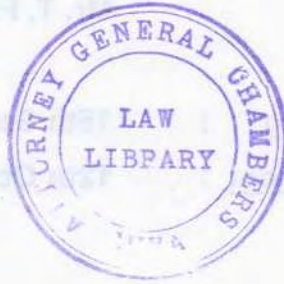


**IN THE HIGH COURT OF FIJI**

At Suva

Civil Jurisdiction



**JUDICIAL REVIEW NO. 0027 OF 2005**

**IN THE MATTER** of an application by **THE COMMISSIONER OF POLICE** for Judicial Review under Order 53 of the High Court (Amendment) Rules 1994

**IN THE MATTER** of the decision of the **DISCIPLINED SERVICES COMMISSION** of 4th February 2005 and **THE CHAIRPERSON DISCIPLINED SERVICES COMMISSION** of 14th March 2005 whereby the Commission refused to concur with the **COMMISSIONER OF POLICE** exercise of his powers pursuant to Section 14(1) c and Section 32(1) A (b) of the Police Act Cap. 85

**Between** : **THE STATE**

**And** : **THE DISCIPLINED SERVICES COMMISSION**

Respondents

**Ex-parte** : **THE COMMISSIONER OF POLICE**

Applicant

**Counsel** : **Mr. G. Leung & Mr. S. Leweniqila for Applicant**  
**Mr. T. Fa for the Respondents**

**Date of Hearing** : **15th September, 2005**

**Date of Judgment** : **12th October, 2005**

### **JUDGMENT**

This case revolves around the meaning and effect of the word "concurrence" in section 153(2) of the Constitution.

The applicant, the Commissioner of Police, in his affidavit dated 22nd of May 2005 states, at paragraph 3, that since he assumed office he has "had to deal with the problem of a police force with low morale and poor discipline. Many of these problems stemmed from the political events of 1987 and 2000 ... I have consistently tried to improve the level of professionalism in the force and introduce a culture of change and innovation, also seeking to raise the ethics and standards of the force".

The applicant is concerned that, (paragraph 27), "the decision of the Disciplined Services Commission however well intentioned, with respect, undermines my powers and my ability to set higher levels of professionalism in the force. These cases are likely to reoccur and it is of fundamental importance to have a definite exposition of the legal position." No disrespect is intended to the Disciplined Services Commission. The action is taken to clarify a matter of important principle.

In his Notice of Motion the Commissioner of Police seeks the following orders:

"1. A declaration that the Disciplined Services Commission acted unlawfully in conducting a "mitigation hearing" for Sergeant Marika Nasegai and Constable Viliame Jitoko ; further or alternatively ;

2. Certiorari to bring before this Honourable Court and quash the decisions of the Disciplined Services Commission for 4th February 2005 and the Chairperson of the Disciplined Services Commission of 14th of March, 2005 to reinstate Sergeant Marika Nasegai and Constable Viliame Jitoko without loss of benefits or entitlements ; further or alternatively ;

3. Mandamus to compel the Disciplined Services Commission to exercise its powers according to law ;

4. Such further or other relief this Honourable Court may deem just".

I, of course, decide this case according to law. I do note that Regulation 3 of the Disciplined Services (Police Service) Commission Regulations reads "The Commission shall always have regard to the maintenance of a high standard of efficiency in the Force".

It is not disputed that the Chairman has been delegated the exercise of the powers of the Commission in cases he sees fit.

I have before me the affidavit of the Commissioner of Police dated the 27th May 2005 and the affidavit of Malakai Nalawa dated 15th September 2005 for the applicant, the notice of motion dated 7th June 2005 and the written submissions of both counsel. There are no affidavits from the Respondent. Leave to apply for Judicial Review was granted on the 1st of June 2005. Oral argument as well as written submissions were entertained. The officers concerned Sergeant Nasegai and Constable Jitoko were not formally upon

record. They had consulted Mr. Fa and were apparently present during the hearing.

Sergeant Nasegai had been charged with four counts of conduct prejudicial to good order and discipline. He was found guilty as charged and given an opportunity to mitigate. He declined to make any submissions in mitigation. The Commissioner then reviewed the proceedings and made the decision to reduce him to the rank of Corporal. That decision was relayed to the Secretary to the Disciplined Services Commission (DSC).

Constable Jitoko had pleaded guilty to seven counts of being absent from duty without leave. He advanced mitigation before the Tribunal hearing his case. The Commissioner reviewed his proceedings and decided to discharge him from the Force. This decision was also relayed to the Disciplined Services Commission.

When the Disciplined Services Commission dealt with these two cases it heard argument and mitigation and further mitigation respectively from the officers. It decided to restore the Sergeant's rank and reinstate the Constable to the Police Force, both without loss of benefit or entitlement. The Commissioner queried these decisions by letter to the Chairman of the DSC. The Chairman confirmed the decisions.

Counsel for the Commissioner argues that the DSC exceeded its powers by hearing mitigation, further mitigation and argument and acted unlawfully in not permitting a representative of the Commissioner be present to argue the other side of the case, if the officer was to be permitted to advance mitigation or argument. Further, counsel say the DSC generally exceeded its powers in that it considered the merits of the matter when it should have confined itself to ensuring procedural fairness, acting within powers and reasonableness.

The respondent argued that the role of the DSC is a necessary check upon the exercise of disciplinary functions by The Commissioner. It could not hear further evidence but to comply with the principles of natural justice, had to allow representations to be made at least by each officer concerned. If there were matters of mitigation to put forward then the DSC could not come to a proper conclusion without hearing those. Accordingly their actions had been lawful and correct and their order in each case was one which they had power to make.

Section 152 of the Constitution is headed "Functions of Disciplined Services Commission". It states

- (1) "The Disciplined Services Commission has the following functions :
  - (a) To make appointments to the Fiji Police Force or Fiji Prisons Service ;
  - (b) To remove officers from the Fiji Police Force or Fiji Prisons Service;
  - (c) To take disciplinary action against officers of the Fiji Police Force or Fiji Prisons Service.
  
- (2) The functions of The Disciplined Services Commission do not extend to :
  - (a) The Office of the Commissioner of Police ; or
  - (b) An officer of the Fiji Police Force having the rank of senior inspector (or equivalent) or a lesser rank ."

Section 153 "Powers of Commissioner of Police", states :

- (1) "The Commissioner of Police has equivalent powers to the Disciplined Services Commission in respect of officers of the Fiji Police Force having the rank of senior inspector (or its equivalent) or a lesser rank.

- (2) The exercise by the Commissioner of Police of his or her powers to :
- (a) Remove a person from the Fiji Police Force ;
  - (b) Reduce the rank of an officer of the Fiji Police Force ;
- requires the concurrence of the Disciplined Services Commission".

Section 111(4) states :

"The Commissioner of Police is responsible for:

- (a) The organisation and administration of the Fiji Police Force ;
  - (b) Its deployment and the control of its operations ;
- and, subject to sub-section (5) [general policy directions], is not subject to direction or control by any other person or authority in relation to those matters."

Section 142(c) "continues in existence, under the name of the Disciplined Services Commission, The Police Service Commission established under the Constitution of 1990". This is one of three independent service Commissions established or continued, the others being the Constitutional Officers Commission and the Public Service Commission.

Section 143(3) states the DSC consists of a Chairperson and two other members appointed by the President. The remaining subsections and section 144 and 145 deal with appointment, vacancies, disqualification etc. A structure of the ranks in the Police Force is annexed to the affidavit of Maiakai Nalawa. There is no dispute that both the officers in this case are of lesser rank than senior inspector or its equivalent.

It is helpful in resolving the issues in this case to look at the legislation and supporting regulations. In particular, it is necessary to ascertain and

understand the procedures to be followed in the disciplining of members of the Police Force.

The Police Act Cap. 85 as amended was passed to "make better provision for the organisation, discipline, powers and duties of the Police Force and for matters incidental thereto".

Part V of the Act is entitled "Discipline". Sections 27-42 deal with interdiction of officers, offences, power of arrest, trial of offences against discipline, review by the Commissioner, punishment and related matters.

Part IV of the Police Regulations (made under section 60 of the Act) deals with "Discipline". This specifically relates to officers of inspectorate or subordinate level.

Part VIII of the Police Service Commission Regulations is entitled "Discipline". It deals with the same matters for "Gazetted" officers.

I have considered the arguments of the respective parties. In my judgment the framework is as follows.

The Police Act and subsidiary regulations were passed under the previous Constitution but have been continued by the current Constitution. There is a change in name from Police Service Commission to Disciplined Services Commission. Prison Officers are now included.

It is clear from the Constitution, the Police Act and the Regulations that for disciplinary matters there is a dividing line in rank as to which procedure is to be followed. It must be noted though that inherently the procedures are similar. The dividing point in the Constitution is at Senior Inspector level (or its equivalent rank). Those of that rank or lower fall into one category, those higher into another.

The Police Act makes a dividing line of "gazetted" officer. That term means any police officer "of or above the rank of Assistant Superintendent" (section 2). This appears to be consistent with the dividing point at Senior Inspector as the Police Act defines "Inspectorate Officer" as any Police Officer "below the rank of Assistant Superintendent other than a subordinate officer" and subordinate officer means any police officer "below the rank of Assistant Superintendent, whom the Minister may from time to time declare to be subordinate officer". This dividing line is consistent with the actual existing rank structure which is set out at Annexure MN3 in the affidavit of Malakai Nalawa. That shows in order of ascending rank "Sergeant-Inspector-Assistant Superintendent-Superintendent" etc.

Section 152 subsection 2(b) of the Constitution specifically excludes those on or below the line from the functions of the DSC. By section 153(1) the Commissioner of Police has "equivalent powers" to the DSC in respect of those officers on or below that dividing line.

In my judgment that division has been made for a purpose. The purpose is to ensure efficiency and that the DSC is not swamped with minor matters involving lower rank officers. Further, whilst disciplinary charges will be just as important to any person of any rank, there is a greater importance for the public face of the Police Force when an officer of higher rank is the subject of disciplinary charges.

Accordingly the Commissioner of Police is given equivalent powers to the DSC in the appointment, removal or disciplining of officers if they fall in rank on or below the dividing line. There is only one limitation placed upon the ambit of the exercise of those powers, namely it is subject to the "concurrence" of the DSC if the Commissioner's penalty is removal of an officer from the Force or reduction in rank. Under the preceding Constitution such a referral was only required for removal.



What then is the meaning and effect of the word "concurrence"? In this particular case there is no complaint from anyone that the procedures followed were correct and fair until the submission of the two cases to the DSC for their concurrence. It is at this point that the Commissioner says the DSC had no power to receive further evidence or material, hold a mitigation hearing, hear argument or reinstate the officers or act as it did. The Commissioner argues that for officers on or below the dividing line the DSC can only say it concurs or agrees, or it does not concur or agree. If this is not so and argument is to be permitted before the DSC then the Commissioner must have the opportunity also to be heard.

The respondents argue on the main points that such limitations run counter to the principles of natural justice. They further state that as a safety check the DSC should have the power to hear argument and evidence before a proper conclusion can be reached.

A number of questions are raised. Is the DSC exercising some kind of appellate function? Is it a review function generally or similar to that of Judicial Review? Can it hear further evidence and accept further material? Do either or both parties have a right to be heard? Can they be invited to make representations? What findings and orders if any can the DSC make upon conclusion of its deliberations? Are those findings limited to saying we concur or we do not concur? How is the impasse to be resolved if the DSC does not concur in the decision of the Commissioner of Police and the latter considers he or she is correct and declines to alter the decision?

In resolving these questions, it would be wrong to arrive at a conclusion which gave lower ranking officers more opportunities to be heard and argue their cases than those accorded to higher ranking officers. Further, it would not be consistent to have a wholly dissimilar structure for one set of officers as to the other. • The Court of Appeal in *Beniamino Naiveli v. The State, Disciplined Services Commission* (Civil Appeal 59 of 1999), when dealing with a similar

case involving a gazetted officer stated at page 3 "It would be surprising if gazetted officers were to receive less natural justice in respect of disciplinary offences than is accorded by the Act to lesser ranks."

Section 30 Police Act states that "Any police officer, other than a gazetted officer who commits any offence against discipline ... shall be liable to suffer punishment in accordance with the provisions of this Act ..." Section 32 deals with the trial of offences against discipline by use of "Tribunals". Regulation 13 of the Police Regulations governs the "procedure at trial for offences against discipline." By Section 34 the tribunal has the power to summon and examine witnesses and require the production of documents.

By Section 33 the Commissioner "shall review all proceedings heard by any tribunal, other than proceedings heard by himself. He then has the power to quash the finding, alter it, confirm it or remit it to the Tribunal or another Tribunal for rehearing.

Section 37 gives the Commissioner the power to reduce in rank or dismiss from the force any officer, other than a gazetted officer ... provided that the Commissioner shall not dismiss from the Force any such police officer without the concurrence of the Police Service Commission. (The Constitution requires that this now includes reduction in rank.)

Although Part V of the Police Regulations covers discipline for "any inspectorate or subordinate officer", there are no provisions relating to the referral of cases to the DSC, (the Police Service Commission).

Part VIII of the Disciplined Services (Police Service) Commission Regulations makes provision for the discipline of gazetted officers. Regulation 26 sets out the procedure when dismissal of a gazetted officer is being considered. It is pertinent to note that when the Commissioner considers proceedings for dismissal should be instituted against a gazetted officer he shall make a

report to the Secretary (the Secretary of the Public Service Commission) who shall forward such a report to the Secretary of the Commission in order that the Commission may decide whether or not a disciplinary inquiry should be held. If it decides an inquiry will be held the charges are forwarded to the officer together with a brief statement of the allegation on which each charge is based. The officer is given the opportunity to state in writing any grounds upon which he relies to exculpate himself.

The Secretary to the Public Service Commission then appoints a Committee of persons to inquire into the matter unless there are admissions. There are then provisions for the membership and procedure of that Committee including the provision of a judge, magistrate or legally qualified person to be Chairman. No police officer can be a member or Chairman. At the conclusion the Committee forwards its report to the Secretary to the Commission accompanied by the record of the charges framed, the evidence led, the defence and all other proceedings relevant to the inquiry.

Regulation 4(1) in Part II - General states "The Commission may require any police or public officer to attend and give evidence before it and to produce any official document concerning any matter which it is required to consider in exercise of its functions under the Constitution or these Regulations."

Regulation 26(8) then states "The Commission after considering the report of the Committee, may -

- "(a) if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the Secretary for reference to the Committee for further investigation, report and later decision of the Commission ;
- (b) if it is of the opinion that the officer does not deserve to be dismissed, may impose some lesser penalty ; or
- (c) decide in relation to dismissal or otherwise."

Subregulation (9) says "The decision on each charge preferred against the officer shall be communicated to him by the Secretary of the Commission but not the reasons for the decision". (The latter part of this provision might not withstand close scrutiny.)

Regulation 27 deals with the circumstances where there is misconduct not warranting dismissal. There is a procedure involving the informing of the officer of the charges against him and his response thereto in writing. A report is prepared and forwarded to the Secretary of the Commission for decision of the Commission.

It would therefore appear that in the case of gazetted officers the DSC, generally, does not hold hearings but acts upon the information in a report supplied to it.

The available punishments are listed at Regulation 28 and are dismissal, reduction in rank, reduction in salary, stoppage of increment, deferment of increment, suspension of increment, severe reprimand or reprimand.

According to paragraph 13 of the affidavit of the Police Commissioner the constable was in fact dismissed pursuant to section 14(1)(c) of the Police Act and not section 32A(b)(vii) of the Police Act. Section 14(1)(c) deals with the discharge by the Commissioner of any Police Officer, other than a gazetted officer. "... if he is unlikely to become or has ceased to be an efficient police officer or it is desirable in the public interest ..." This is subject to the "concurrence" of the Disciplined Services (Police Service) Commission.

Accordingly be it an officer above or below the dividing line the broad procedure is basically the same. A committee or tribunal investigates the matter, hears from the officer concerned, takes into account all relevant evidence and matters and makes a report or record of its proceedings. In respect of an officer above the line the report goes to the DSC and the

decision is made on the papers. It then deals with the case in accordance with Regulation 26(8), see above. In the case of an officer on or below the line the record of proceedings of the tribunal goes to the Commissioner who reviews the proceedings. He can quash or alter the findings, confirm the findings and punish or remit the proceedings to the tribunal or another tribunal (Section 33 Police Act).

It is most important, of course, to remember that it is the Constitution which is the supreme law and it is not for acts of Parliament or subsidiary legislation to dictate the limits or meaning of words within the Constitution. However, the act and regulations being herein considered were all in existence and must have been in consideration at the time of framing of the 1997 Constitution.

The Shorter Oxford English Dictionary defines the word concurrence as meaning "... 3. Agreement ; assent, consent. ..." Concur is defined as meaning "... 3. To agree in opinion 4. to agree in quality, character etc ..."

By sections 152 and 153 the appointment, removal and disciplinary action against officers of the Fiji Police Force who are above the line are a matter for the DSC. For those officers on or below the line those functions are clearly placed in the hands of the Commissioner of Police. There is only one exception to this regime, that is where the Commissioner exercises his or her power to remove or reduce in rank. If this is to be done then he requires the "the concurrence" or "agreement" of the DSC. On a plain reading of the words this means that concurrence is required in relation to the punishment to be meted out and not as to the procedures giving rise to the finding of guilt or the finding of guilt itself. Accordingly the DSC has no powers as regards the findings of guilt.

Counsel for the applicant in this case has very properly drawn my attention to the case of the State v. A Decision of The Disciplined Services Commission, ex-parte Vakarauwale, [2000] FJHC 76 ; HBJ10 of 2000. The judgment of

Mrs. Justice Shameem was delivered on the 20th of June 2000. This case involved very similar points. The applicant was found guilty of disciplinary offences. Mitigation was heard and the Commissioner imposed a penalty. The penalty was dismissal from the Force so the matter was referred to the Commission for its concurrence. The applicant complained that he had not had the opportunity to make representations to the Commission when it came to consider whether or not it concurred with the decision of the Commissioner.

At page 6 of the judgment Shameem J. states "there is no doubt that the Commission's power to agree to the Commissioner's recommendation to dismiss, was a power which had the potential of adversely affecting the applicant's interests. There is also no doubt, that the Disciplined Services Commission is a public body performing public duties, and therefore has a duty to perform those functions fairly." I respectfully agree with those remarks and they are equally applicable to this case. The applicant is in this case the Commissioner of Police. The matters in issue do affect his office and the overall running of the Force. They also affect the two officers involved, even though broad principle is in issue here. There is no other remedy or appeal the Commissioner can follow, other than Judicial Review.

Mrs. Justice Shameem continues "as Woolf LJ said in R. v. Panel Takeovers and Mergers ex-parte Guinness [1990] Q.B.146 "The court is the arbiter of what is fair."

"It was said in Wiseman v. Borneman [1971] AC 297 at page 308, that natural justice •

"requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances ... For a long time courts have without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that

the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

"The Fiji Court of Appeal in *Public Service Commission v. Lepani Matea* (CA16/98) said :

"The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilised legal system that it is to be presumed that the legislative body intended that a failure to observe it would render a decision null and void. If there are no words in the instrument setting up the deciding the body requiring that such a person be heard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or displace the rule, it must be done clearly and expressly by words of plain intendment. The intention must be made unambiguous and clear. Finally we add that what is a fair hearing will depend upon the circumstances of each case ; it does not mean that in every case a right of personal appearance must be given."

In *Vakarauwale's* case Mrs. Justice Shameem found that "the applicant was exposed to the possibility of the severest penalty possible under the Police Act (namely dismissal). Although he was heard by written representations before the Commissioner's recommendations were sent to the Commission, he was given no further opportunity to ask for a lighter penalty before the Commission. ... In the circumstances, I am of the view that the Commission failed to act fairly. Fairness required the Commission to inform the applicant that it was considering agreeing to the Commissioner's recommendation for dismissal, that it had perused his representations, his previous convictions and the circumstances of the neglect of duty charged, and that he had an opportunity to make further representations to the Commission. Concurrence

is not a rubber stamp. It is the exercise of a discretion with potentially adverse consequences on the person affected.

"The failure of the Commission to act in a way that was procedurally fair was, in my view, fatal to the decision to dismiss. The decision of the applicant of 20th of September 1999 is quashed".

The respondent in this case before me says that this is clear authority that the officer concerned has the right to make representations to the Commission. In those circumstances it must be open to the DSC to come to a different conclusion to that of the Commissioner and make orders accordingly.

What then is the function of the DSC when it is considering whether or not to concur with the penalty imposed by the Commissioner ?

The DSC is not exercising an appellate or review function. Had that been the intention of the framers of the Constitution then different words would have been used, not "concurrence". The legislation and regulation which existed under the previous Constitution clearly gave an officer the opportunity to be heard, to defend himself on the charges and put forward mitigation. That regime existed at the time of framing and passing of the new Constitution and continues till today. That therefore means that an officer is accorded natural justice by being given the opportunity to put forward all aspects of his case before the matter arrives before the Commission for consideration.

The very way in which section 153(2) of the current Constitution is framed necessarily presupposes that procedures to ensure compliance with the rules of natural justice exist and are to be followed before the matter reaches the DSC. These do exist within the Police Act and supporting regulations. That, of course, does not mean that the DSC itself should not observe the rules of natural justice. On the other hand it does mean that within any particular case as regards any officer if the act and regulations have been followed then



the officer will have had the opportunity to put forward his case and in particular to know the findings against him or her and advance mitigation.

Given the fact that the Constitution, in the case of lower rank officers dismissed or reduced in rank, did not give the DSC appellate or review functions and, in the absence of legislatively prescribed procedures, I have to consider what constitutes fairness when the DSC comes to exercise its functions.

In my judgment, the function given to the DSC can fairly be carried out by a review of all the papers submitted to it. No supplementation is required to meet the requirements of fairness to the officer or the Commissioner. There is no provision or necessity for oral hearings or the advancement of further material. In fact to make any would take the DSC beyond the scope of concurring and into the realms of an appellate or reviewing tribunal. This approach also has the benefit of being expeditious and practical, in matters which require that, without compromise of principle.

There is also the risk, as happened in one these two cases, that arguments and material are put forward which were not before the Commissioner. If such is to be allowed to happen then the DSC cannot be described as deciding whether or not to concur with the Commissioner of Police's decision. It would be going well beyond the realms of concurrence. The Commissioner would be left in an untenable position. A culture could grow of saving up mitigation until the DSC's consideration.

I do respectfully agree with Mrs. Justice Shameem when she says that concurrence is "not a rubber stamp". I reiterate the dicta of the Court of Appeal in Lapani Matea's case, supra, that "... what is a fair hearing will depend upon the circumstances of each case ; it does not mean that in every case a right of personal appearance must be given." The DSC must, of course, consider all the documents and make its decision. However, I must

respectfully disagree with Shameem J. in her findings that an officer be allowed either to argue his case or advance mitigation before the DSC.

In my judgment the reason why the concurrence of the DSC is required for the dismissal or reduction in rank of an officer on or below the line is as a check to ensure that the Commissioner's penalty is fair. It is not by way of appeal or review hearing. Indeed to do so would grant lower rank officers an extra opportunity to argue their case which upper rank officers do not have. This is a constitutional safeguard exerciseable by the DSC in respect of the powers of the Commissioner to remove or reduce in rank an officer.

I therefore find that the Disciplined Services Commission did not have power to conduct a mitigation hearing or hear argument. It did not have power to accept any further evidence or material. It did not have power to order reinstatement, restoration of benefits, pay etc.

Its sole function is to concur or not to concur in the decision on penalty of the Commissioner. That function is to be exercised on the face of the papers submitted by the Commissioner.

This necessarily raises the question whether the DSC should not concur if it would come to a different conclusion on penalty or should only not concur if it considers the penalty to be "Wednesbury" unreasonable. In my judgment the constitutional safeguard must mean agreement with the penalty, not a finding of the penalty being within the bounds of reasonableness, but one with which it would not agree.

However, in making their decision the DSC must not only look to the individual concerned, but also to the broad well-being of the Force as a whole. In this regard the DSC can and should take into account the policy aims of the Commissioner for the Force. Further Regulation 3 of the Disciplined Services (Police Service) Regulations states "the Commission

shall always have regard to the maintenance of a high standard of efficiency in the Force".

There is the potential for impasse where the DSC declines concurrence and the Commissioner does not wish to change his decision. Clearly the officer cannot be dismissed or reduced in rank. It might be the DSC considers dismissal is not a fair penalty but reduction in rank is.

I consider that the DSC should state if it concurs with the Commissioner's decision and which or all of his or her reasons support the conclusion. If it does not concur then it should state why. This accords fairness to the Commissioner and also enables him/her to decide what alternative course to take. In either case the officer concerned is aware of the reasons for dismissal or reduction in rank or why these were rejected. If the DSC does not concur and the Commissioner then considers a lesser penalty be imposed, then the officer should have an opportunity to make representations thereon before a final decision is made. If the lesser penalty is reduction in rank after dismissal has been rejected by the DSC then it will mean a resubmission to the DSC.

It does not specifically form part of this judgment, but it is worthy of note that in relation to gazetted officers and lower rank officers "tried" by committee or tribunal it would appear there is no appeal, but only a "review". Further, it would appear there is not even a review of the cases of lower rank officers when the Commissioner hears the matter. For procedural irregularity or lack of fairness there is judicial review, this is a cumbersome procedure and does not consider merit unless it falls into the category of *Wednesbury* unreasonable.

No argument was addressed as to whether or not under the current law the DSC can delegate its powers to the Chairman and, if so, whether the current "delegation" is valid. I make no finding on this point either.

Upon the findings made in this judgment:

1. I make a declaration that the Disciplined Services Commission acted unlawfully in conducting a "mitigation hearing for Sergeant Marika Nasegai and Constable Viliame Jitoko" and in hearing argument;
2. I issue a Writ of Certiorari to bring before this court and quash the decisions of the Disciplined Services Commission of 4<sup>th</sup> February 2005 and the Chairperson of the Disciplined Services Commission of 14<sup>th</sup> March 2005 to reinstate Sergeant Marika Nasegai and Constable Viliame Jitoko without loss of benefits or entitlements ;
3. I issue a Writ of Mandamus to the Disciplined Services Commission to consider in accordance with law whether or not it concurs with the penalties imposed by the Commissioner of Police on Sergeant Marika Nasegai and Constable Viliame Jitoko.

A handwritten signature in black ink, appearing to read 'R.J. Coventry', with a horizontal line underneath the name.

**(R.J. Coventry)**

**JUDGE**