[2004] WASCA 283

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	RE A PRACTITIONER [2004] WASCA 283
CORAM	**:**	MALCOLM CJ MURRAY J MCKECHNIE J
HEARD	**:**	12 NOVEMBER 2004
DELIVERED	**:**	12 NOVEMBER 2004
FILE NO/S	**:**	LPD 1 of 2004
MATTER	**:**	*Legal Practitioners Act 1893* AND A Practitioner of this Honourable Court AND A report by the Legal Practitioners Disciplinary Tribunal to the Full Court of this Honourable Court under the *Legal Practitioners Act*, s 29A(2)(a) and s 30

Catchwords:

Legal practitioners - Practitioner convicted of being knowingly concerned in the importation of narcotics contrary to s 233B(1)(d) of the *Customs Act 1901* (Cth), and possession of and trafficking in drugs of dependence contrary to ss 71(1) and 73(1) of the *Drugs, Poisons and Controlled Substances Act 1981* (V) - Practitioner not a fit and proper person to practise law - Practitioner struck off the roll

Legislation:

Customs Act 1901 (Cth) s 233B(1)(d)
Drugs, Poisons and Controlled Substances Act 1981 (V) ss 71(1), 73(1)
Legal Practice Act 2003 (WA) ss 185(2)(a), 194
Legal Practitioners Act 1893 (WA) ss 29A(2)(a), 30

Result:

Leave to amend report granted
Application granted

Category: B

Representation:

Counsel:

Applicant	:	Ms C F M Coombs
Respondent	:	No appearance

Solicitors:

Applicant	:	Minter Ellison
Respondent	:	No appearance

Case(s) referred to in judgment(s):

New South Wales Bar Association v Evatt (1968) 117 CLR 177
Re A Barrister and Solicitor (1979) 40 FLR 1
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279

Case(s) also cited:

Ex Parte Attorney General for the Commonwealth; Re a Barrister and Solicitor (1972) 20 FLR 234

1 **MALCOLM CJ**: This matter comes before the Court by way of a report by the Legal Practitioners Disciplinary Tribunal to the Full Court under s 29A(2)(a) and s 30 of the *Legal Practitioners Act 1893* (WA) and s 185(2)(a) and s 194 of the *Legal Practice Act 2003*. The report follows proceedings against the practitioner alleging illegal conduct. The reference to the tribunal was that:

> "The practitioner was guilty of illegal conduct between on or about 1 January 1997 and on or about 12 September 1999."

2 The particulars of the relevant conduct were:

> "1. Between 1 August 1999 and 11 September 1999 at Melbourne in the state of Victoria [the practitioner], Carl Heinz Urbanec and Andrea Christine Lucia Mohr, contrary to paragraph 233B(1)(d) of the Customs Act 1901, were knowingly concerned in the importation into Australia of prohibited imports to which section 233B of the Act applies, namely narcotic goods consisting of not less than a commercial quantity of the narcotic substance cocaine which had been imported into Australia between 10 and 11 September 1999.
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> 2. Between 1 January 1997 and 12 September 1999 at Melbourne in the state of Victoria, [the practitioner] did, contrary to subsection 71(1) of the *Drugs, Poisons and Controlled Substances Act 1981*, without being authorised by or licensed under the Act or regulations thereunder to do so, traffic in a drug of dependence, namely cocaine.
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> 3. On 12 September 1999 at St Kilda in the state of Victoria, [the practitioner] did, contrary to subsection 73(1) of the *Drugs, Poisons and Controlled Substances Act 1981*, without being authorised by or licensed under the Act or regulations thereunder to do so, have in his possession a drug of dependence, namely 3,4-methylenedioxy-n-methylamphetamine (ecstasy).

3 The practitioner was served with the reference in prison in Victoria. He informed the Registrar of the Tribunal that he admitted the allegations against him. He did not file an answer and did not attend the hearing by

reason of his incarceration although notice of the hearing was served on him on 8 September 2002.

4 The reference was heard by the Tribunal on 17 October 2003 and the Tribunal decided to issue a report to the Full Court recommending that the practitioner be struck off the roll. The report of the Tribunal to the Court was not prepared until February 2004. In the meantime, the *Legal Practice Act 2003* came into force on 1 January 2004. The report now comes before the Court pursuant to s185(2)(a) and s194 of the *Legal Practice Act*. In my opinion, leave to amend should be granted.

5 The practitioner together with three others was convicted, together with those persons in the County Court of Victoria on his plea of guilty to the offences charged. The offences related to the unlawful importation into Australia of 3.7 kilograms of pure cocaine valued at between $1.35 million and $2.7 million. The practitioner's role was that he was knowingly concerned in the importation of the drugs in question. He provided advice, encouragement and the offer of legal services if the person who actually imported the drugs, one Roberts, needed them.

6 The sentencing Judge said in relation to the practitioner that he was at the relevant time, "A heavy user of cocaine," and that two of his co-offenders, namely, one Moore and one Erbenec, had been one of his sources of cocaine while Roberts was overseas organising the importation of the drugs. It was this past and continuing supply and use of cocaine by the practitioner which explained his participation in the importation together with his co-offenders.

7 The reason for the importation of the cocaine as found by the sentencing Judge was to provide a stock of cocaine which Roberts, Moore and Erbenec would have available for a number of purposes, namely, to a small extent for their own use, to supply the practitioner for profit as the sentencing Judge found judging by the quantity and value of the drugs for sale on a wider market, as well for profit. Although Roberts, Moore and Erbenec used cocaine, there was no finding that they were addicted to it. Roberts was a principal in the scheme and played a lead role. In passing sentence, the learned Judge said:

> "The importation of cocaine into this country and indeed being knowingly concerned in such an offence is a very serious crime; even more so is that the case when the quantity is a commercial quantity. The quantity in this case approached twice the quantity fixed as a commercial quantity. The quantity of the

> drug is not, of course, the only or necessarily the most important factor in sentencing for a crime such as this. Indeed it is but one of very many matters to be taken into account, including the matters referred to in s 16A of the Commonwealth Act, but it is not without considerable significance.

8 The potential for harm from such a quantity is very great. The pernicious nature of the drug is clear is clear from the evidence called on the practitioner's behalf if such evidence was necessary. The courts have firmly rejected the view that trafficking in cocaine should attract less serious penalties than from heroin, *R v Zapata*, 17 October 1996."
In sentencing the practitioner, the learned Judge said on 3 December 2001:

> "[The practitioner], as you admit by your plea of guilty, you knew Mr Roberts was going to Benin to purchase and import cocaine and you assisted in that importation. You gave encouragement and you gave advice which, if not legal advice strictly so-called, was at least advice of a quasi-legal character coming from an experienced criminal lawyer and based on your legal experience with drug cases, including importations, and which was designed to forward the importation.
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> You were willing to provide advice, presumably legal advice, whilst Mr Roberts was overseas, ensuring that he had your contact details if he needed you. Such advice again was designed to forward the importation. You were willing to provide advice, presumably legal advice, and assistance, if required, should Mr Roberts encounter trouble with Customs or the Australian Federal Police upon his return, such advice and assistance intended to forward the importation and sustain Mr Roberts in his offending.
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> Knowing that he had this reservoir of advice and assistance and expertise available to him would no doubt have been a comfort to Mr Roberts. It has been agreed between you and the Crown that your role in the scheme was limited to being useful rather than essential and that it is probable that the importation would have occurred without your encouragement and participation."

9 It was found that the practitioner aided, abetted or counselled the proposed importation in a number of ways described by the sentencing Judge. The practitioner was to be on hand when others involved in the

importation returned to Australia or anything went wrong with the importation so as to provide legal services to the advantage of the co-offenders Roberts, Moore and Erbenec.

10 The learned sentencing Judge said in the course of his sentencing remarks:

> "Your position and status as a solicitor of this state puts you in a special relationship with the law. You were "a member of a profession, on the integrity of the members of which the public is entitled to rely unreservedly" to adopt what was said by King CJ in *South Australian Police v John* (1995) 74 A Crim R 510. You had bound yourself by oath to uphold the law and to conduct yourself honestly in the legal profession.
>
> To behave in the illegal, dishonourable and disgraceful way that you did in this case amounts to a grave matter of aggravation. Your behaviour involved a degree of public scandal which reflects on the profession as a whole and that profession, and indeed the community, demand a sentence which will act as a deterrent to others, including lawyers, who might be tempted to commit similar crimes or indeed any crimes."

11 In addition to being knowingly concerned in the importation, the practitioner was also convicted of one count of selling cocaine to a friend for the price he himself paid to acquire it, namely, $250 to $300 a gram. There was trafficking in cocaine in the period from 1 January 1997 to 12 September 1999 which was described by the sentencing Judge as "repeated and persistent trafficking in breach of laws which you were sworn to uphold".

12 The practitioner was sentenced to terms of imprisonment in respect of the offences of which he was convicted of 6 years for the importation and terms of 3 years and 3 months for the other related offences. In the result, the sentences were structured so that the total period the practitioner would be required to serve was 7 years with a non-parole period of 5 years.

13 On the basis of these facts the Tribunal found the practitioner guilty of illegal conduct. In the circumstances the inevitable result of that finding is that a practitioner guilty of such illegal conduct cannot be considered a fit and proper person to remain a member of the legal profession. This is the overall test: see the discussion of the cases in ***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12 at 24 to 25.

14 In my opinion, the conduct of the practitioner in this case was such that the practitioner was no longer a fit and proper person to remain a member of the legal profession. The maintenance of proper standards and the protection of the public require that the practitioner be struck off the roll of the practitioners: see ***Ziems v Prothonotary of the Supreme Court of New South Wales*** (1957) 97 CLR 279 at 285-286 per Dixon CJ, ***New South Wales Bar Association v Evatt*** (1968) 117 CLR 177 at 183 per Barwick CJ and Kitto, Taylor, Menzies and Owen JJ, ***Re A Barrister and Solicitor*** (1979) 40 FLR 1 at 24 to 25 per Blackburn CJ and Connor and Davies JJ.

15 For these reasons I am of the opinion that the Court should make an order striking the practitioner's name from the roll of practitioners of this Court. There will be no order for costs by consent.

16 **MURRAY J**: I agree. There is nothing that I have to add except the observation that the power of the Court is exercised upon a finding of unsatisfactory conduct under the Legal Practice Act of 2003. That is a term defined specifically to include illegal conduct and in the circumstances of this case there could not be a clearer requirement, in my view, that the practitioner be struck off.

17 **MCKECHNIE J**: I also agree. The convictions are of so serious a nature and were committed in circumstances so intimately related with the practitioner's practice that the protection of the public and the maintenance of proper standards and the reputation of the legal profession requires an order striking the practitioner from the roll.