenticate the substituted page as having been made on 17th February 1981. Both malpractice or deceit import an element of dishonesty.

The question does arise as to what standard of proof is required in a case of this nature. **In the Matter of an Attorney* I.L.R. 41 Calcutta 113(2) Jenkins, C. J. stated:—

"It is a strange story that the Attorney tells; even a strong case of suspicion is not enough to justify disciplinary action especially when there is a positive sworn denial and repudiation of the misconduct imputed. Moreover there is a more than bare denial: There is an explanation of the transaction by the Attorney and it is an old rule that where this is so, an adverse order should not be made on a summary proceeding unless the Attorney's story is highly incredible."

In the case of**Bhandari v. Advocates Committee* (1956) 3 AER 742(3) with regard to the onus of proof Lord Tucker said:—

"We agree that in every allegation of professional misconduct, involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities."

"This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee, and

there is no reason to think that either the Committee or the Supreme Court applied any lower standard of proof."

Counsel for the State in the course of his submissions, made a detailed analysis of the recitals in the Rule and in answer to the Court, frankly conceded that there was no material to show that the Respondent had a dishonest motive having regard to the explanation given by him in his affidavit to the effect that he acted honestly.

Counsel appearing on behalf of the Bar Association submitted that the Respondent is on trial as an Attorney-at-Law, not as a Judicial Officer. He stated that the question is whether he is a fit and proper person to be kept on the Roll. Counsel submitted that at the most, the conduct of the Respondent amounted to a lapse of judicial standards. He further stated that whatever was done, should have been in Court or in Chambers. He submitted that the action of the Respondent does not amount to conduct of a nature which warrants his being dealt with under Section 42 of the Judicature Act.

On a consideration of the material placed before us and having heard the submissions of Learned Counsel, we are satisfied that the Respondent must be absolved from an intent to commit a malpractice or deceit by falsifying a Record.

The Rule is accordingly discharged.

Before we part with this matter, we must state that it is unfortunate that the Respondent acted in the manner he admits he had done. The correct course he should have followed in order to put the record straight is to have amended it in open Court or in Chambers, and as stated by Bonser, C. J. in a similar matter, to have initialled and dated it, without resorting to the course he adopted.

SHARVANANDA, J.— I agree.

VICTOR PERERA, J. — I agree.

Rule discharged.