[HIGH COURT OF AUSTRALIA.]

ZIEMS . . . . . APPELLANT;
RESPONDENT,

AND

THE PROTHONOTARY OF THE SUPREME COURT OF NEW SOUTH WALES } RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 1, *July* 2.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Legal Practitioners — Barrister — Disbarment — Criminal offence — Felony — Manslaughter — Conviction — Name removed from roll of barristers—Appeal—Matters for consideration—Fit and proper person—Material witness—Tender for cross-examination by the defence—Discretion of prosecutor—Presentation of whole of facts—High Court—Jurisdiction.

A barrister who was admitted to the bar in 1936 and, except for a period of war service, practised continuously thereafter, and who resided in Sydney, appeared professionally one day in a court in Newcastle until 4 o'clock p.m. and thereafter attended to his private affairs. About 10 o'clock p.m. that day, at a hotel in which he was temporarily staying, he remonstrated with a seaman who threw some bottles of beer against a wall and used disgusting expressions to two young women whereupon the seaman, who was younger and bigger than the barrister, violently and savagely attacked and heavily punched him about the head and upper part of the body. A sergeant of police who was present intervened and prevented further attack by the seaman and advised the barrister to go to the hospital to have his injuries attended to. The barrister left the hotel and within an hour, whilst driving his motor car along a road some distance away from Newcastle, collided with an oncoming motor cycle on the barrister's wrong side of the road. The rider of the motor cycle died of his injuries. The barrister was charged with manslaughter. Evidence by police and persons who saw the barrister at the scene of the accident was to the effect that he was under the influence of drink. The sergeant of police, who at the coronial inquiry had conceded that the barrister's condition might be due to the blows received by him and not to drink, was not called by the prosecutor and the barrister's counsel was forced to put him into the witness-box and was unable to cross-examine him. The barrister said he was not intoxicated but was suffering from shock and concussion as a result of the injuries inflicted upon him by the seaman. He was convicted and sentenced

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to two years' imprisonment with hard labour. The Supreme Court of New South Wales removed the barrister's name from the Roll of Barristers of New South Wales on the ground of his conviction and sentence. Upon an appeal by the barrister to the High Court,

Held, by *Fullagar*, *Kitto* and *Taylor* JJ., *Dixon* C.J. and *McTiernan* J. dissenting, that the appeal be allowed and that the appellant be suspended from practice during the continuance of his present imprisonment.

The fact of conviction and sentence, whilst of great importance, is not decisive. It is open to the Supreme Court to suspend a barrister from practice.

Per Fullagar J.: (1) The fact of conviction and sentence is not unchallengeable and conclusive of the ultimate issue; (2) Personal misconduct as distinct from professional misconduct may be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister, but the whole approach of a court to a case of personal misconduct is very different from its approach to a case of professional misconduct.

Per Kitto J.: (1) It is not a necessary conclusion from the fact of conviction and sentence to imprisonment imposed upon a barrister that he is unfit to remain a member of the Bar; (2) If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of the privileges and in the effective discharge of the responsibilities carried by members of the Bar, he is not a fit and proper person to remain at the Bar.

Per Taylor J.: (1) Proof of the fact of the appellant's conviction and sentence, without more, does not make it inevitable that an order should be made directing that his name be removed from the Roll of Barristers; (2) The vital question is not whether a practitioner has been convicted of an offence against the criminal law but whether his conduct has been such as to show that he is unfit to remain a member of his profession; and (3) It is not a true rule that a conviction for any offence constitutes a disqualification to be a member of the Bar, nor is disqualification so constituted by an offence which results in imprisonment as against an offence which does not so result.

The discretion of a Crown prosecutor in the matter of calling material witnesses upon a criminal trial discussed by *Fullagar* and *Taylor* JJ.

Archbold's Criminal Pleading, Evidence & Practice, 33rd ed. (1954), par. 876, pp. 515, 516; *Halsbury's Laws of England*, 3rd ed., vol. 10, p. 418; *Re Dora Harris* (1927) 2 K.B. 587, at p. 590; and *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (1944) A.C. 156, at p. 169, referred to.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

APPEAL from the Supreme Court of New South Wales.

On 4th May 1956, before a court of quarter sessions, at Newcastle, Trevor Charles Oriel Ziems, a barrister who had been a practising member of the Bar of New South Wales continuously, except for a period of war service, since 29th May 1936, was convicted of

manslaughter and was sentenced to imprisonment with hard labour for a period of two years.

Ziems's conviction and sentence was reported by the Prothonotary to the Supreme Court whereupon he was called upon to show cause why his name should not be removed from the Roll of Barristers.

On the return of the rule the Full Court of the Supreme Court of New South Wales (*Street* C.J., *Owen* and *Brereton* JJ.), on 13th September 1956, made an order directing that Ziems's name be removed from the said roll.

From the order so made Ziems appealed as of right to the High Court.

Further facts appear in the judgments hereunder.

J. W. Smyth Q.C. (with him *W. B. Perrignon*), for the appellant.

B. B. Riley, for the Council of the Bar Association of New South Wales. The council is represented here because it feels that its failure to be so represented before your Honours by counsel might be construed as indicating a lack of respect for this Court. By a majority the council is of opinion that the appellant's name should not be struck off the roll, but that he should be suspended for a period not less than the period of the appellant's sentence of imprisonment.

Q. Tubman, for the Prothonotary, submitted to such order as the Court might deem fit to make.

J. W. Smyth Q.C. The Crown conceded at the trial that the appellant was a man of excellent character and reputation and of temperate habits. There was nothing whatsoever against his character or conduct at the Bar, civilly or criminally. The Full Court took the view that if a member of the Bar is sentenced to a term of imprisonment, no matter what the offence, it necessarily follows that the name of that member should be removed from the roll. The Court when dealing with a matter of this kind ought to go into the circumstances to ascertain the nature of the offences. That is particularly so in a case of manslaughter which can range from something just short of murder down to something that happens under the most unfortunate circumstances : *In re Weare* (1). In New South Wales there is not any distinction between a conviction for a misdemeanour or a felony (*In re Wishart* (2)). In the

(1) (1893) 2 Q.B. 439, at pp. 445, 447, 449.

(2) The Full Court, Supreme Court of New South Wales, unreported.

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case of the appellant there is no question of any member of the Bar, or any member of the legal profession feeling that it would be revolting to have anything to do with him. There are here the most extenuating circumstances. As a matter of law, unless he had no mind at all, he is liable for the consequences of his act. The principles, so far as they emerge from the cases, would be the principles upon which our courts would act in taking the place of the Benches: Lord *Westbury's* speech in *In re Wallace* (1). Circumstances which have nothing whatever to do with a barrister's professional conduct do not *per se* render him unfit to remain a practitioner of the court. This Court is concerned with the matter purely as conduct unconnected with the appellant's profession, for which he has already been punished, and as to what disciplinary action is appropriate in the circumstances. This Court should substitute its own opinion (*Re a Solicitor* (2)). The facts do not show that the appellant was under the influence of liquor. The test is as shown in *Re a Solicitor* (3)). In *Re a Solicitor*; *Ex parte The Incorporated Law Society* (4) the members of the Court distinguished between the crime itself and the punishment, treating the fact that the person concerned had gone to gaol as not an added circumstance which made them alter their first view. One could not conceive a more severe punishment than that a member of the Bar should be disbarred when he has already been adequately punished. Indeed the penalty imposed in this case was somewhat more than is usual in this type of case. There is here no moral turpitude or professional misconduct. What is involved is an element of recklessness which could well be explained by the surrounding circumstances. There cannot be some impracticability in suspending a member of the Bar as was suggested by the Full Court: see *In re Wallace* (5). It is quite impossible for a member of the Bar, whilst he is in prison, to practise as such a member. As to whether the suspension should extend beyond the term of imprisonment is a matter for this Court to determine. If the appeal lies, it would be a matter for this Court to substitute its own judgment for that of a domestic tribunal.

[DIXON C.J. referred to *Thomas* v. *The Incorporated Law Institute of New South Wales* (6).]

Where the matter is important in principle, as here, and if the appeal lies, then it ought not to be dismissed on the basis that this

(1) (1866) L.R. 1 P.C. 283, at pp. 294-296.
(2) (1956) 3 All E.R. 516.
(3) (1956) 3 All E.R., at p. 518
(4) (1889) 61 L.T. 842, at p. 843.
(5) (1866) L.R. 1 P.C. 283.
(6) (1929) 3 A.L.J. 32.

is purely a domestic matter, because it has got nothing to do with the appellant's professional conduct. The matter of the Court's jurisdiction was dealt with in *In re Davis* (1). In fairness to the accused the Crown should have called the police sergeant as a witness in the case.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J. This is an appeal instituted as of right from an order of the Supreme Court of New South Wales whereby the name of the appellant was removed from the Roll of Barristers of New South Wales. The ground for disbarring the appellant was that on 4th May 1956 he was convicted at quarter sessions of manslaughter and sentenced to imprisonment with hard labour for a period of two years. The offence took place at Newcastle on 17th May 1955 when a car driven by the appellant collided with a motor cycle and killed the rider. The case made against the appellant at his trial was that he was under the influence of liquor to such a degree that he had driven his car upon an erratic course and had so occasioned the collision. In the Supreme Court the view seems to have been adopted, at all events by *Street* C.J., that the conviction and sentence constituted grounds in themselves for disbarring the appellant and that the court should not be concerned to go behind them and review the facts or circumstances. No doubt the fact of the conviction and sentence is in itself a matter of great importance but I do not agree that all the circumstances lying behind them should not be taken into consideration before determining that the appellant should not remain a member of the Bar.

It appears that the appellant was called to the Bar on 29th May 1936 at about the age of thirty-eight. Before that he seems to have served in the offices of solicitors, beginning in the country. On 17th May 1955 he appeared before a Warden's Court at Newcastle. After the adjournment of the court he drove his car to one or two neighbouring places which he had occasion to visit and then back to Newcastle, where he sought accommodation at a hotel whose licensee he knew. There was some difficulty in putting him up, but he remained there during the evening except for a period of over an hour occupied in dining at a neighbouring cafe. At a time which the appellant fixed at about 10 p.m. some trouble arose with a man described as a seaman. He appears to have thrown bottles of beer against the wall of the passage-way and, as the appellant

(1) (1947) 75 C.L.R. 409.

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says, to have used disgusting expressions to two young women there. The police were sent for but the appellant's evidence is that he felt called upon to interfere. According to the depositions of a sergeant of police who arrived in answer to the summons at a time he fixes as 10.25 p.m., he saw the appellant and the seaman together. He says: "They appeared to me to be under the influence of intoxicating liquor and the seaman a younger and bigger man than Mr. Ziems was walking on the left hand side of Mr. Ziems who had hold of him by the upper part of the right arm with his left hand and as they approached the glass doors of the entrance the seaman veered away to his left as though he had been pushed and then he quickly swung round and violently and savagely attacked Mr. Ziems punching him heavily about the head and upper part of the body. Mr. Ziems' spectacles fell to the tiled passage floor and he was struck up against the brick wall of the building. I quickly intervened and prevented the further attack by the seaman." The seaman was arrested and taken away. The police sergeant advised the appellant to go to the hospital to have the injuries which the seaman had inflicted upon his face and head attended to, injuries that must have seemed not altogether inconsiderable. The licensee says that he sat the appellant down in the lounge and went about his own duties intending to take him to the hospital but that when he came back the appellant had gone. Apparently the appellant had driven off in his own car on the way to another hotel where accommodation had been arranged for him. The story is taken up by the driver of a truck and a passenger therein, both of whom witnessed the fatal accident. At some time after 11 p.m. the driver noticed a car in front as he drove his truck along the highway. The car proved to be the appellant's. The truck maintained a position between ten and forty yards behind it. The truck driver and his passenger in their evidence described a journey in which the appellant's car in front repeatedly veered from one side of the road to the other until at length it collided with an oncoming motor cycle on the appellant's wrong side of the road. When the accident occurred they and the driver of a car behind the truck stopped and went to the scene. They all regarded the appellant as under the influence of drink. The rider of the motor cycle was removed to a hospital where three days later he died of his injuries. The appellant was taken to the police station and the police evidence was to the effect that he was intoxicated. The appellant's case was that he was not intoxicated but suffering from shock and concussion as a result of the injuries inflicted upon him by the seaman. He stated what drink he had

had and the time when he took it. If this evidence had been accepted, the witnesses who thought he was intoxicated must have mistaken the symptoms of shock and concussion for the effects of drink. He could not absolutely exclude by the evidence of other witnesses the logical possibility of his having obtained additional drink, but the licensee's evidence and other testimony tended to confirm the story he told of the limited quantity of drink he had consumed, and he called medical and other evidence to support the explanation of his conduct as the consequence of shock and concussion. His own mind on what occurred on that night after he received the blows of the seaman, if he is to be believed, was amnesic. The police sergeant who witnessed the fracas between the appellant and the seaman had, in his depositions before the coroner, conceded the possibility that the swaying of the appellant in the passage was due to the blows from the seaman and not to drink, and had described the conflict as one in which the appellant received many blows. He was not, however, called at the trial by the prosecutor and the appellant's counsel was forced to put him in the witness-box, where his evidence proved much less favourable to the appellant than had his depositions, and where he was not exposed to cross-examination on the appellant's behalf. In this and perhaps other respects the trial was not altogether satisfactory. But the fact remains that the jury completely rejected the appellant's case and on ample materials convicted him of manslaughter. Further, the the judge presiding at quarter sessions treated his offence as very serious and imposed a substantial term of imprisonment.

I have stated the circumstances of the case compendiously but I think not unfavourably to the appellant. I am unable to accept the view that the circumstances should have led the Supreme Court to leave the appellant's name on the roll of counsel. He was held guilty of a grave crime deserving of severe and degrading punishment. There can be no doubt of the moral blameworthiness of the conduct of a man who drives a motor car while under the influence of liquor, a consideration brought home by the fact that he caused the death of a fellow creature. On the case accepted by the jury the appellant's earlier conduct must be regarded as very unseemly.

In dealing with the question whether a man should remain on the roll of barristers the special if not singular position of counsel should be borne steadily in mind. If counsel is adequately to perform his functions and serve the interests of his clients, he should be able to command the confidence and respect of the court, of his

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fellow counsel and of his professional and lay clients. When a barrister is justly convicted of a serious crime and imprisoned the law has pronounced a judgment upon him which must ordinarily mean the loss by him of the standing before the court and the public which, as it seems to me, should belong to those to whom are entrusted the privileges, duties and responsibilities of an advocate. There may be convictions for a crime of which this is not true, but I cannot think that the present is one of them.

The history of the Bar, both in Australia and in England, may disclose instances of men who have fallen very low indeed and yet, having escaped disbarment, have afterwards attained recognition if not eminence. In no such case, however, was a court called upon to pronounce upon the disqualifying effect of the conduct that had been pursued by the man who afterward succeeded, and it is equally true that, on the other hand, for a like reason men have escaped disbarment who have never ceased to be a source of anxiety and worse to other members of the Bar.

The duty of a court cannot be affected by either description of consideration just as it cannot be affected by a consideration of the hardness of the case of the man who has been convicted. The jurisdiction the court exercises has nothing to do with punishment. The purpose of the power to remove from the roll of barristers is simply to maintain a proper standard, and that is a necessarily high standard, for the Bar is a body exercising a unique but indispensable function in the administration of justice.

The decision of the Supreme Court appears to me to be correct in its conclusion even if some of the reasons do unduly limit the scope of the inquiry into the facts which it may be proper for a court to make where a barrister has undergone a conviction and sentence of imprisonment. I may add, too, that I think that it is open to the Supreme Court to suspend a barrister from practice: see *In re Spensley* (1). But, even so, it is probably a better course in most cases where room exists for the belief that time may give the barrister a title to resume his place at the Bar to allow him to re-apply at a subsequent time and offer positive evidence of the grounds upon which he then claims to be re-admitted.

In the present case I find no sufficient reason for interfering with the order of the Supreme Court. I think that the appeal should be dismissed. It is perhaps desirable to add that at the hearing of the appeal the question was not raised whether special leave to appeal was necessary.

(1) (1864) 1 W.W. & a'B. (L.) 173.

McTiernan J. I agree that the appeal should be dismissed.

The verdict of the jury that the appellant was guilty of manslaughter necessarily involves that the Crown made out its accusation that the appellant committed the offence by driving his motor car while he was drunk.

To drive a motor car in this condition is evil conduct; because calculated to cause bodily injury or death. In this case the consequences were unfortunately fatal. The gravity of the offence committed by the appellant, in my opinion, is not exaggerated by holding that the circumstances in which it was committed very seriously affect his claim to be regarded by the court as a fit and proper person to be a barrister. I think that the conclusion of the Supreme Court on this question is, in the circumstances, reasonable and I agree with it.

The removal of the appellant's name from the roll of barristers is not further punishment of him, but merely an inevitable consequence of his conviction. Although I agree with the order of the Supreme Court, I do not decide that the circumstances given in evidence upon the trial of the appellant at quarter sessions ought to be a permanent obstacle to his applying on a future occasion to be called again to the Bar of New South Wales, provided that in the meantime his good fame and worthiness to be a barrister have been re-established.

Fullagar J. In considering this case it is necessary to bear three things in mind. The first is that the offence of which the appellant was convicted and for which he was sentenced to imprisonment for two years is a very serious offence. The second is that "The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges" (per *Dixon* J., as he then was, in *In re Davis* (1)). The third is that the appellant challenges what is not merely an exercise of discretion by the Supreme Court, but an exercise of discretion in a matter which is in a special sense the province of the Supreme Court as the highest court of New South Wales. It relates to the right of a man to practise in that court and in other courts of New South Wales over which that court exercises a supervisory jurisdiction in certain ways. On the other hand, the possibly disastrous consequences of disbarment to the individual concerned (in this case a man of about fifty

(1) (1947) 75 C.L.R., at p. 420.

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years of age) are not overstated by *Cockburn* C.J. in *Hudson* v. *Slade* (1) and a court to which an appeal comes as of right is bound to examine the whole position with meticulous care. Giving full weight to all these considerations, I am of opinion, having regard to all the circumstances of this case, that this appeal should be allowed.

In a case of this kind it is essential, in my opinion, to begin by defining the ground on which an order of disbarment is to be made. It is stated in general terms by saying that the person in question is not a fit and proper person to be permitted to practise at the Bar. The next question is—at what facts is it proper to look in order to see whether that conclusion is established? The answer must surely be that we must look at every fact which can throw any light on that question. But, descending to particularity, is it the conviction that is the vital thing, unchallengeable and conclusive of the ultimate issue? Or must we look beyond the conviction, and endeavour to ascertain, as best we can on the material before us, the facts and circumstances of the particular case? To my mind, there can be only one answer to these questions. The conviction is not irrelevant: it is admissible *prima facie* evidence bearing on the ultimate issue, and may be regarded as carrying a degree of disgrace itself. But, in the first place, its weight may be seriously affected by circumstances attending it, and it must be permissible to look at the conduct of the trial. And, in the second place, it is on what the man did that the case must ultimately be decided, and we are bound to ascertain, so far as we can on the material available, the real facts of the case. It is only when we have done this that we can be in a position to characterise the conduct in question, and to see whether we are really justified in saying that a man is disqualified from practising his profession. I would only add that there is one thing that we manifestly cannot do. We cannot look behind the conviction to the extent of saying that there is much evidence that the appellant was driving his car in a state of intoxication, and refuse to look any further behind it.

Bearing these matters in mind, I think that the first question to be considered is whether the reasons given by the Supreme Court for the order under appeal disclose any ground for interfering with what I have said that I regard as a special kind of discretion reposed in that court. I am prepared to assume that a man, though otherwise of good fame and character, is shown *prima facie* not to be a fit and proper person to practise the profession of a barrister, if it be proved that on one occasion, being intoxicated, he drove a car

(1) (1862) 3 F. & F. 390, at p. 411 [176 E.R. 174, at p. 184].

in a grossly negligent manner, that that grave misconduct caused the death of another user of the road, and that it was followed by conviction on a charge of manslaughter. But, even on that assumption, I find myself, with the greatest respect, unable to agree with the Supreme Court on a point of very great importance, on which I have already expressed my opinion. Also I think that the general proposition on which the order of disbarment was ultimately founded did not justify that order.

There was, at the appellant's trial, ample evidence on which a jury, properly directed, could find that the appellant, driving his car in a grossly negligent manner when in a state of intoxication, caused the death of a motor cyclist with whom he came into head-on collision, and that he was therefore guilty of manslaughter. The appellant did not appeal to the Court of Criminal Appeal, and he could not, of course, challenge the conviction as such in these proceedings. In the Supreme Court, however, his counsel sought to have all the circumstances of the case and the evidence on the trial investigated—not for the purpose of maintaining that the verdict could not be supported, but with a view to showing that a verdict of acquittal would not have been an unreasonable verdict, and that in any case it could not be said to be established beyond doubt that the appellant's conduct was so disgraceful as to justify his being disbarred. It appears to have been thought by the Supreme Court that it was not permissible to look behind "the plain facts that a member of the Bar was convicted of manslaughter by a jury and was sentenced to a term of imprisonment". I have already stated my inability to accept this view. It is not in accord with that which was expressed by *Jordan* C.J., speaking for himself and *Halse Rogers* J. and *Roper* J. (as he then was) in the unreported case of *In re Wishart*, which Mr. *Smyth* cited to us. That was a case not of a barrister but of a solicitor, and it may be that the considerations applicable to a solicitor differ in some respects from those applicable to a barrister. But, so far as the question immediately under discussion is concerned, the case cannot be distinguished on that ground. *Jordan* C.J. said: "It must be remembered that in the present proceedings there is no question of punishing the respondent. He has been convicted, and what was regarded as the appropriate punishment has already been inflicted. The question for this Court is whether he is fit to remain on the Roll of Solicitors. The fact that he has been convicted is of secondary importance. We are more concerned with the facts of the particular case." For reasons which I have given, I cannot doubt that the view of *Jordan* C.J. is correct.

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There is another point (though I attach much less importance to it) on which I find myself unable to agree without qualification with the view of the Supreme Court. It is said that: "The personal and the professional sides of his life cannot be dissociated." If this is read literally, it goes, in my opinion, much too far. Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister: see, e.g. *In re Davis* (1). But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former.

The appellant was, at the time of the hearing of the case by the Supreme Court, and he presumably still is, in prison. The ground on which ultimately the Supreme Court decided that he should be disbarred was the incongruity which would be involved in the appellant's holding the status of a barrister and at the same time serving a sentence of imprisonment. *Owen* J. said: "If it were permitted, this Court would be holding out the respondent to members of the public as a fit and proper person to act for them in legal matters while he is serving a gaol sentence." The *prima facie* incongruity may be conceded, though any practical danger to the public might be thought to be reduced by the limitation of activity which normally results from imprisonment. But it is quite consistent with a recognition of the incongruity that suspension during the period of imprisonment should be considered adequate to the occasion. I have no doubt that suspension as distinct from disbarment could be ordered. Admission to the Bar of New South Wales is governed by Pt. II of the *Legal Practitioners Act* 1898-1954. A candidate is admitted by order of the court under s. 10. There is no express statutory power either to disbar or to suspend, but it was held by the Privy Council in *In re the Justices of the Court of Common Pleas at Antigua* (2), that "The power of suspending from practice must be incidental to that of admitting to practise . . . . The Court that confers . . . may for just cause take away." In *In re Davis* (3), *Starke* J. said: "The power of removal or suspension is incidental to that of admitting to the roll of barristers" (4). In the same case *Latham* C.J. said: "In the unreported case of *In re White* (August 1930) the Supreme Court held on the authority

(1) (1947) 75 C.L.R. 409.
(2) (1830) 1 Knapp 267 [12 E.R. 321].
(3) (1947) 75 C.L.R. 409.
(4) (1947) 75 C.L.R., at p. 419.

of the *Antigua Case* (1) that the court had a power of suspending barristers from practice and disbarring them in a proper case " (2). Whether the present is a proper case for suspension I will consider later.

From what I have said it appears, I think, that this appeal cannot be disposed of on the mere ground that this Court should not interfere with the discretion of the Supreme Court. I feel bound to examine the circumstances of the case in detail for myself. When this is done, I think that two things appear. The first is that there is a reasonably probable version of the whole episode which, as I think, leaves one with a grave doubt as to whether the ultimate issue in the case can properly be found against the appellant. The second is that there were at least two unsatisfactory features of the trial which resulted in the appellant's conviction.

The appellant, who gave evidence both in the coroner's court and on his trial, said that earlier in the evening of the accident he had been at the Terminus Hotel at Newcastle, that he had seen a drunken seaman attempting to lay hands on two young women and heard him using " filthy language " in their presence. He took the man, who was a much younger and bigger man, by the arm, and attempted to lead him away. He was thereupon struck a violent blow on the nose. He said that he did not remember receiving more than one blow, and did not in fact remember anything more that happened that evening. The story, however, was continued by Sergeant Phillis of the Newcastle Police, who had been summoned by telephone when the seaman first began misbehaving himself. Sergeant Phillis said at the coronial inquiry that he arrived at the hotel about 10.25 p.m. and saw the appellant and the seaman walking towards the entrance. The appellant was holding the seaman's right arm with his left hand. The men were staggering, and both appeared to him to be intoxicated. As they neared the entrance, the seaman veered to the left, then swung round and " violently and savagely attacked Mr. Ziems, punching him heavily about the head and upper part of the body ". The appellant's spectacles fell to the floor and he was " struck up against the brick wall of the building ". The sergeant intervened, and, with the help of a constable and after a violent struggle, arrested the seaman, who was handcuffed and taken away. The sergeant said that the appellant's " nose had been badly injured, and blood was spouting out . . . and there was blood on his face and spectacles and on his clothing." He wanted him to go to hospital, as he considered that

(1) (1830) 1 Knapp 267 [12 E.R. 321]. (2) (1947) 75 C.L.R., at p. 414.

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he needed medical attention. The appellant asked him to take him to the hospital, and he said that he would do so after he had disposed of the arrested man. He appears, however, to have forgotten his promise, and he did not return to the hotel. In cross-examination the sergeant said that it would be quite consistent with what he saw that the seaman was drunk but not the appellant. He said that the appellant received " a dozen or twenty " blows before he intervened. He did not seem to be in a position to defend himself. The other man had him against the wall and was striking him against the wall. He would have expected cerebral injury to result. He thought that a man of the appellant's age should receive medical attention. There was medical evidence to the effect that the incident described by Sergeant Phillis would be very likely to produce a state of concussion in the appellant, in which he would not for a considerable time be conscious of what he was doing. It was within half an hour of Sergeant Phillis leaving him that the appellant set out in his car.

It is difficult to imagine evidence of greater importance than that of Sergeant Phillis. Yet at the trial he was not called as a witness for the Crown. One hesitates, of course, in a case in which the Crown is not represented, to comment adversely on this omission. But no sound explanation of his not being called by the Crown appears either from his cross-examination (when he was called for the defence) or otherwise, and *prima facie* he ought to have been called by the Crown. There is, of course, no rule of law that a prosecutor for the Crown must call every witness who has been bound over and is available. On the contrary, the discretion of the prosecutor has been recognised in many cases, and was recently asserted in *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (1). Any one or more of a variety of reasons may justify a prosecutor in not calling a witness who has given evidence for the Crown before the coroner or before the magistrates, and I would not wish to say anything that might unduly limit his discretion. The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness. I have no doubt that the correct practice is that which is stated in *Archbold's Criminal Pleading Evidence and Practice*, 33rd ed. (1954), pp. 515, 516. It is there said: " Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, it has been usual to do so in order that the prisoner may cross-examine them."

(1) (1944) A.C. 156, at pp. 167-169.

Reference is made to *R.* v. *Simmonds* (1); *R.* v. *Beezley* (2); *Reg.* v. *Vincent* (3) and *Reg.* v. *Barley* (4). In *Halsbury's Laws of England*, 3rd ed., vol. 10, par. 764, p. 418, the learned author of the article says: "All the witnesses whose names are on the back of the indictment should be called by the prosecution except those who were conditionally bound over and upon whom notice to attend has not been served . . . . Even if it is not proposed to examine a witness whose name is on the back of the indictment, counsel for the prosecution should, unless there are exceptional reasons to the contrary, place him in the witness box so that the defendant may have an opportunity of cross-examining him." It may be that in some jurisdictions it is not customary to list the witnesses on the back of the indictment, but the substance of the matter must, of course, be the same in such a case.

In *Reg.* v. *Woodhead* (5) *Alderson* B. announced that the judges had laid down a rule that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. But the prosecutor, it was said, ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose. If they were called for the defence, the person calling them made them his own witnesses. This statement is, of course, quite consistent with there being cases in which a particular witness ought to be called by the prosecutor. The position was considered in a judgment delivered by Lord *Roche* for the Privy Council in *Seneviratne* v. *The King* (6). The appellant had been convicted of murder in the Supreme Court of Ceylon. His Lordship referred to an Indian case (no report of which is available here) of *Ram Ranjan Roy* v. *The King* (7), in which it appears to have been laid down that "all available eye-witnesses" should be called by the prosecution. He then said:—"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case" (8). But a little later he said:—"Witnesses essential to the unfolding of the narratives on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution." I should have thought that, in the present case, the narrative of relevant matters was incomplete without the evidence of Sergeant Phillis.

(1) (1823) 1 C. & P. 84 [171 E.R. 1111].
(2) (1830) 4 C. & P. 220 [172 E.R. 678].
(3) (1839) 9 C. & P. 91 [173 E.R. 754].
(4) (1847) 2 Cox 191.
(5) (1847) 2 C. & K. 520 [175 E.R. 216].
(6) (1936) 3 All E.R. 36.
(7) (1914) I.L.R., 42 Calc. 422.
(8) (1936) 3 All E.R., at pp. 48, 49.

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In *R.* v. *Dora Harris* (1), Lord *Hewart* C.J. said :—" in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury " (2). In *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (3), Lord *Thankerton* for the Privy Council, referring to this statement, said :—" In their Lordships' view, the learned Chief Justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are " (4). It is not, indeed, to be supposed that the Lord Chief Justice did so intend, but there could be no possible question that Sergeant Phillis was not merely a material witness but a witness of vital importance. So far as appears, the only possible object of not calling him was to place the appellant under the tactical disadvantage which resulted from inability to cross-examine him. Such tactics are permissible in civil cases, but in criminal cases, in view of what is at stake, they may sometimes accord ill with the traditional notion of the functions of a prosecutor for the Crown. It is a very relevant fact here that the witness in question was a police witness, and a senior member of the force at that.

In fact, as I have said, Sergeant Phillis was called for the defence at the trial. His evidence was of great importance from the point of view of the defence, but, as was to be expected, it came out less favourably to the appellant than the evidence of the same witness before the coroner. For on this occasion it was in cross-examination by the Crown that he said that he had formed the opinion that the appellant was very much under the influence of liquor, and the appellant's counsel could not, of course, cross-examine him on that very important statement. Sergeant Phillis, however, did give evidence of great importance from the appellant's point of view. Speaking of the time when he entered the hotel and first saw the appellant and the seaman, he said : " They were both swaying about and appeared to be under the influence of intoxicating liquor. As they approached the internal entrance doors, I noticed the other man veer away to his left-hand side, and then he swung back to his right-hand side very violently and he commenced to punch the accused about the upper part of the body and the head, and punched him very savagely back against the brick wall, which is tiled, and continued to punch him severely, savagely, the accused's head striking the wall on a number of occasions." He also gave an account of a telephone conversation which he had had with Detective

(1) (1927) 2 K.B. 587.
(2) (1927) 2 K.B., at p. 590.
(3) (1944) A.C. 156.
(4) (1944) A.C., at p. 169.

Pratt immediately after the accident. That conversation was as follows: "A. He said, 'Did you go to the Terminus Hotel tonight?' I said, Yes, there was a brawl there.' He said, 'Do you know a man named Ziems?' I said, 'Yes, he was there.' I said, 'You mean the barrister from Sydney?' and he said, 'Yes'. He said, 'How was he?' I said, 'He had been pretty badly knocked about. He should have gone to hospital.' He said, 'He is out here at Charlestown. He has been driving his car and he has had an accident'. I said, 'Oh, goodness, he is not in a fit state to drive his car' and he said, 'Why, is he under the influence?' I said, 'Well, he could have been, but he was pretty badly knocked about, and is not in a fit state to drive the car.'"

The appellant was, in my opinion, placed at a material disadvantage by the refusal of the Crown to call Sergeant Phillis as a witness. But a much more serious feature of the trial to my mind is to be found in a grave misdirection in the charge of the learned trial judge to the jury. That charge is open to serious criticism with regard to the manner in which it deals with the evidence of Sergeant Phillis. All that his Honour said about that evidence was: "You heard Sergeant Phillis, about whom a lot of comment has been made by both counsel, who told you that the accused was very much under the influence." He had previously referred to the appellant's own evidence in such a way as to suggest that there was no evidence of his having received more than one blow. His reference to Sergeant Phillis was misleading in the extreme—suggesting, as it did, that the only thing of any importance that Sergeant Phillis had said was that the appellant was "very much under the influence". But the real vice of the charge to the jury was even more serious, and was indeed fundamental.

The charge of manslaughter against the appellant might have been put in either of two ways. It might have been put that he caused death in the course of doing the unlawful act of driving a motor car in a state of intoxication. Or it might have been put that he caused death by the grossly negligent act of driving on the wrong side of the road, the negligence being accounted for and explained by his intoxicated condition. However it was put, the appellant's defence was that his actual condition had been brought about not by excessive drinking but by savage blows on the head—that the act which caused the death was not really a voluntary act, and that it was deprived of voluntariness not by excessive drinking but by concussion and cerebral disturbance resulting from physical violence which he had suffered. There was evidence to support this defence.

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Instead of putting the case to the jury in this way, and telling them simply that the ultimate burden of proving guilt beyond reasonable doubt rested on the Crown, his Honour put it to the jury that the defence was insanity, and told them that the burden of proving insanity (though not of proving it beyond reasonable doubt) rested on the appellant. It is true that, at an early stage in his charge, his Honour did in substance put the real defence to the jury, but he qualified this immediately by telling them that, if they found this defence proved, the only proper verdict would be "Not guilty on the ground of insanity". And he repeated this later, giving them in substance the direction appropriate to cases where the defence is really insanity, including the direction as to burden of proof. This seems to me to have been fundamentally wrong, and, if anything was calculated to seal the fate of the appellant, it was surely a direction along these lines. The jury would feel that real insanity was out of the question, as indeed it was, and the only alternative which his Honour had left to them was to convict.

The matters which I have mentioned, and especially the grave misdirection, mean to my mind that the conviction as such is deprived, for present purposes, of practical significance. Then, when one looks at the evidence apart from the verdict, it seems to me impossible to say that it justifies a finding that the appellant is not a fit and proper person to practise at the Bar. One must be very sure of the facts before making so serious a finding. It may be assumed that the appellant had had some drink. But no reason is apparent for supposing that Sergeant Phillis's account of what he saw was not substantially true. One does not need medical evidence to infer that the blows which he described might well have had a real and direct effect on the appellant's capacity to drive a motor car. Their effect would probably be more serious in the case of a man who had had *some* drink—even an amount which would not be considered excessive in itself. Indeed, it seems to me probable that the tragedy in this case would not have happened if it had not been for the concurrence of two factors—a consumption of drink by the appellant (which may or may not have been excessive) and the vicious blows on the head which the appellant suffered as described by the sergeant. And, if it is even a reasonable possibility that those blows may have been a material factor contributing to a condition in which the appellant was not fit to drive a motor car, it ought not, in my opinion, to be held that the conduct of the appellant disqualifies him from practising at the Bar. I think that it is not merely possible but probable that those blows were a

material contributing factor. It may, of course, be said that the appellant ought not to have allowed himself to become involved in a fracas with a drunken sailor. But to say that it follows from this that he ought to be disbarred would appear to me to be an untenable proposition.

The appeal should, in my opinion, be allowed. It remains to consider whether the order of the Supreme Court should be simply discharged, or an order suspending the appellant from practice during the term of his imprisonment should be substituted for that order. The reasons which I have given for allowing the appeal lead, I think, logically to the conclusion that there should be neither disbarment nor suspension. Having regard, however, to the incongruity which has been mentioned and to the views of the Council of the Bar, I would assent to an order of suspension during the term of imprisonment.

KITTO J. On 4th May 1956, before a court of quarter sessions, the appellant, a member of the Bar of New South Wales, was found guilty of manslaughter and sentenced to be imprisoned with hard labour for two years. His conviction and sentence having been reported to the Supreme Court by the Prothonotary, he was called upon by rule to show cause why his name should not be removed from the roll of barristers.

On the return of the rule, the Full Court of the Supreme Court had before it a transcript of the evidence given at the appellant's trial and of the summing-up by the trial judge. On behalf of the appellant an affidavit was filed which verified and annexed a copy of the depositions taken at the coronial inquiry which had led to the appellant's being committed for trial. It appeared that the charge arose out of the death of a motor cyclist which, the Crown alleged, had been caused by the appellant's driving of a motor car while under the influence of drink. The learned judges of the Supreme Court declined to investigate the merits of the charge or the course of the trial, or to go into the details of the evidence either at the trial or at the inquest. On the view they took it was unnecessary to do so. They considered that it was incongruous (per *Street* C.J.) and impossible (per *Owen* J.) that the status of a barrister should be held by a person serving a sentence for such an offence as that of which the appellant had been convicted. On that ground, and on that ground alone, they ordered that the appellant's name be removed from the roll.

From the order so made this appeal is brought. The issue is whether the appellant is shown not to be a fit and proper person to

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be a member of the Bar of New South Wales. It is not capable of more precise statement. The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister in a system which treats the Bar as in fact, whether or not it is also in law, a separate and distinct branch of the legal profession. It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.

Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession ; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar ; and to draw the dividing line is by no means always an easy task.

In the present case it is not for conduct, but because of a conviction, that the appellant has been disbarred. The Supreme Court, in my opinion, was right in refusing to go behind the conviction, since it had not called upon the appellant to show cause

in respect of anything else. If the issue before the court had been whether the appellant's conduct on the occasion to which the conviction related had in fact been such as to disqualify him from continuing a member of the Bar, that conduct would have had to be proved by admissible evidence. The learned judges of the Full Court were not in a position, and rightly made no attempt, to form any opinion as to the credibility of the witnesses whose depositions were before them, or to come to a conclusion, upon consideration of the proceedings at the trial and the inquest, as to whether the trial might have been more favourable to the appellant than it was if the prosecution had conducted its case differently, or if the trial judge had summed up to the jury more fully or more appropriately than he did. The appellant was being called upon to answer a case relating, not to his conduct, but to his conviction and sentence. He had had the usual opportunity of appealing against both, and he had not appealed. The only question upon which the Court could adjudicate was the abstract question to which alone it devoted its attention: If a barrister has been convicted and sentenced to imprisonment on a charge of manslaughter arising out of the death of a person in a road collision caused by the barrister's driving of a motor car while under the influence of drink, is it a necessary conclusion from those facts that he is no longer a fit and proper person to be a member of the Bar.

With the greatest possible respect for those who answer that it is, I find myself unable to agree. The conviction is of an offence the seriousness of which no one could doubt. But the reason for regarding it as serious is not, I think, a reason which goes to the propriety of the barrister's continuing a member of his profession. The conviction relates to an isolated occasion, and, considered by itself as it must be on this appeal, it does not warrant any conclusion as to the man's general behaviour or inherent qualities. True, it is a conviction of a felony; but the fact that as a matter of technical classification it bears so ugly a name, ugly because the most infamous crimes are comprehended by it, ought to be disregarded, lest judgment be coloured and attention diverted from the true nature of the conviction. It is not a conviction of a premeditated crime. It does not indicate a tendency to vice or violence, or any lack of probity. It has neither connexion with nor significance for any professional function. Such a conviction is not inconsistent with the previous possession of a deservedly high reputation, and, if the assumption be made that hitherto the barrister in question has been acceptable in the profession and of a character and conduct satisfying its requirements, I cannot think that, when he

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has undergone the punishment imposed upon him for the one deplorable lapse of which he has been found guilty, any real difficulty will be felt, by his fellow barristers or by judges, in meeting with him and co-operating with him in the life and work of the Bar. The assumption on which this is based may, of course, be false in a particular case. But that it must be made in the present case is surely undeniable, since no one has come forward to say a word against the appellant, and he has been called upon to answer nothing but the fact of his conviction.

These considerations have led me to the conclusion that the appellant's conviction was not such as to call for the removal of his name from the roll of barristers. I am fortified in this opinion by the fact that counsel for the Bar Association, who appeared to assist the court both in the Supreme Court and before us, did not support the appellant's disbarment. It remains to consider their suggestion that he should be suspended from practice during the remainder of his present imprisonment. If it were not that the members of the Court who think with me that he should not be disbarred are in favour of the proposed suspension, I should be against it. If the appellant's conviction and imprisonment are held not to disqualify him from the Bar, it seems to me, with respect, that logically that should be the end of the case. There can be no question of imposing a punishment additional to the imprisonment, and as far as I can see there is no purpose to be served by adding a *de jure* suspension to the *de facto* suspension which the appellant's incarceration produces while it lasts. However, even if I am right in thinking that suspension is inappropriate, it can do no harm, and I am prepared to assent to it so that an order may be made.

The appeal, in my opinion, should be allowed accordingly.

TAYLOR J. On 4th May 1956 the appellant, a member of the New South Wales Bar, was convicted of manslaughter and sentenced to imprisonment with hard labour for a period of two years. Thereafter, the fact of his conviction and sentence was reported to the Full Court of the Supreme Court of New South Wales and, on 13th September 1956, an order was made directing that his name be removed from the roll of barristers. This order was made because in the language of *Street* C.J., it was " incongruous " and " out of keeping with all that is seemly " for a barrister serving a term of imprisonment to be allowed to retain all the rights and privileges which accrue to him as a member of the profession. " It cannot be right," said the learned Chief Justice " that he (the appellant)

should be allowed to retain his professional status while he is serving a sentence of two years' imprisonment with hard labour for such an offence as that of which he was convicted " whilst *Owen* J. observed : " It is impossible that a person should at one and the same time hold the status of a barrister and be serving a substantial term of imprisonment for a felonious act. The two positions are, in my opinion, utterly incompatible ". All of the members of the court agreed that the circumstances in which the offence was committed could not be taken into consideration in determining whether the appellant's name should be removed from the roll but they also agreed that these circumstances might be of importance if and when, at some future time, an application should be made by the appellant for re-admission.

The questions raised before us on this appeal are, to say the least, unusual and call for anxious consideration. In most applications of this character—and, fortunately, they are rare—the court acts because the evidence before it has established that a member of the Bar has so conducted himself as to show that he is unfit to remain a member of a strictly honourable profession. The quality of his conduct is observed and if it is plainly seen that he should no longer remain a member of the Bar his name is removed from the roll. But what conclusions concerning the appellant's conduct or character can be drawn from the bare fact that he has been convicted by a jury on a charge of manslaughter ? He has, it appears, been a member of the Bar for twenty years ; at the beginning of this period he was required to establish that he was a fit and proper person to be admitted to the Bar and, apparently, he retained that qualification, at least, until his conviction. It is, of course, obvious that many offences are of such a character that proof of the commission of any one of them by a member of the Bar could produce only one result. And, for the simple reason that proof of such an offence would, itself, establish conduct on the part of the person concerned constituting a disqualification for his profession, this would be so whether a conviction resulted in imprisonment or not. But, on the other hand, it cannot be suggested that a barrister should be disbarred upon proof that he has committed any offence whatever its nature or consequences. The first difficulty which arises in the case will, therefore, readily be appreciated when it is remembered that the expression manslaughter is a compendious expression and that the acts which may constitute it range from culpable negligence on a particular occasion to the most infamous and reprehensible conduct. That being so mere proof of a conviction for manslaughter gives no real clue to the

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conduct of the person concerned nor could it enable a court to make any real assessment of his character or reputation. This could not be done without some knowledge of the underlying facts.

The Full Court, however, was not concerned with the appellant's conduct as such ; it was concerned merely with the fact of conviction and sentence and the underlying facts were thought by the members of the court to be irrelevant. But, whilst I respectfully agree with the observations of the learned Chief Justice concerning the high standard of conduct expected and required of members of the Bar, I find it impossible to assent to the proposition that proof of the fact of the appellant's conviction and sentence, without more, made it inevitable that an order should be made directing that his name be removed from the roll of barristers ; the vital question, in my opinion, in such cases, is not whether a practitioner has been convicted of an offence against the criminal law but whether his conduct has been such as to show that he is unfit to remain a member of his profession.

In attempting to deal with the fundamental problem raised by the appeal I have, with the greatest respect to the learned judges of the Supreme Court, sought to ascertain the precise principle upon which they acted. I agree at once that a state of incongruity is created if the appellant, whilst in prison, is to be entitled to hold himself out as a person entitled to practise as a barrister. But it does not follow that the removal of his name from the roll is the appropriate method of dealing with such a situation. Nor do I think that their Honours so acted merely because the appellant was in prison ; the fact that he had been convicted of a felony was stressed by them and this was thought to be a weighty matter and a primary factor for consideration. The fact is, however, that the appellant was convicted of an offence against the criminal law and it adds nothing to this to say that he was convicted of a felony for it is a simple matter to call to mind misdemeanours which are just as reprehensible and infamous as the worst forms of felonies. One might be disposed, therefore, to think that the distinction between convictions which ought to be regarded as a disqualification for the Bar, and those which ought not, cannot be made to depend upon the distinction between felonies and misdemeanours. Is then the true rule that a conviction for any offence constitutes a disqualification ? Or is a distinction to be drawn between offences which result in imprisonment and those which do not ? Obviously, the first of these inquiries must be answered in the negative and a simple illustration is sufficient to dispose of the latter. Let it be assumed that two members of the Bar are separately convicted of the offence

of driving a motor vehicle whilst under the influence of intoxicating liquor and that one of them is subjected to a fine whilst the other is sentenced to imprisonment for a short period. Is the latter to be disbarred and the other to remain in practice? Or to bring the illustration closer to the present case one may ask whether, if the offence of one should result in tragedy, he is to be disbarred because he has been guilty of a felony whilst the other, whose like conduct amounted only to a misdemeanour, is to remain free to practise his profession. The vital question, as I have already said and as these considerations show, is whether the conduct of the person concerned, whether it constitutes an offence against the law or not, has been such as to show that he is unfit to remain a member of the Bar. The fact that his conduct may have amounted to an offence against the law is of course a matter for consideration but for the reasons given it is by no means the end of the inquiry.

In the circumstances it is, I think, incumbent upon us to examine the facts which led to the appellant's conviction for the purpose of seeing whether they disclose conduct on his part which shows that he is not a fit and proper person to remain a member of the Bar.

As already appears the charge upon which the appellant was convicted was manslaughter, it being alleged that about 11 p.m. on 17th May 1955 he was criminally negligent in the control of a motor car which he was then driving on the outskirts of Newcastle. At the root of the case was the assertion that he was under the influence of intoxicating liquor at the time. Whether the jury found adversely to the appellant on both of these issues it is impossible to say but, on the assumption that they did, one may then ask whether adverse findings on these issues are sufficient to disqualify the appellant. For my part I am quite unable to see that they do. If the *conduct* of the appellant—as distinct from its consequences—is considered it will be seen that the jury was satisfied that on the occasion in question the appellant was grossly negligent and, probably, that he drove his car under the influence of liquor. It may then be observed that if such conduct on a particular occasion is sufficient to constitute a professional disqualification it would be sufficient to disqualify a member of the Bar whether disclosed in support of a charge of manslaughter, or a charge of negligent driving or a charge of driving under the influence of liquor and whether or not upon conviction on any of these charges imprisonment followed. In my view the fact, without more, that the appellant so conducted himself on one occasion was quite insufficient to warrant his disbarment. It is, I think, essential to look further and form a judgment—

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so far as it is possible upon the evidence before us—concerning the nature and character of the appellant's conduct on that occasion.

It was established by the evidence of four witnesses at the appellant's trial that some distance before the appellant's car collided with a motor cycle ridden by the deceased his car swerved to the wrong side of the road, then back again to its correct side and then to its incorrect side again where the collision ultimately took place. The picture presented by the evidence of these witnesses is one of erratic driving at this stage of the appellant's journey from Newcastle to Swansea. The evidence referred to was given by the occupants of two other vehicles which followed the appellant's car for a considerable distance at a speed estimated to be between twenty-five and thirty miles per hour. There is no suggestion of excessive speed on the appellant's part. How far the appellant's car managed to get on to the incorrect side of the road is, upon the evidence, a matter of conjecture, but the witnesses who testified to the manner in which the appellant was then driving also said that until this stage of the journey the appellant had driven in a normal fashion; he had driven at a proper speed, he had safely negotiated roadworks which left but little space to pass and he had stopped at the traffic lights at Adamstown just a few minutes before the accident. These witnesses were by no means unanimous that the demeanour of the appellant, which they had an opportunity of observing after the accident, was that of a man under the influence of liquor. It is true that one, Norrie, said that he was able to smell alcohol on the appellant and, in common with one other of these four witnesses, that he was unsteady on his feet but they all heard the appellant answer questions both readily and intelligently. Consideration of the evidence of these witnesses satisfies me that it is at least questionable whether any jury would have convicted the appellant upon their testimony alone. But it was not the only evidence, for police officers who arrived on the scene shortly after the accident were called and the acceptance of the opinions expressed in their evidence could lead only to a conclusion adverse to the appellant.

There is, however, other relevant evidence before us which ought to be considered and for reasons which will readily appear, this Court is in a far better position to consider it than the jury was upon the appellant's trial. From the evidence before the Court—and it consists not only of the transcript of the evidence taken upon the trial but also of that which was taken upon an earlier coronial inquiry—it is beyond doubt that about half an hour before the appellant's accident he had been subjected to a savage assault;

he had been violently punched about the face and upper parts of the body more than a dozen times and, in the course of the assault, his head had been struck a number of times against a brick wall. This assault was witnessed by a police officer, Sergeant Phillis, who was then hastening to the Terminus Hotel in Newcastle after receiving information that a seaman was creating a disturbance there. But before any police officers had arrived the appellant, foolishly one may think, had himself intervened and was trying to eject the seaman. This intervention on his part terminated in the assault which Sergeant Phillis witnessed as he was arriving at the premises. This officer gave evidence at the coronial inquiry and in his evidence-in-chief he testified that when he first saw the appellant and the seaman they were crossing the vestibule of the hotel and he formed the impression that both men were under the influence of liquor. This opinion, he said, was based upon the fact that the two men were making a somewhat erratic course to the doorway. But subsequently, in cross-examination, he frankly acknowledged the insufficiency of this circumstance as a basis for his conclusion; the erratic course was equally consistent with the fact that the seaman, who was a tall and powerfully built man, was under the influence of liquor and had no wish to leave the hotel. That he had no such wish is evidenced by the fact that as the sergeant approached the doorway the assault took place and, that he was a powerful man, is evidenced by the fact that the sergeant and a constable were not able to subdue him immediately. Again, in his evidence-in-chief at the coronial inquiry Sergeant Phillis said that after the seaman had been subdued he thought the appellant was under the influence of liquor; "his face", he said, "was flushed, his eyes were bloodshot, he was unsteady on his feet, and he smelt of intoxicating liquor". But again in cross-examination he agreed that the assault that he had witnessed might well have accounted for all but the last of these signs. Indeed, the appellant's face was bleeding, he had blood on his spectacles and clothing and his head had been struck against the wall with such force more than once as to lead the sergeant to think that some cerebral damage was probable. It was, and is, evident that his injuries were severe for Sergeant Phillis said that he wanted him to go to hospital and undertook that after he had disposed of the seaman, he would come back to the hotel to take the appellant to the Newcastle Hospital. Unfortunately, however, other matters intervened and he forgot. In view of the impressions concerning the appellant, which were formed by Sergeant Phillis and expressed in his evidence-in-chief at the coronial inquiry, it is not surprising that he was called as a

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witness by the officer who appeared to assist the coroner. As already appears he was so called and, no doubt, in view of the chronological significance of his evidence, he was the first witness at that inquiry. But the concessions which he made in cross-examination—and which in the circumstances appear to have been inevitable—destroyed to a considerable extent the value of the opinions previously expressed by him. Moreover, since the fact of the assault and the nature of the appellant's injuries were most material in determining what conclusions should be drawn from the evidence of those witnesses who described the appellant's demeanour immediately after the accident, the concessions made by Sergeant Phillis operated to strip that evidence of much of its incriminatory value. It is beyond doubt, therefore, that the evidence of Sergeant Phillis was most material in determining whether the appellant was or was not guilty of the offence charged.

But upon the trial of the appellant the prosecutor refrained from calling Sergeant Phillis as a witness. The evidence called for the Crown consisted of the evidence of the occupants of the two following cars who described both the manner in which the appellant's car was driven immediately before the accident and his subsequent demeanour and of that of the police officers who, shortly after, investigated the circumstances of the accident. All of these witnesses, it may be observed, formed their impressions of the appellant, such as they were, in entire ignorance of the nature, and, indeed, of the fact of the assault which had occurred so shortly before. Faced with this situation counsel for the appellant decided to call Sergeant Phillis in his own case. The decision was inevitable for Sergeant Phillis was the one witness who was able to describe fully the vicious manner in which the appellant had been assaulted. The appellant himself remembered being struck once only and professed to remember no other details of the assault. It should, perhaps, be added that upon the evidence there is no reason for thinking the appellant was not truthful on this point; even after the accident, when seeking to excuse himself, he merely told the police that earlier he had been punched on the nose at the Terminus Hotel. The position in which counsel for the appellant found himself was, therefore, that if he failed to call Sergeant Phillis he would lose the benefit of his evidence concerning the assault and if he did call him he adopted him as his witness and was not in a position to cross-examine. In adopting the latter course he exposed the appellant to the danger of the jury seizing upon the *prima facie* views formed by this officer and was, for all practical purposes, deprived of the benefit of concessions similar to those made by the same witness at

the coronial inquiry. In the result significant evidence was excluded from the jury and when the learned trial judge came to sum up Sergeant Phillis appeared as a witness who testified unequivocally to the appellant's insobriety.

There may have been some legitimate reason why Sergeant Phillis was not called as a witness in the Crown case but if there was it does not appear. He was the one witness who could give evidence of a most material matter for the appellant himself could not. Moreover, he was a senior police officer and it was strange that, in the circumstances, it should have been left to the defence to call him. But, probably, he was not called in the Crown case because the concessions made at the earlier hearing in cross-examination, and his opinion, then expressed, that the appellant's injuries made him unfit to drive a car, were at variance with the evidence of the other police officers who saw the accused after the accident and who, with no knowledge of the previous assault, formed opinions distinctly adverse to the appellant. And, it seems, there was some disagreement between those officers and Sergeant Phillis concerning statements alleged to have been made by the latter in response to inquiries by one of the former shortly after the accident. But, whatever the reason may have been for not calling this witness in the Crown case, it is obvious that the full content of his evidence, as given at the coronial inquiry, was of the utmost materiality. In the circumstances it is not out of place to recall the observations made by Lord *Hewart* C.J. (*R.* v. *Dora Harris* (1)) concerning the calling of witnesses in criminal cases. He said: "In civil cases the dispute is between the parties and the judge merely keeps the ring, and the parties need not call hostile witnesses, but in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury" (2). This statement was the subject of some discussion in *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (3) where the Judicial Committee was called upon to consider whether a Crown prosecutor was bound to tender for cross-examination any witness whose name was endorsed upon the indictment and upon whose evidence he did not intend to rely. The opinion of their Lordships was that "It is consistent with the discretion of counsel for the prosecutor, . . . that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, and this practice has probably

(1) (1927) 2 K.B. 587.
(2) (1927) 2 K.B., at p. 590.
(3) (1944) A.C. 156.

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become even more general in recent years, and rightly so, but it remains a matter for the discretion of the prosecutor " (1). Thereafter, their Lordships referred to Lord *Hewart's* observations and remarked that " the learned chief justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are " (1). Lord *Hewart's* observation was, of course, made only in relation to *material* witnesses and the observations made in the later case in no way suggest that it is within the province of a prosecutor to refrain from calling a witness whose evidence is quite plainly material. No doubt, in some cases, there may be special reasons which will justify the prosecution in discarding a particular witness but no such reason appears in this case. It is, perhaps, possible that if the Crown had been represented in this case some reason, not otherwise apparent, might have been advanced but there can be no question that the evidence of Sergeant Phillis was of the utmost materiality and if it had been fully available to the jury it is possible that the trial may have ended differently. At all events, upon the evidence available to us, there is room for grave doubt whether the injuries received by the appellant did not constitute a factor which contributed substantially to the accident.

For the reasons I have given it is, I think, possible to say, firstly, that the mere fact of the appellant's conviction involving, as it may have done, a finding that, on the occasion in question, he drove his car with gross negligence and under the influence of intoxicating liquor did not justify the removal of his name from the roll of barristers. Secondly, it may be said that, when the whole of the evidence now available is examined, the fact of the appellant's conviction, as a factor for consideration, loses a great deal of its weight and, finally, that it is impossible, upon the evidence, to conclude that the appellant's conduct on the occasion in question was such as to make it appear that he was unfit to remain a member of the Bar.

There remains the question as to what order should be made in the circumstances. Clearly enough the order that his name should be removed from the roll of barristers should be set aside ; the only difficulty as I see the case is to determine what order should be substituted. For my own part I am of opinion that where a member of the bar is serving a term of imprisonment for a serious offence he should not, during the term of his imprisonment, be permitted to hold himself out—however ineffectually that may be done—as a person entitled to practise as a barrister. Accordingly, whilst I

(1) (1944) A.C., at p. 169.

think there was no justification for the removal of his name from the roll of barristers, I am of opinion that an order should be made suspending him from practice during the residue of the term of his imprisonment. The efficacy of such an order is recognised by the *Barristers' Seniority and Suspension from Practice Rules* and there seems no doubt that the court has power to make such an order: *In re Spensley* (1).

Appeal allowed. Order of the Supreme Court of New South Wales set aside. In lieu thereof order that the appellant be suspended from practice during the continuance of his present imprisonment.

Solicitors for the appellant, *Walter Dickson & Co.*

Solicitors for the Council of the Bar Association of New South Wales, *Dettman, Austin & Maclean.*

Solicitor for the Prothonotary, *F. P. McRae,* Crown Solicitor for New South Wales.

J. B.

(1) (1864) W.W. & a'B. (L.) 173.