DECISION OF THE DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL

COMPLAINT NO. 52/2019

In the Matter of LOWELL SPENCE and SOPHIA THOMAS, an Attorney-at-Law.

AND

In the Matter of the Legal Profession Act, 1971

Panel:	Mrs. Tana'ania Small Davis, Q.C. Ms. Lilieth Deacon Miss Anna Gracie
Appearances:	Mr. Lowell Spence - Complainant Mr. Matthew Hyatt – Counsel for the Complainant Ms. Sophia Thomas - Respondent Mr. Hugh Wildman – Counsel for the Respondent
Recording Secretary:	Ms. Jeanie McLeod and Ms. Donnette Mclean
Hearing Dates:	18 September 2021, 9 and 23 October 2021, 10 November 2021, 20 December 2021, 1 February 2022, 13 April 2022 and 3 May 2022

COMPLAINT

1. By Form of Application dated 13 March 2019 and Form of Affidavit by Applicant sworn on 13 March 2019, Mr. Lowell Spence ("the Complainant") made a complaint against Ms. Sophia Thomas ("the Respondent") that she had breached the following Canons:
   (a) Canon V (m) in that she knowingly used false evidence and/ or participated in the creation/ use of evidence which she knew to be false;
   (b) Canon V(n) which stipulates that she ought not to have counselled or assisted the witness in conduct that she knew to be illegal or fraudulent;
   (c) Canon V (o) which mandated that Ms. Thomas ought not to have made a false statement(s) of fact;

(d) Canon III (h) which states that an attorney engaged in conducting the prosecution of an accused person has the primary duty to see that justice is done and he shall not withhold facts or secrete witnesses which tend to establish the guilt or innocence of the accused;

(e) Canon I(c), in that she failed to observe the canons and failed to maintain her integrity and counselled others to act in ways detrimental to the legal profession; and

(f) Canon I(b) in that she failed to maintain the honour and dignity of the profession and her behaviour discredited the profession of which she is a member."

2. Prior to the commencement of the Complainant's case on 18 September 2021, the Respondent's attorney sought to argue the preliminary point that the Affidavit in support of the Complaint was devoid of substance to ground the complaint and was a nullity, that the affidavit contained hearsay and that the document attached to the affidavit did not have a jurat attached to it. The Respondent's attorney submitted that that the Panel had no jurisdiction to hear the matter as it was a creature of statute and had to follow the provisions of the Legal Profession Act. The Respondent's attorney relied on the provisions of Rule 30 of the Civil Procedure Rules 2002 and the authorities of **R v Monica Stewart 12 JLR 465** and **Reinaldo Pino Bestard v Carlene McFarlane, Complaint No. 193 of 2020**. Upon further exchanges with the Panel in relation to the content of the Form of Affidavit, the Respondent's Attorney withdrew his preliminary objection and the matter proceeded.

3. The Respondent's attorney then made an application for certain paragraphs of the letter dated 24 April 2018, annexed to the Form of Affidavit to be struck out. The Panel struck out paragraphs 17, 27, 28, 31, 34 and 36 in their entirety and sections of paragraphs 20, 23, 32 and 33.

4. At the close of the Complainant's case, the Respondent's attorney advised that he wished to make a no case submission and time was afforded to the parties to put their positions in writing. In his submission filed 5 October 2021, the Respondent's attorney again raised the issue as to the Panel's jurisdiction to hear the complaint. The Panel considered the submissions and having reminded itself of the test laid down in Lord Parker's **Practice Direction (Submission of No Case) [1962] 1 WLR 227** and the decisions in **Paul**

Thompson v The Industrial Disputes Tribunal [2020] JMCA 11, Barrington Frankson v The General Legal Council, Privy Council Appeal No 8 of 2005 and **McCalla v General Legal Council 49 WIR 213 at pages 246 to 249,** ruled that it had jurisdiction to hear the complaint and upheld the no case submission in part and ruled that the Complainant had failed to discharge his burden in relation to the complaints in relation to breaches of Canon V (m) and Canon V(n) and those were dismissed.

EVIDENCE

The Complainant

5. The evidence of the Complainant was that on 9 December 2009 he was charged with three (3) offences: Conspiracy to Defraud, Uttering Forged Documents and Obtaining Money by False Pretences. The trial in respect of the Offences began in December 2014 in the Half Way Tree Parish Court before Her Honour Mrs. Wolfe-Reece (as she then was). The Complainant was represented by Mr. Bert Samuels and the Respondent, attached to the Office of the Director of Public Prosecutions, was the attorney assigned to prosecute the case.

6. During the trial, on 7 November 2017 the Respondent sought to refresh the memory of one of the witnesses, a bank officer Mr. Dominic Duval with his statement given to the police, and sought the permission of the court to do so. The Complainant stated that his counsel asked to see the document being handed to the witness and when presented with it, saw that it was a photocopy and not the original. The Complainant then stated that his counsel objected to the use of the photocopy and that the Respondent searched through her papers for the original statement and told the court that she could not find it. The Complainant stated that the Respondent then advised the trial judge that the original statement was at her office and an adjournment was granted to give her time to retrieve the original statement.

7. The Complainant stated that on the resumption of the matter on 22 November 2017, the Respondent gave a document to a police office to hand to the witness Mr Duvall, however the Complainant's lawyer again objected to the document being handed to the witness without his having had sight of it. The judge instructed the police officer not to pass the document to the witness. The Respondent then retrieved the document from the police officer

and handed it to the Complainant's counsel. Mr Samuels compared the document to the photocopy that had been disclosed to the defence and remarked that they were not the same document. A request for an adjournment to examine the documents was made and the judge asked the Respondent if the document was the original of the document which she had previously served on the defence., to which the Respondent replied, 'yes it is the original', after which they adjourned and the lawyers went in to the judge's chambers.

8. The matter was adjourned to allow counsel to compare the two documents. Following the adjournment, Mr. Samuels indicated that he had identified eleven (11) differences between the two documents. The Respondent explained that the documents had the same content. The judge then adjourned the matter for the Director of Public Prosecution to attend court to address the situation.

9. On the resumption of the matter, under cross examination by Mr. Samuels, the witness admitted that he had signed the purported original the day before court on the instructions of Mr Hines, head of the bank's internal investigation unit. Mr Duval said that the May 2017 statement submitted to the DPP is the original statement and that this one was done the day before coming to court. He said he was asked by Mr Hines to sign a new statement which he did and gave it to the Respondent. The trial judge spoke to the lawyers in her chambers and then back in open court she stated that the Director of Prosecutions would be addressing the court on the adjourned date of 21 December 2017.

10. On 21 December 2017, the Director of Public Prosecution, Mrs. Paula Lewellyn, announced in Court that the prosecution would offer no further evidence and the trial judge told the Complainant that he was free to go.

11. The following documents were admitted into evidence:-

    (a) Form of Application dated 13 March 2019 was tendered and admitted as **Exhibit 1**;

    (b) Form of Affidavit sworn 13 March 2019 as amended was tendered and admitted as **Exhibit 2**; and

(c) Statements of Dominic Duval dated 18 May 2017:

i. Original dated 18 May 2017 and signed 19 May 2017 tendered as **Exhibit 3a**; and

ii. Re-print dated 18 May 2017 and signed November 2017 tendered as Exhibit **3b**.

12. The cross examination of the Complainant was aimed at establishing that the Respondent was not involved in the production of the second statement, that she had only requested the bank's investigating officer to retrieve an original from the witness.

13. The Complainant agreed that while being cross-examined Mr. Duval stated that it was Mr. Hines who had instructed him to put the second statement together and that the Respondent had just presented the statement in court as Mr. Duval's statement. He also agreed that there was no evidence in court to suggest that the Respondent caused any statement to be prepared by Mr. Duval and that Mr Duval said he was acting on Mr Hines' instructions. When asked what then is his complaint against the Respondent, the Complainant replied that when his counsel wished to call Mr. Hines on the matter, the Respondent admitted in court that she was the one who instructed Mr. Hines to re-create/ reproduce the statement.

14. In answer to the suggestion that the Respondent did nothing wrong in instructing Mr Hines to get the witness to recreate or reproduce a copy of his original statement, the Complainant disagreed and said based on what the judge said the Respondent did not follow the proper rules and that the document produced was changed and that she should have brought the original.

15. In answer to the suggestion that the complaint was brought solely due to the statements and actions of the Director of Public Prosecutions, the Complainant stated that before the DPP's statements and intervention, he had already formed the view that the Respondent had done something wrong and that what was said by the DPP confirmed his suspicions.

The Respondent

16. The Respondent gave evidence that she was called to the Jamaican Bar in 2008 and that she was Crown Counsel who joined the Office of Public Prosecutions in June 2012. The Affidavit of Sophia Thomas sworn 11 June 2019 was tendered and admitted as **Exhibit 4**.

17. The Respondent stated that during the Complainant's trial twelve (12) witnesses were called to give evidence. She stated that the matter was adjourned on several occasions and that it continued on 2 November 2017. On that date, Mr. Dominic Duval, Business Analyst at National Commercial Bank started to give his evidence and he continued on 7 November 2017. At that time, he was questioned about who was the payee and drawer on the cheque but the witness stated that he could not recall. At that point, the Respondent sought the permission of the trial judge to refresh the witness' memory from his statement that she had in her possession.

18. On the Respondent's narrative, the judge did not grant permission to refresh as the Respondent only had a photocopy of the statement and the Judge ruled that the Respondent could not refresh the witness using a photocopy. The Respondent made searches for the original and concluded that she had mislaid the original statement. Prior to the resumption of the matter, the Respondent contacted Mr. Richard Hines, Manager of the NCB Group Fraud Prevention Unit/ Special Investigation Unit to ascertain whether Mr. Duval had the original statement on his computer and if he did, to secure a reprint of the document.

19. The Respondent stated that when the matter came up again for trial on 22 November 2017, she attempted to hand the statement to Mr. Duval for the purpose of refreshing his memory not realising that it was not an exact reprint though the substance of the statement was "identical" to the original.

20. The Respondent maintained that there was no new material in the reconstructed document which could have resulted in an injustice to the Complainant. Further, that the Director of

Public Prosecutions exercised her discretion to discontinue the trial, so the Complainant was not disadvantaged in any way.

21. In cross-examination, when challenged about her approach of using a copy document instead of an original in contravention of the proper procedure, the Respondent disagreed and said that use of the original depended on the circumstances as by her understanding of the law, the copy was the same as the original. The Respondent further stated that she knew of no such law which required her to get permission to use a copy. In answer as to why then did the judge refuse to permit the use of the copy and whether the judge gave a reason for the refusal, the Respondent stated that in her view the judge misunderstood the law, did not give a reason and only said that the Respondent could not do it that way. The Respondent went on to say that in her mind she had laid the foundation for the use of the photocopy as the court was aware that she could not find the original. She had requested an adjournment because she could not find the original.

22. In response to questions posed as to what took place in Court on 22 November 2017, the Respondent stated that "she got a statement" that was to refresh the witness' memory; she agreed that the opposing party could inspect a refreshing document and said that her failure to allow inspection was a mere oversight and not due to any deliberate or malicious intention, as it was usually her practice to share documents with opposing counsel.

23. The Respondent denied that she led the judge to believe that she had found the original statement and denied saying words to the effect that she had found the original. In response to further questioning, the Respondent stated that she never told the court that she received both statements in May of 2017, that what she told the court was "*Your Honour I have two original statements in this matter, one that was already served on Mr. Samuels in May of 2017 and the one in my possession today*". The Respondent staunchly maintained she never said both statements were received in May.

24. The Respondent stated that on the 22 November 2017 she thought she had a "second" original. She explained that by referring to it as "second original" she meant that it "*came*

from the very witness who had made the first original statement and there were no changes, save and except the ones that are before the panel and that is why I call it the second original and at the time, I was not aware that those changes had been made". The Respondent was asked: "Are you saying that there were two separate statements given or is it a duplicate?" Her response:

> "*The first statement, which I believe the panel has in its possession, was the statement that I had already served on Mr. Samuels from May of 2017, and if my memory is not as accurate it's not because I wish to mislead the Panel, but the first one was served on Mr Samuels and Mr Dabdoub and there had been full disclosure of that first statement. When I tried to refresh the memory of the witness from a copy of that which Mr Samuels and everybody already had, I couldn't find it. I then went to Mr Hines and asked him to obtain the very same thing, in other words, it is on his computer so all he is doing is to print it and give me back the same statement, which is why I refer to it as the second original.*"

25. The Respondent said that the "second original" was given to her two to three minutes before she entered the courtroom and that she didn't examine the document as she expected it to be a replica of what was produced earlier.

26. The Respondent admitted that there would be some concern about the date of the "second original" (as it bore the date of 18 May 2017) but stated that she gave no instructions in relation to the date of the document. The Respondent also admitted that there were differences between the document though she could not say that there were eleven. The Respondent maintained her staunch denial of any knowledge of the document having any differences prior to be advised of it by defence counsel.

27. The Respondent admitted that during cross-examination Mr. Duval admitted that the document presented at court was a new document which he signed in November 2017. She however denied speaking to the witness or asking the witness or anyone to back date the statement. The Respondent admitted that Mr. Duval only gave one original statement in May 2017 but denied that she misled the court into thinking that she had received two original statements in May 2017 as in her mind she thought that what she had was a "second" original; she got two originals, one in May 2017 and the one which she had in court on 22 November 2017.

28. The Respondent denied reconstructing, instructing anyone to reconstruct, and orchestrating the reconstruction of any document.

29. The Respondent admitted that the DPP intervened and had come to court two or three times but stated that this was following her report of what had taken place. She agreed that the DPP indicated that she would offer no further evidence but that the decision was based on three points namely, that a vital witness had disappeared, the posture taken by the judge to Crown Counsel and that a re-trial may be an abuse of process.

30. The Respondent ended by staunchly disagreeing with all the suggestions that she had breached the Canons in the complaint. In relation to Canon III (h), she said the only fact that she withheld was not telling the judge that she had a second original. In relation to Canon I(c), she said she only told Mr Hines if the witness has the statement, please reprint it.

The Documents

31. There are two documents for the scrutiny of the Panel. The first is the Original statement of Mr. Dominic Duval created in May 2017 and the second is the "Second Original" as termed by the Respondent which was created in November 2017.

32. The Panel compared the two statements given by Mr. Dominic Duval which were admitted into evidence as Exhibit 3. The Original bears the stamp "*National Commercial Bank Jamaica Limited CENTRALISED OPERATIONS Kingston, Jamaica*"., The "Second Original" bears the stamp "*NATIONAL COMMERCIAL BANK Jamaica Limited Group Operations & Technical Division Operations Centre Kingston 10, Jamaica*". Evidently, the former unit ceased to exist. This was the first and most noticeable difference between the two versions of the statement.

33. The other differences which the Panel noted are as follows:

    (a) "...*am*..." to "...*have been*...";

(b) "*...13 years. Presently, I am the...*" to "*...the past 13 years and have held the position of...*";

(c) "*...AIDPS. Before that, I was the supervisor...*" to "*...AIDPS and was also...*";

(d) "*...document processing...*" to "*...document processing activities...*";

(e) "*...Proofing and the forwarding of cheques for verification...*" to "*...Proofing and processing cheques for distribution to the verification team...*";

(f) "*...September, 2009...*" to "*...September 2009...*";

(g) "*..., it was requested from NCB's Fraud...*" to "*..., NCB's Fraud...*";

(h) "*...Unit, to provide images of a cheque...*" to "*...Unit requested the image of a cheque...*";

(i) "*...conducting. A front...*" to "*...conducting and a front...*"; and

(j) "*...provided, which was a...*" to "*...provided. The cheque was a...*".

34. In both documents, the date which appears at line 6 is May 18th , 2017 and the date which appears in the final line of both documents is 2017 May 19.

SUBMISSIONS BY THE PARTIES

35. Each of the parties submitted written submissions. The Complainant urged the Panel to find that the Respondent had breached the Canons I(b), I(c), III(h) and V(o):

(a) As it was revealed in court through the testimony of Mr. Duval that the document presented in court was a new document and not the original of the document disclosed to the Complainant in May 2017, the document was signed in November 2017 though it gave the impression that it was signed on 19 May 2017, and that Mr. Duval had only given one original statement in May 2017;

(b) given the Respondent's role as a prosecutor and in discharge of the highest level of professional integrity, she ought to have given full and frank disclosure of the fact that the original statement could not be found and seek an alternate fair and ethical means to proceed with the matter. See: **R v Randall [2002] 2 Crim App R. 17** and **Boucher v The Queen (1954) 110 CC 263**;

(c) that the foundation to rely on a copy had not been properly laid before the trial judge on 7 November 2017 as it was the Respondent who requested the adjournment to retrieve the original statement at her office;

(d) that the Respondent utilised a document that the court would have believed was the original;

(e) that the Respondent did not give the Defence the opportunity to inspect the refreshing document;

(f) that the Panel should consider the ordinary dictionary definition of "original" and find that the document presented in court on 22 November 2017 was a reconstruction;

(g) that the Respondent on proper inspection knew or ought to have known that what she had in her possession was not the original statement given; and

(h) that the actions of the Respondent amounted to a deliberate attempt to mislead the court in believing that she had found the original witness statement.

36. In the Complainant's submissions in response to the Respondent's arguments, the Panel was urged to consider that:

(a) rather than admit that the original statement could not be found and lay the foundation for the use of the photocopy, the Respondent instead sought to introduce the reproduction;

(b) asking Mr. Hines to reproduce the document showed a lack of probity and integrity and pointed to a breach of Canon I (b);

(c) in suggesting that Mr. Hines reproduce a document to be passed off as the original was an act that amounted to a breach of Canon I (c);

(d) in cross-examination, the Respondent admitted to withholding the fact that she had a "second original", an act which the Complainant contends was a deliberate omission to deceive the court into believing the original document was before it; and

(e) the various acts of the Respondent when viewed cumulatively and drawing inferences from the Respondent's conduct should be construed as "knowledge" to warrant a finding that the Respondent breached Canon V (o).

37. In submissions filed on behalf of the Respondent, the Panel was asked to consider and find that the Respondent had not breached the Canons as:

(a) the Complainant stated that Mr. Duval testified that it was Mr. Hines and not the Respondent who asked him to prepare the statement and that there was no evidence before the Court that the Respondent caused any new statement to be prepared;

(b) On cross-examination the Complainant agreed that the Respondent did not say that she asked Mr. Hines to change the statement but to reproduce it;

(c) That the burden of proof rests on the Complainant and the standard is proof beyond reasonable doubt (see: **Campbell v Hamlet [2005] UKPC 19**). It is the Complainant who must show that the Respondent acted in a dishonest way and had specific intent to act dishonestly;

(d) There is nothing sinister or criminal in the Respondent requesting a reprint of a statement;

(e) It is for the Complainant to prove that the Respondent had the requisite mens rea (see **R v K (2001) UKHL 41**).

(f) There is no evidence that the Respondent intended to subvert the process during the criminal trial; and

(g) That following the decision in **James Forbes v R (2021) JMCA Crim 10**, and given the specific circumstances of the case, there is no evidence of any act or mental element on the part of the Respondent to commit misfeasance in a public office or misconduct as alleged by the Complainant.

STANDARD OF PROOF

38. The Panel reminds itself that these proceedings are neither criminal nor civil, but the standard of proof in disciplinary proceedings is the criminal standard which is beyond all reasonable doubt (see **Campbell v Hamlet [2005] UKPC 19**). The Panel also reminds itself that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is required (see **Bhandari v Advocates Committee [1956]1 WLR 1442** at 1452). It is for the Complainant to discharge this burden.

DISCUSSION & ANALYSIS

39. The issues for the Panel's determination are:

    (a) Whether the Respondent knowingly made a false statement of fact to the Court (Canon V (o));

    (b) Whether the Respondent as an attorney engaged in conducting the prosecution of the Complainant withheld facts or secreted witnesses which tend to establish the guilt or innocence of the accused (Canon III (h));

    (c) Whether the Respondent failed to observe the canons and failed to maintain her integrity and counselled others to act in ways detrimental to the legal profession (Canon I(c)); and

    (d) Canon I(b) in that she failed to maintain the honour and dignity of the profession and her behaviour discredited the profession of which she is a member."

Canon V (o) – An Attorney shall not knowingly make a false statement of law or fact.

40. Canon V has the rubric "An Attorney has a duty to assist in maintaining the dignity of the Courts and the Integrity of the Administration of Justice".

41. The Respondent's own evidence, is that on 22 November 2017 after defence counsel's objection that the newly produced document was not the original, she told the court "*Your honour I have two original statements in the matter, one that was already served on Mr. Samuels in May of 2017 and the one in my possession today*". We accept the Complainant's account that when asked by the judge whether the document handed up is the original, the Respondent responded in the affirmative. In paragraph 25 of the Respondent's Affidavit [Exhibit 4] she admitted that she said the document signed November 2017 was an original but that the statement was in fact a reconstruction of the original. She stated however that she thought the statement signed November 2017 was an exact reprint of the statement signed May 2017 as she had requested. She did not inform the judge that she was unable to locate the original statement. On further questioning by the judge, the Respondent instead advised the court that she had two originals, one previously disclosed to the Defence and one now in her possession.

42. To interpret what would be understood by the Respondent's statement, the context is important. The Respondent had previously attempted to hand the witness a photocopy document in order to refresh his memory as to an important piece of evidence to the prosecution of the case: the drawer and payee on a cheque. The Respondent had been stopped from doing so by the judge, upholding the defence attorney's objection to the use of a photocopy and ruling that the original statement should be presented. When the Respondent had been unable to locate the original statement in her file at court, the proceedings were adjourned to facilitate her retrieving the original statement from her office. When the matter resumed and the Respondent simply proceeded to hand up the document without more, it would naturally be taken to be the original statement which she had now located in the adjournment. The Respondent maintained that she considered the second document to be an original of the photocopy that she had previously attempted to utilise in refreshing the witness' memory.

43. The Respondent's evidence is that having not been able to locate the original statement she requested Mr. Hines to secure a reprint of the statement from Mr. Duval.

44. There is a serious concern that the Respondent did not inform the judge and Defence counsel that she had not been able to find the original but what she had in her possession was a reprinted document bearing an original signature. It is deeply worrying that instead of proceeding in that way, the Respondent opted for a course that lacked the candour to the Bench which is a hallmark of the profession. In doing so, the Respondent did not act with the utmost integrity.

45. The Respondent stated that what was operating in her mind was that she had a "second original" and there was no need to advise the Court that the original document could not be located. In fact, the second document was not even a reprint of the first document, since there were eleven instances in which its wording was different. Those differences means that there were two distinct documents being presented to the witness to refresh his memory.

46. As the saying goes "*a rose by any other name is still a rose*." Quite similarly a copy by any other name is still a copy. Putting the Respondent's case at its best, even if the document produced was an exact replica, the fact that it was a reproduction meant it was not an original, simply a copy bearing an original signature. The fact that it was signed in November 2017 but dated 18 May 2017 was a misrepresentation of what the document was.

47. The **Oxford English Dictionary** defines the following words as follows:

    (a) Original:

        i. (adj.) That is the origin or source of something; from which something springs, proceeds, or is derived; primary.

            1. Designating the thing, as a document, text, picture, etc., from which another is copied or reproduced; that is the original

        ii. (adj.) Belonging to the beginning or earliest stage of something; existing at or from the first; earliest, first in time.

    (b) Copy:

        i. (noun) A thing made to be similar or identical to another.

        ii. (verb) A thing made to be similar or identical to another.

48. The **Oxford Thesaurus** gives the following words as synonyms of the word "copy" – reproduction, imitation, replica, representation. In relation to copy in specific reference to a document it lists – duplicate, carbon, carbon copy, facsimile, photocopy, Xerox, photostat and transcript.

49. Anything short of a document which came into being and signed at the same time as the photocopy document is not **the** original of that document. She knew that it was a reprint or reproduction of a previous statement. It could therefore not be an original of the statement signed on 19 May 2017.

50. The importance of the original in the context of refreshing a witness' memory is that it is only permitted to be done from a document that was made or verified by him at an earlier time if the witness states that it records his recollection of events at that earlier time and that his recollection is likely to have been significantly better when the record was made than by

the time he gives evidence in person.[1] Permission for the witness to refresh his memory is a matter of the trial judge's discretion. The editors of **Archbold 2006** report at para 8-84 that at common law if the witness had no recollection of the facts which was sought to be elicited independent of the document, the rule is that where the original documents is in existence, a copy could not be used and the witness would only be permitted to refresh his memory from the original.

51. The Respondent could have proceeded on the basis of seeking the judge's permission to refresh the witness' memory from the photocopy, the original no longer being available and having laid the foundation as to the creation of the original and that the witness made or verified a copy while the facts were fresh in his recollection on the basis of it being a duplicate or quasi-original. A witness may even be permitted to refresh his memory from a statement made from his notes even if it is not an exact copy.[2] The second document, being one that was finalised, printed and signed in November 2017 was a different original. The fact that it was different from the document that was in the court's contemplation, no matter how slight the differences may have been or that they did not go to any central fact required to be proven, puts its status as a new and different original beyond debate. The refreshing document would not have become evidence unless in cross examining on it, defence counsel went beyond the specific part that the witness used to refresh his memory[3].

52. The need for the trial judge to be certain that the aide-memoire was a document prepared at an earlier time and not a recent product is self-evident: it will only be reliable as an aide-memoire if it had been made either contemporaneous with the events or at an earlier time than the present when the witness' memory was clear.

53. The differences between the two statements are not merely typographical or grammatical corrections however they are not material. Notwithstanding there being no material differences, this does not derogate from the duty to disclose to the court and to the Defence counsel the existence of a new document and the circumstances of its creation so that the question of whether it was a suitable aide memoire could be assessed.

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[1] Attorney General's Reference (No. 3 of 1979) 69 Cr App R 411 at 414
[2] R v Cheng 63 Cr. App R 20
[3] R v Britton (1987) 85 Cr App R 14

54. In **Complaint No. 176 of 2016, Sameer Younis v Lanza Turner-Bowen,** a complaint was brought against the attorney alleging that she had breached Canons V(o) and VI(cc) of the Legal Profession Act. The Panel considered the House of Lords decision in R v Taaffe [1984] 2 WLR 326, in which Lord Scarman adopted the reasoning of Lord Lane, CJ in the Court of Appeal and stated as follows:

> *"...I find the reasoning of the Lord Chief Justice compelling. I agree with his construction of section 170(2) of the Act of 1979: and the principle that a man must be judged upon the facts as he believes them to be is an accepted principle of the criminal law when the state of a man's mind and his knowledge are ingredients of the offence with which he is charged."*

55. The Panel went on to find at paragraphs 22 and 23 of the Decision that:

> *" 22. ...In all the circumstances the Panel is of the view that on the language of Canons V (o) and VI (cc), which are plain and unambiguous, it must be established beyond reasonable doubt that the Respondent actually knew that the notices had been returned when she deponed to the Affidavits of 7th October 2004 and 9th November 2004. Even if one accepts that the Respondent had failed in her duty to carry out an investigation prior to making those Affidavits and/or that she had given the Affidavits recklessly, the fact remains that her unchallenged evidence summarised at sub-paragraphs 9vii) to 9xii) hereof is that her subsequent investigation revealed no trace of the returned notices and that neither her bearers or her instructing partner could account for same. A prior investigation would not therefore have made any difference. The authorities establish that the Respondent has to be judged on the facts as she believed them to be, provided that the Panel, as the judge of fact, believes her account*
> *23. Given the strictures of the language in Canons V (o) and VI (cc) and having regard to the fact that actual knowledge of the falsity of the representation must be established to the standard of a criminal case beyond reasonable doubt, the Panel is of the view that ultimately the Respondent should be given the benefit of the doubt."*

56. In determining the Respondent's state of mind, the Panel considers the following relevant:
    (a) on the 7 November 2017 the Respondent departed from established and her own practice of showing Defence counsel the memory refreshing document before putting it in the witness' hand;
    (b) at the time of attempting to put the document in the witness' hand, the Respondent knew that it was a photocopy and that the usual practice is for the original document to be used;

(c) the judge upheld the objection to the use of the photocopy and allowed an adjournment for the Respondent to locate the original which the Respondent had told the court was not on the file she had with her and that she would check back at her office;

(d) having been given the opportunity to retrieve the original from her file at office, on discovering that the original could not be found, rather than making or renewing her application to use the photocopy document, the Respondent instead opted to ask Mr. Hines to ask Mr. Duval to reprint the statement from his computer to be treated as an original;

(e) the Respondent knew that the document was a recent reproduction and not an original of the photocopy she had disclosed to the defence counsel;

(f) having been handed the document only two or three minutes before court on 22 November 2017, the Respondent only checked the document to ensure that the material that she wanted the witness to refresh his memory was there;

(g) notwithstanding the earlier oversight of passing the document to the witness without first showing it to Defence counsel, the Respondent again on a second occasion failed to give Defence counsel an opportunity to inspect the memory refreshing document before passing it to be given to the witness;

(h) failing to disclose to the court or to defence counsel that the document was a reprint generated from the witness' computer in November 2017 prior to passing up the document to be given to the witness; and

(i) only disclosing the circumstances of the production of the document after the witness had been cross examined on it and following the defence counsel's request to cross examine Mr Hines as to the circumstances of its production.

57. Even if the Respondent was utilising the second document as a second original statement, as where the witness had given two statements, even if the second one had minor or no revisions of the first one, she would have been under a duty to make that fact known to the judge and to the defence counsel. Her own state of mind was that it was an exact re-production of the already disclosed statement, but she knew it was recently signed. In failing to do so, she left the court with the impression that the document that she was passing to the witness on 22 November 2017 was the original of the photocopy that she had used on the

previous occasion, also made in May 2017 and which she had located. In her clarifications, the Respondent categorised it as a second original as though the two documents had been created at the same time, but she failed to disclose that it was recently printed from the witness' computer and therefore recently signed.

58. Whilst the Panel accepts the evidence of the Respondent that she was focussed on eliciting two points from the witness, this did not excuse her behaviour in failing to be candid with the court and defence counsel and not making the requisite application whether or not she agreed with the Judge's understanding or application of the law.

59. The Respondent knew that the judge was displeased with the attempt to give the witness a photocopy of the statement to refresh his memory and had adjourned the trial to facilitate her retrieving the original. The Respondent therefore knew that this issue of presenting the statement as an aide-memoire had attracted adverse comment. She should therefore have been at pains to ensure that the proper procedure was followed on 22 November 2017. She did not make the true state of affairs known to the court and she gave answers to the judge that the document was the original and a second original.

60. The Panel takes note of the learning in **R v Randall [2002] 2 Crim App R. 17** at paragraph 10, in which their Lordships stated as follows:

> "... *The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence. To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. These rules are well-understood and are not in any way controversial. But it is pertinent to state some of them:*
>
> 1. *The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice: R v Puddick (1865); R v Banks [1916] UK. The prosecutor's role was very clearly described by the Supreme Court of Canada in Boucher v The Queen (1954):*
>
> *"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The*

role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings..."""

61. The Panel views the lack of candour on the part of the Respondent to be a departure from the justness and dignity of the profession. The Respondent was both an officer of the court and an officer of justice. The duty is even higher as a member of the Office of Public Prosecutions. Failing to observe this fundamental function will bring the profession into disrepute.

62. We find that the Respondent clearly presented the matter to the court as though she was now presenting the original of the photocopy that she had initially attempted to refresh the witness' memory from on 7 November 2017. She knew that the document was (re)created in November 2017 and she therefore knew that it was not the original of the photocopy.

63. We find the Respondent knowingly made a false statement of fact when she told the judge on 22 November 2017 that the document that she was attempting to use to refresh the witness was the original statement.

Canon III (h) – An Attorney engaged in conducting the prosecution of an accused person has a primary duty to see that justice is done and he shall not withhold facts or secrete witnesses which tend to establish the guilt or innocence of the accused

64. Canon III(h) has two limbs to it which must be satisfied in order for the Respondent to be in breach of the canon. The Complainant must not only show that a fact was withheld, but that the fact would affect his guilt or innocence. What the Respondent chose to withhold, was that the document was a reproduction and not the original that was being presented to the Court, or that a separate second statement was now being relied on to refresh the witness' memory. That was not a fact that tended to establish the Complainant's guilt or innocence. In the circumstances the Panel finds that Canon III(h) has not been made out.

Canon I (c) – An Attorney shall maintain his integrity and shall not counsel of assist anyone to act in any way detrimental to the Legal Profession

65. On the question of whether the Respondent counselled another to do an act to bring the legal profession into disrepute, The Respondent instructed Mr Hines to have Mr. Duval reproduce the statement. The Panel does not find that the request for a reprint of the statement is itself sinister or untoward. Mr. Hines was never called to give evidence as to how the second document came into being. The Complainant agreed that Mr. Duval's evidence was that the instruction he said he received from Mr Hines was to re-create or reproduce the statement. There is no evidence to enable to Panel to make a finding that the Respondent counselled either Mr Hines or Mr Duval to do an act that would bring the legal profession into disrepute.

Canon I (b) – An Attorney shall at all times maintain the honour and dignity of the profession and shall abstain from behaviour which may tend to discredit the profession

66. In the case of **Shawn Campbell and Others v R [2020] JMCA Crim 10** the Court of Appeal was called upon to consider an allegation of prosecutorial misconduct against the DPP. The Court considered paragraph 28 of ***Randall v R*** which states;

> *" ...There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."*

67. The Court at paragraph 260 went on to state as follows:

> *"[260] It appears from this dictum that the conduct complained of in a given case would have to be "gross"; "persistent"; "prejudicial" or "irremediable" in nature in order for an allegation of prosecutorial misconduct fairly to be made..."*

68. In **Gresford Jones v The General Legal Council (ex parte Owen Ferron) Miscellaneous Appeal No. 22 of 2002 delivered March 18, 2005**, at pages 22 to 23 of the Judgement, Harrison J.A. stated as follows:

"The governing words of Canon I are:

> *"An attorney shall assist in maintaining the dignity and integrity of the Legal Profession and shall avoid even the appearance of Professional impropriety."*

This standard of conduct required to be maintained by members of the legal profession is easily understood and perceived as basic, good, upright and acceptable behaviour. Any deviation from this legal code is subject to scrutiny as it relates to the requirement of a particular canon. Consequently, "the honour and dignity of the profession..." may be besmirched by a breach of a particular canon or "the behaviour (of an attorney) may tend to discredit the profession..." and be a breach of a specific canon. Either conduct would fail to contravene the requirements of the proper conduct demanded by Canon I (b). It is my view that the canon is specifically widely drafted in order to emphasize the ever prevailing high standard of conduct demanded by the profession and re-enforced by all the Canons in the Rules. The Committee was accordingly not in error to find that Canon I (b) relates to the conduct of an attorney "in relation to the Court, the regulatory body governing the profession, the law practice, the client, colleagues and certain other persons" and to find that the appellant was in breach thereof. The Canon may also be construed in light of the cumulative effect of the overall conduct of the appellant ..."

69. In **Aaron v The Law Society [2003] EWHC 2271**, in paragraph 49 of the judgment of Auld LJ, the following reference was made to the well-known textbook Cordery on Solicitors, 9th Edition, at paragraph 1,430 to 1,440 and 1407:

> "As stated in Cordery on Solicitors ...solicitors are not liable in conduct for simple mistakes or errors of judgment, but negligence may, depending on the circumstances, amount to professional misconduct. It may be helpful for me to set in full the latter paragraph, which draws on passages from the judgments of Sir Thomas Bingham MR, as he then was, in Ridehalgh v. Horsefield ... and of Lord Denning MR in Re a Solicitor [1972] 2 All ER 811 , at 815I: "
>
> Then Auld LJ quoted the following from Cordery:
>
> "Professional misconduct is simply conduct which the Solicitors' Disciplinary Tribunal and the Judges from time to time regard it to be. 'Conduct which would be regarded as improper according [to] the consensus of professional, including judicial, opinion could be fairly stigmatised as such whether it violated the letter of a professional code or not.' Conduct does not have to be 'regarded as disgraceful or dishonourable by his professional brethren of good repute and competency' to amount to professional misconduct as even negligence may be misconduct if it is sufficiently reprehensible or 'inexcusable and such as to be regarded as deplorable by his fellows in the profession'. It will be noted that these quotations preserve the assessment of professional conduct, as to whether or not it amounts to professional misconduct, to the profession itself and to the judges."

70. We consider that the Respondent's conduct was gross and repeated and therefore intentional in misleading the Court as to the provenance of the so called "second original". It was not a simple mistake or error in judgment. Being an attorney of nine years practice at the time and five years with the Department of Public Prosecutions, she ought to have known the proper procedure in proceeding to refresh a witness' memory. The manner in which she proceeded to circumvent the process of obtaining the court's permission was not exemplar of honesty and candour. Acquiring a reproduced document with an original signature bearing a back date and failing to inform the Court of the absence of the original smacks of pursuing a course to have the use of the document at all costs or certainly without regard to candour in the face of the court, truth, due process and fairness to the defendant.

71. For these reasons and those reasons set out in our analysis in paragraphs 56 through 63 above we find that the Respondent's conduct was such that she failed to maintain the honour and dignity of the profession and her behaviour discredited the profession of which she is a member.

FINDINGS OF FACT

72. The Panel makes the following findings as it is obliged to do by virtue of section 15 of the Legal Profession Act:

    (a) At the trial date of 7 November 2017, the Respondent did not lay the foundation of the use of the photocopy statement to be used to refresh the witness' evidence as she indicated to the Trial Judge that the original was at her office;

    (b) That based on the Respondent's indication that the original was at her office and on the Respondent's application, an adjournment was granted to produce the original statement;

    (c) The Respondent made checks at her office and discovered at that time that the witness' original statement was mislaid/ lost;

    (d) The witness did not have another original of the statement he gave in May 2017;

    (e) The Respondent spoke to Mr. Hines and requested that he ascertain from the witness whether he had the original statement on his computer and if so, he should reprint it for presentation at trial;

(f) At the trial date of 22 November 2017, the Respondent did not inform the judge that she had not found the original statement and that she had secured a reprint before having the document passed to the witness;

(g) That the statement presented was not a replica with an original signature or a "second original" but a new document with changes both to grammar and the content though the changes were not material;

(h) The Respondent did not check the statements to ensure that the reproduction was an exact replica of the original;

(i) The Respondent did not know that the document delivered to her by Mr Hines had some changes to content, though not material; and

(j) The Director of Public Prosecution offered no further evidence in the matter against the Complainant.

CONCLUSION

73. Having carefully considered the evidence, the Panel finds that the evidence presented by the Complainant in relation to one of the grounds of complaint has met the requisite standard of proof, that is proof beyond a reasonable doubt that the Respondent has violated the canons of professional ethics. In particular the Panel finds that the Respondent has failed to maintain the honour and dignity of the profession and her behaviour discredited the profession of which she is a member and that the Respondent failed to maintain her integrity and counselled others to act in a manner injurious to the legal profession.

74. The Panel therefore finds the Respondent is guilty of professional misconduct as per Canon VIII (d) in that she has breached **Canons V (o) and I(b) of the Legal Profession (Canons of Professional Ethics) Rules**.

75. In accordance with the procedure recommended by the Court of Appeal in **Owen Clunie v General Legal Council, Miscellaneous Appeal No. 03 of 2013 [2014] JMCA Civ 31**, the Panel directs that a date be fixed to give the Respondent an opportunity to be heard in mitigation before a sanction is imposed.

Dated the 29 day of July 2022.

TANA'ANIA SMALL DAVIS, Q.C.

LILIETH DEACON

ANNA GRACIE