

CPD Course: Ethics in crime

Resource Person: Mr. Sanjay Bhuckory SC

Attendees: Law Practitioners and Legal Officers

Date: 19th November 2019

Time: 14.00- 16.00

The Institute for Judicial and Legal Studies welcomed Mr. Sanjay Bhuckory SC to deliver a CPD lecture on “Ethics in crime”. The course sought to explore ethical do’s and don’ts in criminal practice. Reference was made to the Code of Ethics for both Barristers and Attorneys, whereby law practitioners have a paramount duty towards the good administration of justice so as not to play into their clients’ hands to pervert the course of justice during Police enquiry or to mislead the court during trial. Overall, the session lasted for 2 hours and was very insightful.

Overview of lecture:

- Preliminary checks;
- Exposing the subject- The Law;
- Exposing the subject- Cases; and
- Practical case scenarios.

Mr. Bhuckory SC began this session by stating that he would be referring to the legislations and case laws with regards to the subject in the first part, and provide a more practical overview through questions in the second part. In addition, he stated that would be providing an analysis of ethics in crime from the perspective of a barrister/attorney and not from that of an offender. Mr. Bhuckory SC stated that a counsel has a duty to his client to fearlessly raise every issues, advance every arguments and ask every questions, however distasteful, which he/she thinks will help his client’s case. This duty stems from a barrister’s or attorney’s code of honour rather than a code of law. In addition, Mr. Bhuckory stated that this principle can be found in the case of *Rondel v Worsley [1967] UKHL 5*.

Following this, Mr. Bhuckory SC went to provide some preliminary checks for clarification. They were as follows:

1. Who is your client?

The naivety of this question was highlighted by the resource person. He stated that law practitioners must ensure to ascertain the obtain proper identification (ID card, passport etc...).

2. Are you conflicted?

Distinction was made between the day to day way of operation and the corporate world (where conflict checks are made). Appropriate steps (otherwise, issues such as complicity or complications of witnesses might arise) must be taken to ensure that there are no elements of conflict of interest when agreeing to take on a criminal case.

Before moving onto the next issue, Mr. Bhuckory SC made reference to clause 4.1 (f) of the Mauritian Code of Ethics for Barristers and stated that a very low standard has been set (referring to the word '**may**'). He drew comparison with the UK's high threshold as the word 'significant' is present.

Clause 4.1 (f) of the Code of Ethics for Barristers:

4.1 -A practising barrister shall not accept any brief or instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister shall be professionally embarrassed where -

- (f) the matter is one in which there **may** be a risk of a breach of confidence entrusted to him in his professional capacity by another client or any other person or where the knowledge which he possesses of the affairs of another client is likely to give an undue advantage to the new client.

The case of *Dowarkasing v. ICAC & Anor (2011) SCJ 431* was referred to. Here, Counsel for the Respondent (ICAC) pointed out that there was conflict of interest on behalf of Counsel for the Applicant as he was the Chief Investigator of the ICAC and that he was privy to information that he could use to the advantage of his client. Furthermore, the resource person referred to the judgment and stated that it was up to Counsel for the Applicant himself to decide whether he should step down or not (however, the SC did hold that if at a later stage something unethical comes up, action will be taken). Reference was also made to the Law Society of Scotland and the Law Society of UK, whereby a pertinent piece of advice was given (in a case with similar facts) which was as follows:

"If you are in possession of confidential information about your original client which would be of benefit to the new one, you must make certain that this is not disclosed and not make use of or used."

3. Who pays your fees?

This is closely linked to section 1. Law practitioners need to ascertain the identity of their clients (offenders of crimes such as drug trafficking or possession of stolen property are tricky to deal with).

4. Have you declared your fees?

5. Interaction with the client

6. Corporate clients

Reference was made to the case of *Police v. Alvaro Sobrinho Africa Ltd (2019) INT 28* (failure to provide sufficient information with regards to legal representation to the relevant authority).

7. Exchange of correspondence- Put everything on record.

8. Advising clients- Know your clients- Resource person advised law practitioners to cover their backs- Case of *Re Hurnam (2008) SCJ 17* was referred to.

9. Acting strictly as lawyers

Law practitioners should keep a reasonable distance from the clients and act professionally within the acceptable standards (refrain from mingling or socialising with clients).

10. Client's privilege

Mr. Bhuckory SC referred to section 300 of the Mauritian Criminal Code Act 1838 (similar to the French system) which criminalises disclosure of confidential information confided to the lawyer by his client (can do so upon authorisation by client). The case of *Kramutally v. R (1989) MR 203* was cited whereby the court had to decide whether the prohibition mentioned above was absolute or relative. It was held by the court that in certain exceptional circumstances, counsel could divulge what was confided to him/her. The case of *State v Bacha (1996) SCJ 79* was also cited.

Section 300 of the CC Act 1838 (in detail):

“Any physician, surgeon, as well as any pharmacist, midwife, or any other person, who may, in consequence of his or her profession or vocation, become the depositary of any secret confided to him or her, and who, except when compelled by law, to become informer, reveals such secret, shall be punished by imprisonment for term **not exceeding 2 years, and by a fine not exceeding 100,000 rupees.**”

11. Privilege for Court proceedings

Reference was made to section 290 of the Mauritian Criminal Code Act 1838 which is as follows:

“In the case of words spoken or of writings produced before any Court, defamatory allegations, foreign to the cause at issue, may give rise, either to a public prosecution, or to a civil action by the parties in the suit, where the right to such action has been reserved to such parties by the Court, and may, in every case, give rise to a civil action from a third party.”

The case of *Sabapathee v. The State (1997) SCJ 337* was referred to.

12. Money offences

The case of *Gooriah v. Attorney-General & Ors (1996) SCJ 311* gives a clear indication of this section. Additionally, sections 6, 14, 16 and 31(a) of the Financial Intelligence and Anti-Money Laundering Act 2002 as well as sections 51-55 of the Prevention of Corruption Act 2002 were also referred to.

13. Personal publicity

Reference was made to section 7 of the Mauritian Code of Ethics for Barristers. Furthermore, Mr. Bhuckory SC drew comparison with the UK's laws on publicity with regards to law practitioners. He stated that prior to 2013, the UK had a strict prohibition with regards to publicity. However, this has undergone a radical change and the following factors (comments with regards to cases require an assessment of many factors) must be adhered to:

- Nature and type of proceeding;
- Stage of trial;
- Need to ensure that media comment does not hinder the administration of justice; and
- Nature of comment that is proposed to be made (whether commenting on cases require individual client consent).

Following the exposure of the subject, notably the assessment of the legislations and case laws, Mr. Bhuckory SC went on to provide practical case scenarios which are listed below:

1. You have accepted the brief in a criminal case. Your client tells you “Look I did the crime, just get me out”. What will you tell him?

- (a) You tell him that it is impossible “because of my ethics”
- (b) You tell him- I will try
- (c) You cross-examine every witness as regards to their credibility, their capacity to remember facts and events only
- (d) You call witnesses suggested by your client, who have sworn to you that the accused was not there
- (e) You take the case, cross-examine one witness and put to him that “he might well himself have done it”

2. The Legal aid service has appointed you in a criminal case of rape. You do not wish to take the case. How do you proceed? Will you see the Presiding Magistrate, explain to him or her the reasons for your refusal or will you accept the brief because you have been practising criminal law for less than 3 years now?

3. You see on your table a document marked “Top secret for your eyes only”. This document is damning against the opposing party. It has not been sent by your attorney or by your client. Your client, an old lady of limited means has never been able to bring you any proof to sustain her case. How can you use this document?

- (a) You return it to the opponent's attorney-at-law and explain to him the circumstances.
- (b) You take a photocopy, return the document without specifying the sender and

subsequently use it in Court.

(c) You return the brief of your client to your attorney and tell him you will not take the case and destroy the document.

4. It is a Monday morning. A client walks into your chambers at 9am before the banks are open. The client asks to be defended. You accept and claim a fee of Rs. 100,000. The client takes Rs. 100,000 from a bag in Rs. 1,000 notes and pays you. Can you accept such payment? Should you contact someone for advice? Should you say that you will not appear because of doubt? Would accepting the money amount to receiving stolen property?

5. A client is charged with fraud and insists on using a forged document for a case. The barrister refuses to do so and requests the Magistrate to allow him to withdraw from the case in the 'interest of justice'. The Magistrate refuses to accede to the barrister's request on the ground that the above basis is too vague and that he/she needs to know what has happened in the case. The barrister refuses to comply with the Magistrate's request but the Magistrate insists to know. Does the barrister have to impart the reason to the Magistrate?

6. A barrister is retained by an accused who is facing serious criminal charges. Due to some circumstances, the barrister is unable to defend as professionally as is expected under the Code of Ethics. The accused is convicted and sentenced. What are the actions that could be taken against the barrister, and should he compensate the accused for his professional negligence?

7. You are representing a client in a bail application. In conference prior to the application, the client reveals that he has a previous conviction for assault and has failed to surrender to court on two occasions in the past. When you arrive in court later, the prosecution counsel informs you that your client has a clean record. The bail application starts. What should you do on these circumstances?

8. You have a hectic schedule due to heavy load of work. A client approaches you and relates his problem to you and tells you it is urgent. You know that you will not have time to deal with the client's case, but still takes the case. Is there a breach of the Code of Ethics?

9. A newly called barrister cannot meet the two ends at the end of the month. X barges in his office and tells the counsel 'Chef, mo ine fer n fraud. Guetter couma ou pou fer mai tir moi dan sa case la même si bizin cause menti ek rode fausse témoin - Mo éna kas moi ek mo pou payer'. Assuming you are the counsel, what do you do?

10. You appear for the Prosecution and you happen to overhear Defence Counsel talking to the Accused in the following terms: "There is a strong case against you, I advise you to plead guilty, despite the fact that you are not." The matter is about to be called. What should you do in the circumstances?

11. You appear in a case against a very senior member of the Bar. On the day of the trial, you are made aware informally that the opposing Counsel is attending a golf

tournament and that his junior will appear on his behalf to request a postponement on the ground that the Counsel is laid up. What should you do in the circumstances?

12. Is the law practitioner obliged to draw the attention of the court to a relevant law or precedent, even if it is unfavourable to his/her client?

As a conclusion, Mr. Bhuckory SC stated that criminal practice is becoming more and more risky as law practitioners are faced with dilemmas which may have a direct link with ethics. As such, the resource person encouraged law practitioners to follow the preliminary checks (listed above) so as to operate within the reasonable ethical standards.