[2020] JMCA App 35

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS APPEAL NO 6/2016

MOTION NO 18/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**OSWEST SENIOR-SMITH**	**APPLICANT**
AND	**GENERAL LEGAL COUNCIL**	**1ST RESPONDENT**
AND	**LISA PALMER HAMILTON**	**2ND RESPONDENT**

Bert Samuels, Mrs Denise Senior-Smith, and Ms Bianca Samuels instructed by Oswest Senior-Smith & Company for the applicant

Ms Melissa McLeod instructed by Hylton Powell for the 1st respondent

Mr John Vassell QC and Mrs Trudy-Ann Dixon-Frith instructed by DunnCox for the 2nd respondent

25 September, 20 December 2019 and 31 July 2020

PHILLIPS JA

[1] This is a motion for conditional leave to appeal to Her Majesty in Council. The application was made pursuant to the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, and section 110(2) of the Constitution of Jamaica (the

Constitution) which states that an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases:

> "(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

[2] Mr Oswest Senior-Smith (the applicant) posited three main questions that he deemed to be of "great general or public importance or otherwise" that required determination by Her Majesty in Council, namely:

> 1. whether any or all remarks made by counsel in court, especially in counsel's bench, were to be considered to be expressed for the purpose of judicial proceedings, and as such, protected by absolute privilege;
> 2. whether the shorthand notes were the only record of proceedings which should be considered in a matter before a tribunal, in circumstances where they conflicted with counsel's position on the matter, or with the notes of a journalist, a neutral third party; and

3. whether Mrs Lisa Palmer Hamilton's (the 2nd respondent) conduct fell within the bounds of professional misconduct so that a prima facie case could have been established.

[3] We heard this motion on 25 September 2019, and on 20 December 2019, by majority (Sinclair-Haynes JA dissenting), we made the following orders:

"1. The motion for conditional leave to Her Majesty in Council is refused.

2. Costs to the 1st and 2nd respondents to be taxed if not agreed."

[4] The following are the reasons, by the majority, for that decision.

The proceedings in this court

[5] The applicant alleged that certain comments made by the 2nd respondent about him in an ongoing murder trial amounted to professional misconduct. The comments were uttered after the applicant had reached across counsel's bench toward the 2nd respondent, in what the 2nd respondent said was a confrontational, intimidating and offensive manner (which the applicant of course denied that it was), which had evoked a statement from the 2nd respondent either that "[she] felt as if [she] was being assaulted" or that "[the applicant] had assaulted her". The incident in court was published in the Gleaner newspaper the following day. The applicant indicated that he had received calls and comments from his colleagues and one retired judge of the Court of Appeal in respect of his alleged conduct in court.

[6] As a consequence, the applicant lodged a complaint with the 1st respondent indicating that the 2nd respondent's accusation amounted to professional misconduct, and that he had a right to have his dignity respected and protected, which had been breached by the 2nd respondent. In her response thereto, the 2nd respondent asserted that she had not accused the applicant of assaulting her, but had said that "[she] felt as if [she] was being assaulted".

[7] The decision of the Disciplinary Committee of the General Legal Council (the Committee) was delivered on 24 September 2016. The Committee found that no prima facie case and hence, no complaint had been made out against the 2nd respondent.

[8] In his appeal against that decision, the applicant contended that the Committee erred when it, *inter alia*, failed to properly apply the provisions of the law applicable to its deliberations; failed to hold hearings before arriving at its decision; failed to give the applicant an opportunity to respond to the 2nd respondent's affidavit in response to his complaint; outsourced its obligations by relying on the verified shorthand notes of the court proceedings; and finally, had no regard to his status as an attorney-at-law.

[9] In paragraph [55] of the majority decision of the court, four main issues were identified for determination of the appeal. They were:

> "(1) What is the true and proper construction of the provisions of the LPA and the Rules applicable to the deliberation/determination of the Committee in order to arrive at a decision as to whether a prima facie case has been made out? (ground 1)
>
> (2) Did the Committee comply with the said provisions?

(i) Did it act perfunctorily and bereft of the competence contemplated by the LPA and the Rules, and/or did it act with injudicious haste?

(ii) Was there any obligation for the [applicant] to be permitted an opportunity to reply to the 2nd respondent's affidavit?

(iii) In all the circumstances of the case was there a denial of fairness or breach of the principles of natural justice? (grounds 4 and 5)

(3) Did the Committee outsource its obligations by relying on the verified shorthand notes, and were the notes reliable in any event? (grounds 2 and 3)

(4) Ought there to be a special Committee constituted to hear the application by an attorney-at-law against another attorney-at-law, bearing in mind the potential reputational loss and embarrassment which could be suffered by the attorney making the complaint? (ground 6)."

[10] On these issues, the court made the following findings which are set out in the conclusion of the judgment in paragraphs [103]-[105]. They read as follows:

> "[103] There is no doubt that on a true and proper construction of the LPA and the Rules applicable to the Committee that the Committee, in the instant case, acted lawfully and in full compliance therewith. The [applicant] had every opportunity to lay his complaint and all relevant material before the Committee; and the 2nd respondent to state her case in response. The Committee considered the information before it and ruled accordingly. The decision was that no complaint was made out against the 2nd respondent. The complaint was therefore dismissed. No further statement or reasons was required. The verified shorthand notes could reasonably have been accepted and relied on by the Committee as the official record of the proceedings in court. Based on the recorded account of the 2nd respondent's statements therein, it was within the competence of the Committee, made up as it is of senior

> attorneys, to conclude that those statements did not amount to dishonourable or disgraceful conduct, equating to professional misconduct, or misconduct in a professional respect, or to any criminal activity.
>
> [104] The [applicant] has not demonstrated that the Committee had at any stage failed to give proper consideration to the material before it. The [applicant] has also failed to demonstrate that the Committee had acted without due enquiry, failed to act fairly and or in breach of the principles of natural justice, applicable to the particular and peculiar circumstances relative to the material at hand, namely, the complaint of one senior attorney being brought against another senior attorney.
>
> [105] Although the circumstances maybe considered unfortunate, they have been resolved appropriately within the context of the legal profession's governing statute, the LPA and its Rules."

[11] As a result of those findings, by a majority decision, the appeal was dismissed, and the decision of the Committee was affirmed with costs to the 1st and 2nd respondents.

The motion for conditional leave to Her Majesty in Council

The applicant's submissions

[12] As indicated at paragraph [2] herein, the applicant posited three main questions for determination before Her Majesty in Council. Counsel's main complaint against the decision of this court appears to be focused on the statements made in paragraphs [64] and [65] of the judgment, which reads thus:

> "[64] The Halsbury's Laws of England, 2012, volume 32, in paragraph 597, makes the following statement on absolute privilege:

> 'No claim lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. [**Munster v Lamb**] The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings, or where it has no reference at all to the subject matter of the proceedings.'
>
> [65] The utterances which were said in the instant case were definitely spoken in the cut and thrust of the litigation by advocates representing the defence on the one hand, and the prosecution on the other. Although in disciplinary proceedings the focus is the oversight of ethical and dishonest conduct of attorneys-at-law, the protection given to counsel for words spoken in the cut and thrust of a trial remains the same, and is subject to absolute privilege, save and except (for instance) if the words are spoken dishonestly with the intent to deceive the court. The words used in this case, in the well of the court, are protected by absolute privilege. It must also be remembered, and is of significance, that the standard of proof in disciplinary proceedings is the criminal standard of proof beyond a reasonable doubt (see **Campbell v Hamlet**). As a consequence, since the statements made in this case, in the well of the court, must be assessed within the context of proof beyond a reasonable doubt, and in any event are protected by absolute privilege, in my view, they would not give rise to a prima facie case of professional misconduct."

[13] Counsel for the applicant contended that the exception set out in the extract from the Halsbury's was not addressed by the court in its majority judgment. Counsel

argued that the court had "dismissed any notion of professional misconduct by reliance on the protection afforded to Counsel without any assessment as to whether the words spoken could fall within the exception and outside the protection under the law". Counsel posited that the question seemed to be whether the words spoken had any reference to the proceedings, as, if they did not, they would lose the protection under the law.

[14] Counsel then submitted that the doctrine of absolute immunity has been recognised in cases of much antiquity, such as in **Munster v Lamb** [1881-85] All ER Rep 71, and has been set out and applied in this jurisdiction in **Wilbert Christopher v Ana Gracie and Another** [2011] JMCA App 22 and **Bodden v Brandon** [1952-79] CILR 67. However, counsel maintained that there was no case in this jurisdiction in which the only question which arose in the case was whether the conduct complained of had been done/said for the purpose of judicial proceedings in the course of proceedings and was relevant to the subject matter of the proceedings.

[15] Counsel referred to sections 13(1)(b) and 13(3)(h) of the Constitution in support of his contention that the court had a duty to protect individuals from unjust attacks. The doctrine of absolute privilege could not disregard the constitutional rights of the citizen, he submitted. Additionally, counsel argued, although the Committee did not set out the reasons for its decision, it was "inescapable" that the doctrine of absolute immunity would not have been operating on the minds of the members of the Committee in their deliberations on the matter.

[16] Counsel submitted that placing heavy reliance on the shorthand notes of the proceedings was an error, as they were "replete with mistakes and in some cases did not read coherently", and so should not have been accepted by the learned judge in the court below and the Committee as being accurate. Counsel therefore reiterated that the questions posed in the grounds of the motion for conditional leave were of great general or public importance or, in any event, fell under the rubric of "otherwise" in section 110(2) of the Constitution, and ought to be addressed by Her Majesty in Council. He stated that that question is also important as it would give guidance to the Committee in respect of future matters before it in similar proceedings.

[17] Counsel also reiterated the applicant's complaint that the procedure adopted by the 2nd respondent in arriving at its decision did not provide him with the "necessary protection afforded him by law". He contended further that the conduct of the 2nd respondent had affected his reputation and integrity. Accordingly, the question as to whether the 2nd respondent's actions constituted professional misconduct ought to be placed before Her Majesty in Council.

The respondents' submissions

[18] Counsel for the respondents submitted that, based on authorities issuing out of this court dealing with section 110(2) of the Constitution, namely, **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009; **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA

App 27; and **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and Others** [2015] JMCA App 7, the questions posed by the applicant for consideration before Her Majesty in Council have not satisfied the threshold of being "of great general or public importance or otherwise". They had also contended that the questions submitted did not raise difficult questions of law and did not require serious debate before the Judicial Committee of the Privy Council (the Privy Council).

[19] Both counsel argued that the question as to whether the words spoken by the 2nd respondent were protected by absolute privilege was not a question of great general or public importance. Counsel for the 1st respondent asserted that although counsel for the applicant had referred to the exception to the principle of absolute privilege, he did not set out the specific exception that he wished the Privy Council to address, and in any event, the judgment had already recognised that the doctrine had exceptions. The 1st respondent's counsel also argued that the fact that the principle had only been applied in this case, in this jurisdiction, was not determinative of whether the law was settled, which counsel submitted that it was. Queen's Counsel for the 2nd respondent added that, in the instant case, the incident had occurred in the well of the court. The words spoken were not extraneous to the case as was suggested in **Bodden v Brandon**, but arose out of submissions taking place before the court.

[20] With regard to the questions as to whether reliance ought to have been placed on the shorthand writers' notes and whether the 2nd respondent's actions constituted professional misconduct, both counsel submitted that the applicant was seeking to have

the Privy Council make findings of fact as to which account of the incident was more credible. Counsel for the 1st respondent posited that an answer to those questions would essentially require the Law Lords to analyse and make rulings on matters of fact which the Committee and this court had already considered. They also argued that the courts have given a very wide discretion to the Committee when making findings as to professional misconduct and the principles applicable thereto, and so questions arising out of those findings would not require further consideration before the Privy Council. Additionally, any findings on those questions could not be applied generally, and so would not be of "great general public concern". Accordingly, those questions did not raise an important matter of law and would not fall into the "or otherwise" provision of section 110(2)(a).

Discussion and analysis

[21] I will set out again for ease of reference section 110(2) of the Constitution. It reads as follows:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases:
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

[22] There are several cases which have dealt with the issue as to how the phrase "of great general or public importance or otherwise" should be viewed by this court in relation to the question which the applicant may wish to submit to Her Majesty in Council. In **Norton Wordworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10, at paragraph [32], the court summarised the statements and conclusions arrived at in several earlier decisions. This is what was stated:

> "...A question 'of great general or public importance' is one that is regarded as being subject to serious debate. It must be not just a difficult question of law but an important question of law that not only affects the rights of particular litigants but one whose decision will bind others in their commercial and domestic relations. It must not merely be a question that the parties wish to have considered by the Privy Council in an effort to see whether the Law Lords would agree with the decision of the Court of Appeal. It must be a case of gravity involving a matter of public interest, or one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character (see **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham**) (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009; **Vick Chemical Company v Cecil DeCordova and Others** (1948) 5 JLR 106; **Dr Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams** (1992) 29 JLR 79); and **Daily Telegraph Newspaper Company Limited v McLaughlin** [1904] AC 776)."

[23] In **Paul Chen-Young and Others v Eagle Merchant Bank Jamaica Limited and Others** [2018] JMCA App 31, McDonald-Bishop JA (on behalf of the court) referred to the dictum of Morrison P in **National Commercial Bank Limited v The IDT and**

Peter Jennings, where, at paragraph [33], he endorsed the principles arising from the earlier cases which have been canvassed, summarised and set out in paragraph [32] in **Norton Hinds** above. McDonald-Bishop JA then stated in paragraph [62] that "[i]f the question cannot be said to be of great general or public importance, it can nevertheless be submitted for the consideration of Her Majesty in Council if it is such that it ought otherwise to be submitted". The learned judge of appeal quoted the statement of this court in **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470, at page 476, where Wolfe JA (as he then was) said:

> "Is the question involved in this appeal one of great general or public importance or otherwise? The matter of a contract between private citizens cannot be regarded as one of great general or public importance. If the applicant is to bring himself within the ambit of this subsection he must therefore do so under the rubric 'or otherwise'. Clearly the addition of the phrase 'or otherwise' was included by the legislature to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the Court may require some definitive statement of the law from the highest judicial authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. 'Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their Lordships Board for guidance on the law."

[24] The above authorities make it clear the sort of matters that, in the opinion of this court, will be accepted as posing a serious debate and worthy of submission to the Law Lords in the Privy Council pursuant to section 110(2) of the Constitution.

[25] In my view, the main contention of the applicant was not really whether "any or all remarks made by counsel in counsel's bench were to be considered to be expressed

for the purposes of judicial proceedings" (particularly, since that was not stated anywhere in the judgment of this court), but whether the statements made by the 2nd respondent were uttered for the purposes of judicial proceedings. Counsel for the applicant appears to have included that complaint as a ground to the motion in order to argue that the utterances of the 2nd respondent, not being for the purposes of judicial proceedings, would have lost the protection of absolute privilege, and therefore given the statements of the majority of this court, ought to be submitted to the Privy Council to be addressed by the Law Lords. There are, in my view, several difficulties with this approach. Firstly, this was never argued before the Committee or this court. Secondly, it would require the Law Lords to make certain findings of fact which is not their remit and inapplicable in the circumstances of this case. Finally, the position is entirely without merit, bearing in mind the affidavit evidence tendered by both the applicant and the 2nd respondent before the Committee, which formed part of the record of appeal.

[26] In paragraph [8] of the majority judgment of this court, the court set out the applicant's understanding of the background to the incident, the subject of his complaint to the Committee. An issue had arisen as to whether a statement which had been made previously by the witness giving evidence in the ongoing murder trial, had been taken from him when he was an accused at the material time, he having pleaded guilty. Both counsel had different views on the matter and the applicant was trying to tell the 2nd respondent that she was "taking the judge into error" when he pulled over to her, leaned down in her direction, and having repeated his comments, the impugned

statement was then made by the 2nd respondent, reacting she said, to behaviour which she found to be intimidating and offensive. The 2nd respondent explained that this was done light-heartedly and even evoked laughter from the jurors. I therefore agree with Queen's Counsel for the 2nd respondent that the parties appeared to be acting in a manner endeavouring not to escalate their conflict before the jury.

[27] The question therefore would be, did this exchange take place between advocates in the conduct of the case for the purpose of judicial proceedings? In my view, it was obvious that it did. The authorities on this aspect of the matter are very clear and unambiguous requiring no serious debate.

[28] In the case of **Munster v Lamb**, the defendant, a solicitor, spoke disparaging words of the plaintiff (Munster), firstly indicating that he had placed the sister of the accused in a trial in a convent against her will, so that she would be prevented from giving evidence at her sister's trial; and then, when the trial was adjourned, further stated that he had his own opinion with regard to the purposes in respect of which several young women were resident at Munster's home. The defendant also stated that he believed that there may have been drugs in Munster's house, and he had his own opinion with regard to the purposes for which they were there, and what they had been used for.

[29] Mr Munster sued the defendant who pleaded in his statement of defence that he was a solicitor, and as a solicitor he had been engaged in defending his client who had been charged with her husband for breaking into a dwelling house. The plaintiff was

non-suited at first instance, and the application to set aside that order was discharged by the Divisional Court, which held that, "the expressions complained of were within the line indicated by the authorities as the boundaries of the advocate's privilege". Mr Munster appealed.

[30] After canvassing the law as it had developed over the years and examining the submissions provided to the court, Sir Baliol Brett MR made the following insightful statement at page 795-796 of his judgment:

> "What is the ground of the rule thus laid down? The rule was not made in order to protect the witness who makes false and malicious statements, and it does not look to the benefit of the person injured by such statements, but proceeds on the ground of public policy, in order that the administration of law may be free, and that a witness may, give evidence with no fear of ever being charged in an action for anything that he may have said in the course of his evidence. The same point was decided in the Common Pleas Division, and in the Court of Appeal in *Seaman v Netherclift* [(1876) 1 CPD 540] a case which proceeded on the same ground. We find also that the same rule applies to the case of parties to an action. If it is right, for the reasons which have been given, that the privilege should attach to judges though they act with malice and speak falsely, and have no reasonable ground for what they say, how can it be suggested that it is not for the public benefit that counsel should be within the rule? Of all the three classes, judges, witnesses, and counsel, the person who most wants to have his mind clear from fear of the consequences of what he may say is a counsel who is engaged in the conduct of a case. A counsel is in a position of extreme difficulty, for he has not to speak of the things which he knows; he does not know whether the facts which he is instructed to bring forward are true or false, but he has to argue in favour of the proposition which will best advance the case of his client. If in the midst of these difficulties he is to be called on to consider whether what he desires to say in support of his client's case is relevant to the question at issue, if he is to be subject to the

> risk of being liable to an action, should he, by an error of judgment, or in consequence of incorrect instructions, make a statement which turns out not to be relevant, the difficulty of doing his duty will be greatly increased. He wants protection more than the judge or the witness, and he wants it more for the public benefit. In my opinion, the reason of the rule covers him, not merely as much as the other classes of persons, but more, in order that he may be able to keep his mind free for the performance of his duty. It is illogical to my mind to say that counsel do not want protection. The protection is given, not for the benefit of a man who may wish to act with malice, but because, if the rule were otherwise, an innocent counsel would be in danger, and would be put to trouble. It is better that the rule should be made large, even though it may be large enough to cover the case of a man who acts with malice and is guilty of misconduct."

[31] Later on in the judgment, the learned Master of the Rolls referred to the rule stated in **Kennedy v Hilliard** (1859) 1 LT 78; 10 ICLR 195, where Pigot CB, whom he referred to as "a judge of immense learning", explained the principle in this way:

> "Upon a review of the authorities, it appears to me that the law is correctly laid down in the following proposition, with which MR STARKIE, in his TREATISE ON LIBEL AND SLANDER, closes his description of this part of the subject, viz, 'That an action of slander cannot be maintained for anything said or otherwise published by either a judge, a party, or a witness in due course of a judicial proceeding, whether criminal or civil.' I take this to be a rule of law, not founded, as is the protection in other cases of privileged statements, on the absence of malice in the party sued, but founded on public policy, which requires that a judge in dealing with the matter before him, a party in preferring or resisting a legal proceeding, or a witness in giving evidence oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel."

[32] The learned Master of the Rolls therefore concluded that:

> "It seems to me that we may introduce counsel into this statement, and then the rule so stated is the rule of the common law, for the rule requires that a counsel speaking in the conduct of a case in which he is instructed shall do so with his mind uninfluenced by the fear of an action for defamation. If we take that to be the rule, the question of malice, of bona fides, or of relevancy cannot be raised. The only question is whether what is complained of was said in the course of the administration of the law, and, if this is so, the case must be stopped, for no action can be maintained from the moment the fact is established that what the plaintiff is suing for was said by the defendant acting as counsel in a judicial inquiry in any court of justice. If this rule is applied to the facts of the present case, it becomes clear that the plaintiff has no cause of action, and therefore the judgment must be affirmed."

[33] I find that that statement of the law, which was developed so many years ago, remains extant today. And, in the circumstances of this case, the actions done and the words stated in the trial were obviously carried out in a legal proceeding, in the course of the administration of the law. The matter the subject of the debate relates to specific and particular circumstances of the particular case. I agree with counsel for the respondents that each particular case will have a different set of circumstances, and perhaps a different outcome in each case, bearing in mind the exceptions. However, the settled aspect of the law will continue to be applicable for the court to assess and grant absolute privilege to the conduct/words of judges, witnesses, parties and to counsel in the pursuit of contested litigation in and relevant to the judicial proceeding.

[34] In **Bodden v Brandon**, a case out of this court, the defendant, an advocate, representing the accused in a trial for attempted murder, made certain comments to the plaintiff, who was a married woman, indicating that she was a girlfriend of the victim of the attempted murder, and therefore exercised his right to challenge her from sitting as a member of the jury. When she passed the defendant in court, returning to her seat, she said "thank you" and he made those remarks to her, which she was offended by, and which she said defamed her. She demanded an apology from the defendant, which he refused to give, and so she sued him.

[35] At first instance, the learned judge, Melville J (Ag) having canvassed the law, in dismissing the claim, found that the words were defamatory of the plaintiff, but went on to consider whether the defence of absolute privilege applied, and in the penultimate paragraph of his judgment he said this:

> "That being the state of the law, can it be said that the words were not uttered in the course of a judicial inquiry? Some jurors had already been sworn, and immediately after the furore and the defendant had been rebuked by the trial judge, the empanelling continued and then the actual trial. It is quite clear that in using the words, the defendant exceeded his instructions... but in my view the words were uttered in the course of the trial and though highly irrelevant and nauseating, to say the least, they were spoken on an occasion which was absolutely privileged. Accordingly, there must be judgment for the defendant with costs to be taxed or agreed."

[36] The court generally canvassed authorities on this area of the law and examined the dicta in **Munster v Lamb** carefully in dealing with the competing contentions. The

applicant, on the one hand, stated that the words had not been uttered by the respondent in his capacity as an advocate, as he had "stepped aside" from that position, and had had a private quarrel with the applicant insulting her, as it was, in passing. The respondent's position, on the other hand, was that the words that he had spoken were as an advocate, and the statement was made directly out of his challenge of a juror, and it was his duty to speak on the basis of his challenge which was done on the ground of bias.

[37] In dismissing the appeal, Lewis JA made the following comments on page 79 of the judgment:

> "In my opinion, the argument of learned counsel for the respondent is to be preferred. The words used by the respondent on the face of them indicate that he was speaking as an advocate with reference to an act done by him as part of the proceedings in the case and for the purpose of explaining his reason for that act. They were uttered in reply to the words of thanks which the appellant had addressed to him as advocate with reference to that act as she passed by him to resume her seat.
>
> It is not necessary, in my view, that the words should be addressed to the court. It is sufficient that they were made by the respondent when speaking as an advocate and with reference to the case then being heard in court. Once this is established the court is not permitted to enquire whether counsel *bona fide* thought that it was necessary in his client's interest to speak the words. That is the very inquiry which the rule prohibits.
>
> I think that the rule in *Munster v Lamb* is wide enough to cover the facts of this case and that this appeal should be dismissed."

[38] In **Wilbert Christopher v Anna Gracie**, Morrison JA (as he then was), on behalf of the court, dealt with the issue of whether to discharge the order of a single judge of appeal who had refused an application for extension of time to appeal the decision of the Parish Court Judge (then Resident Magistrate), in circumstances in which one of the claims by the applicant was that counsel had uttered words that were defamatory of him, in a matter in chambers before the learned judge. The matter was struck out with the notation "reason of privilege". The application before the full Court of Appeal was refused on the basis that, as Morrison JA said at paragraph [11], after having considered and acknowledged the dicta in and ratio decidendi of **Bodden v Brandon**, and commenting that it was good law:

> "...any statement allegedly made by the 1st respondent of and concerning the applicant during a sitting of the court (albeit in chambers) attracts absolute privilege and is therefore not actionable. In my view, there is nothing in section 5(1)(b) of the Legal Profession Act to which Mr Christopher was anxious to refer us, to compel a different conclusion on this point. The fact that an attorney-at-law is also an officer of the court, which is what section 5(1) (b) states him to be, adds or takes away nothing, in my view, from the applicability of the rule of absolute privilege in these circumstances. Indeed, one of the explicit justifications of the rule is, as Fry LJ put it in the leading older case of ***Munster v Lamb*** (1983) 11 QBD 58, 606 , 'the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty'."

[39] As a consequence, these questions posed by the applicant are not important questions in law and, in this case, any particular ruling would only specifically affect these particular litigants. They are not questions of any gravity involving matters of public interest. The questions involving the issue of absolute privilege and the exception

under the doctrine are not questions of any great general or public importance, for, as indicated above, the law has been settled for over 100 years. Equally, if those questions were to fall into the rubric of "or otherwise" the issues, as can be seen, do not require any definitive statement on the law from the Privy Council, as the law as stated and as settled, has been applied by this court nearly half a century ago, and then as recently as within the past 10 years.

[40] The issue of the use and reliability of the shorthand notes as a question of great general or public importance or otherwise cannot be viewed as serious. The Supreme Court is a court of record. This court has stated that the shorthand notes are the official notes of court proceedings. It was therefore acceptable for the learned trial judge to rely on them, so too the members of the Committee. Indeed, it would be entirely inappropriate for the views of counsel, or for that matter, those of a senior journalist, on the issue of the accuracy of the notes, to dictate what should be accepted as the record of proceedings in the courts.

[41] The question of what constitutes professional misconduct has been guided by numerous authorities over the years and is not a closed subject, but will be determined on the basis of each particular case on the specific allegations as presented.

[42] It is for the foregoing reasons that I concurred with the order set out in paragraph [3] herein.

SINCLAIR-HAYNES JA (DISSENTING)

[43] I am constrained to differ from my learned sisters' refusal to grant the applicant conditional leave to appeal to Her Majesty in Council. Counsel Mr Senior Smith's application was made pursuant to the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, and section 110(2) of the Constitution of Jamaica (the Constitution).

[44] In support of his application for leave, Mr Senior Smith ('the applicant') posed the following questions which he deemed to have been of great general or public importance or otherwise.

1. Whether any or all remarks made by counsel in court, especially in counsel's bench, were to be considered to be expressed for the purpose of judicial proceedings, and as such, protected by absolute privilege;

2. Whether the shorthand notes were the only record of proceedings which should be considered in a matter before a tribunal, in circumstances where they conflict with counsel's position on the matter, or with the notes of a journalist, a neutral third party; and

3. Whether Mrs Lisa Palmer Hamilton's (the 2nd respondent) conduct fell within the bounds of

professional misconduct so that a prima facie case could have been established.

Were Crown Counsel's remarks expressed for the purpose of the proceedings and therefore protected by absolute privilege?

The applicant's submission

[45] The applicant's contention is that Crown Counsel's utterances were not "spoken in the ordinary course of any proceedings before" and were therefore not privileged because the impugned words had no "reference to the subject matter of the proceedings".

[46] Mr Samuels, counsel for the applicant, argued that the doctrine of absolute privilege does not disregard the constitutional rights of the citizen. He referred the court to sections 13(1)(b) and 13(3)(h) of the Constitution which he argued, puts the responsibility on the court to protect persons from unjust attacks. The doctrine of absolute privilege cannot ignore the constitutional rights of the citizen, he posited.

[47] Counsel further argued that it could not have been deemed "inescapable" that the doctrine of absolute immunity operated on the minds of the members of the committee in their deliberations because the committee has not provided the reasons for its decision.

[48] He submitted that the questions posed in the applicant's grounds on the motion for conditional leave were of great general or public importance or, in any event, fell under the rubric of 'otherwise' in section 110(2) of the Constitution. He posited that an

answer to the question would provide guidance to the General Legal Council ('the 1st respondent') in respect of similar matters.

[49] He further posited that the conduct of the 2nd respondent has affected the applicant's reputation and integrity and he is left without the protection of the law. The question whether the 2nd respondent's conduct/actions constituted professional misconduct therefore ought to be placed before Her Majesty in Council.

Respondents' submission

[50] Mr Vassell QC, on behalf of the 2nd respondent, directed our attention to decisions from this court in which it was held that the questions posed by the applicant for consideration before Her Majesty in Council, had not satisfied the threshold of being of great public importance or otherwise. He argued that the questions submitted by the applicant did not raise difficult questions of law and therefore required no serious debate before the Judicial Committee of the Privy Council. Whether the words spoken by the 2nd respondent were protected by absolute privilege was not a question of great general importance, he submitted.

[51] He indicated that the judgment had recognized the exceptions to the doctrines. According to Mr Vassell, the applicant had failed to state the specific exception he wished the Privy Council to address.

[52] It was Queen's Counsel's further submission that the incident occurred in the well of the court and were uttered consequent on submissions being made before the court. The words uttered, he submitted, were not extraneous, as were complained of in

the case of **Bodden v Brandon**. He contends that the words were spoken in "the cut and thrust of litigation by advocates" and are therefore protected by absolute privilege.

Law/analysis

[53] Section 110(2) of the Constitution speaks to matters that are eligible for review by the Privy Council. The section reads:

> "(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to her Majesty in Council, decisions in any civil proceedings; and
>
> (b) such other cases as may be prescribed by Parliament."

Are the questions of great general or public importance or otherwise?

[54] The issue is whether this matter is one of great general or public importance and, if not, whether the applicant's complaint falls under the heading, "or otherwise". On the front of the Gleaner newspaper, were the words: "Deputy DPP Accuses Defence Lawyer of Assaulting Her During Murder Trial".

[55] The uncontroverted evidence is that the newspaper was widely circulated and the public demonstrated "great interest" in the matter. Unfavourable comments about the applicant's alleged conduct were made on various social media platform. Persons including judges, spoke to him about the article which forced him to respond in defence of his reputation.

[56] For the article to have generated such widespread interest and to have elicited such comments, both locally and overseas, is, in my view, supportive of the applicant's contention that it is a matter either "of great general or public importance" or "otherwise".

[57] In fact, the authorities relied upon by the 2nd respondent, are in my view either distinguishable or supportive of the applicant's contention. In **Norton Wordsworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10 this court held that a question of general or public importance was regarded as one subject to serious debate. It was further held that:

> "It must be a case of gravity involving a matter of public interest, one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character."

[58] The numerous comments which the publication attracted, demonstrate that the behaviour which was ascribed to counsel fell at least under the rubric and within the category - otherwise of some public importance. Whether counsel is permitted to threaten another or attempt to assault particularly a female prosecutor in court, in my view, must be of some interest to the public.

[59] If the question is not one of great general public importance, this court has held, in obedience to section 110(2) of the Constitution, that it can nevertheless be submitted for the consideration of Her Majesty in Council, if it "otherwise ought to be submitted".

[60] This court has repeatedly embraced Wolfe JA's statement in **Olasemo v Barnett Limited** (1995) 51 WIR 191 regarding the reason for the inclusion of the words "or otherwise". At page 201, the learned judge said:

> "clearly, the phrase 'or otherwise' was added by the legislator to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the court may require some definitive statement of the law from the highest judicial authority of the land 'Or otherwise' does not per se refer to interlocutory matters, 'Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their Lordships' Board for guidance on the law."

[61] Even if the issue is whether the 2nd respondent's accusation of assault on her in open court during a murder trial cannot be regarded as one of "great general or public importance", in my view, it ought "otherwise" to be submitted for determination by the highest court. As also for its determination as to whether the 1st respondent, the body responsible for overseeing the conduct of attorneys, especially regarding the conduct of a criminal matter in which the public had taken an interest, ought not to have found that a prima facie case was made out.

Were the statements made for the purpose of the proceedings?

[62] The authorities relied upon by my learned sister in support of her contention that the statements by the 2nd respondent is privileged because they were likewise uttered for the purposes of the proceedings, are inapplicable. The trial concerned whether the accused was guilty of murder. The 2nd respondent's statement that she felt assaulted was wholly unrelated to the proceedings. It formed no part of her instructions. It

concerned a personal issue with the applicant. Indeed, that statement was entirely irrelevant to the advancement of her case.

[63] The learned authors of Halsbury's Laws of England 2012, Volume 32 at paragraph 597, outlined the circumstances in which attorneys' statements are privileged. Paragraph 597 reads:

> "No claim lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral written, relevant or irrelevant, malicious or not. [Munster v Lamb] The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings, or where it has no reference at all to the subject matter of the proceedings."

[64] The words uttered and the posture adopted by the 2nd respondent cannot be said to have been done or said in the cut and thrust of the litigation by advocates. The facts of this case are wholly disparate from those of the cases relied on by Phillips JA in support of her conclusion. The reasoning behind the absolute privilege conferred upon attorneys, witnesses and judges was plainly expressed by Sir Baliol Brett MR in **Munster v Lamb**:

> "Of all the three classes, judges, witnesses, and counsel, the person who most wants to have his mind clear from fear of the consequences of what he may say is a counsel who is engaged in the conduct of a case. A counsel is in a position of extreme difficulty, for he has not to speak of the things

> which he knows; he does not know whether the facts which he is instructed to bring forward are true or false, but he has to argue in favour of the proposition which will best advance the case of his client. If in the midst of these difficulties he is to be called on to consider whether what he desires to say in support of his client's case is relevant to the question at issue, if he is to be subject to the risk of being liable to an action, should he, by an error of judgment, or in consequence of incorrect instructions, make a statement which turns out not to be relevant, the difficulty of doing his duty will be greatly increased. He wants protection more than the judge or the witness, and he wants it more for the public benefit. In my opinion, the reason of the rule covers him, not merely as much as the other classes of persons, but more, in order that he may be able to keep his mind free for the performance of his duty. It is illogical to my mind to say that counsel do not want protection. The protection is given, not for the benefit of a man who may wish to act with malice, but because, if the rule were otherwise, an innocent counsel would be in danger, and would be put to trouble. It is better that the rule should be made large, even though it may be large enough to cover the case of a man who acts with malice and is guilty of misconduct."

[65] It is settled law that in advancing his client's case, counsel ought to enjoy the liberty of doing so fearlessly. The rationale, as stated in cases, is that it is not in the interests of justice that an attorney with instructions, even if such instructions accuses the witness of immorality or a crime, should be hesitant in examining or addressing the court for fear of disciplinary or other action.

[66] The 2nd respondent was under no duty, in advancing the Crown's case, to have made the statements she made. They formed no part of her examination of the witnesses nor were they relevant to her address to the court in respect of the matter. They therefore were not made in the cut and thrust of the trial and had no reference to the subject matter of the proceedings. They accused counsel of a crime.

[67] Importantly, the applicant has not instituted criminal or civil proceedings. He approached the 1st respondent, the body charged with the responsibility of upholding the standards of professional conduct. If the 2nd respondent's words were spoken dishonestly with the intent to deceive the judge and the jury, especially in a criminal matter, the issue is live as to whether prima facie such conduct was unbecoming of this noble profession. Conversely, if the 2nd respondent felt constrained to bring the matter to the attention of the judge because she was indeed "appalled" as she said, because he bore down on her and caused her to "feel assaulted", she rightly could have reported him to the 1st respondent, the body sworn to maintain the integrity of this noble profession.

[68] Assuming the applicant was guilty of the words and behaviour attributed to him, such behaviour would have been ignoble and would have brought the profession into disrepute in the presence of reporters, jury and the public not only in Jamaica but further afield.

[69] It is for the above stated reasons that I am unable to agree with my learned sisters.

P WILLIAMS JA

[70] I have read in draft the reasons for judgment of my sisters Phillips JA and Sinclair-Haynes JA. The reasons advanced by Phillips JA accord with my own reasons for concurring in the majority decision set out in paragraph [3] herein.