

THE STATE

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v

POLICE SERVICE COMMISSION

*ex parte*

BENIAMINO NAIVELI

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[HIGH COURT, 1995 (Scott J), 4 August]

Revisional Jurisdiction

C *Public Service-disciplinary proceedings-power to dismiss and procedures to be followed-Police Service Commission Regulations Regn. 22,23,24 and 26.*

D After his appeal against conviction for a criminal offence was rejected by the Fiji Court of Appeal the Applicant was dismissed from the Police Force. On a motion to review his dismissal HELD: Regulation 23 does not grant a power to dismiss either before the criminal appeal period has expired or without a disciplinary enquiry.

No cases were cited.

Motion to review a decision of the Police Service Commission.

*A.H.C.T. Gates* for Applicant

E *D. Singh* for the Respondent

Scott J:

F On 12 June 1992 the Applicant, who while holding the rank of Assistant Commissioner of Police (Crime) had been interdicted on 18 March 1991, was convicted by the High Court of an offence of Abuse of Office contrary to section 111 of the Penal Code. He was sentenced to 9 months imprisonment (suspended) and fined.

On 12 August 1994 the Fiji Court of Appeal dismissed his Appeal against conviction. On 6 September 1994 Appeal proceedings were commenced in the Supreme Court. Those proceedings are still pending.

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On 13 September 1994 the Applicant received a letter from the Secretary of the Police Service Commission (the Respondent) advising him that the Respondent at its meeting held on 25 August 1994 had decided that the Applicant was to be dismissed from the Fiji Police Force with effect from 18 March 1991. (See Exhibit C to the Order 53 statement filed on 6 December 1994).

On 25 January 1995 this Court gave the Applicant leave to seek Judicial Review of the decision by the Respondent to dismiss him. The evidence consists of a supporting affidavit which verifies the Order 53 Statement and an affidavit by the Respondent's Chairman, Mr. Charles Walker, filed on 26 April 1995. In addition both Counsel filed helpful written submissions for which I am grateful.

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It is not disputed that disciplinary proceedings leading to dismissal of a gazetted officer (see the Police Act, Cap. 85 section 2) from the Fiji Police Force must comply with the rules laid down by Part VIII of the Police Service Commission Regulations (Cap.85 - Subs S31 and see section 129 (1) of the Constitution of Fiji 1990) and in particular with Regulations 22, 23, 24 and 26 thereof.

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The relevant parts of these Regulations are as follows:-

“ Criminal Prosecution

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22. Subject to the provisions of regulation 23, when a preliminary investigation or an inquiry discloses that an offence against any law may have been committed by a gazetted officer, the Commissioner shall order an investigation and shall take action in accordance with Force Standing Orders.

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No disciplinary action while proceedings is pending

23. Where criminal proceedings are instituted against any gazetted officer disciplinary proceedings shall not normally be taken until the conclusion of such the proceedings and the determination of any appeal therefrom.

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Criminal Conviction of Gazetted. Officer

24. Where criminal proceedings have finally concluded (including the determination of any appeal) resulting in the conviction of a gazetted officer, the Commissioner shall report the matter, together with his recommendation as to punishment, if any, to the Secretary who shall forward the report to the Secretary of the Commission for consideration by the Commission.

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Disciplinary action after acquittal on criminal charge

- 25-(1) A gazetted officer acquitted of a criminal charge in any Court shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent his being dismissed or otherwise punished on any other charge arising from his conduct in the matter, unless the charge raises substantially the same issue as that upon which he has been acquitted.

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(2) (Not relevant).

A Dismissal

26-1(a) Where the Commissioner considers that disciplinary proceedings for dismissal should be instituted against a gazetted officer, he shall make a report to the secretary who shall forward such report to the Secretary of the Commission in order that the Commission may decide whether or not a disciplinary inquiry is to be held.

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(8) The Commission after considering the report of the Committee, may -

(a) -

(b) -

(c) decide in relation to dismissal or

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otherwise.”

The Applicant says that since his appeal to the Supreme Court was pending at the time that he was dismissed Regulation 24 was breached and the Respondent acted without jurisdiction.

D The Respondent's answer to this has been somewhat unclear but at the hearing before me on 20 July Mr. Singh indicated that the legal argument apparently being advanced by Mr. Walker in paragraph 7 of his affidavit was not being pursued and neither did he put forward any argument in support of the other legal submission apparently contained in paragraph 6 of the same affidavit. The sole argument advanced by Mr. Singh was that contained in his written submission. The argument may be summarised:-

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(i) Regulation 23, by the inclusion of the word “normally” gives the Respondent a discretion to dismiss any gazetted officer found guilty of a serious criminal offence whether or not the criminal appeal procedure has been exhausted.

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(ii) Where (i) above applies the officer may be dismissed without a disciplinary inquiry being initiated (Regulation 26 (1) (a)) or a Committee of Enquiry being appointed (Regulation 26 (2) (a)) or a report of a Committee of Enquiry being considered (Regulation 26 (8)).

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(iii) In the present case the Applicant had been found guilty by the High Court of committing a “serious criminal offence” and therefore the exercise of the discretion to proceed to dismiss contained in Regulation 23 was justified.

(iv) Regulation 24 only applies where it had been decided to suspend disciplinary proceedings pending the outcome of

criminal proceedings and these criminal proceedings would almost invariably be of the less serious type i.e. the type set out in Regulation 18.

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In my view Mr. Singh's approach raises a number of serious difficulties. The first is that there is nothing whatever in the wording of the Regulations under consideration to suggest the existence of a two track approach to disciplinary proceedings, the first an "abnormal approach" under Regulation 23 for "serious" criminal offences and the second under Regulation 24 for less serious criminal offences such as those listed under Regulation 18.

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Second, even if there were anything in the Regulations to support the suggested dichotomy how is the division to be made? Mr. Singh says that section 111 of the Penal Code carries a maximum sentence of 3 years imprisonment and, is therefore "serious". But how serious is "serious"? Is there such a category as "very serious" or another such as "not very serious" and if so what is the dividing line between these categories? Is it 2 years or 2 ½ years or even 3 years and if so to any of these then why? A moment's thought will make it clear that in matters affecting a person's livelihood and career distinctions of the kind suggested by Mr. Singh cannot be left unscheduled.

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There is no definition of "serious" in the Regulations, indeed no mention of the concept of seriousness at all. Furthermore, the theory which Mr. Singh propounds breaks down when closely examined: to give but one example, Regulation 18 (a) -negligently allowing a prisoner to escape - should, according to the theory, be treated less seriously and therefore under Regulation 24. But the equivalent criminal offence created by the Penal Code carries a maximum of 7 years imprisonment, more than twice as much as this "serious" offence with which the Applicant was charged and which was, according to Mr. Singh, dealt with under Regulation 23. The plain fact of the matter is that the distinction suggested by Mr. Singh does not exist and could not work. Furthermore, insofar as there is any relevant evidence at all such evidence tends to establish the contrary of what is being advanced. Under the Force Standing Orders referred to in Regulation 23, Order 315 reads:-

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"All crime listed below is regarded as serious crime:-

.... Criminal Offences in which the accused is a Police Officer: except an offence under section 200 (d) of the Penal Code".

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(Section 200 (d) was repealed and replaced by the Minor Offences Act 1971. The current section is section 4 of Cap.18 - Drunk and Disorderly).

Something must be said about the word "normally" which appears in Regulation 23. The first thing to be noted is that the use of the word in legal drafting is

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somewhat unsatisfactory for the obvious reason that it is inherently question-begging. The word does not appear in Stroud's Judicial Dictionary but in Black's Law Dictionary 5th edition "normally" is defined to mean:-

"As a rule, regularly according to rule, general custom etc".

With a meaning such as that the questions which immediately arise are what rule? what is meant by regularly? which general custom?

B Mr. Singh suggested that the use of the word "normally" had been inserted to give a discretion. As already seen I believe that Mr. Singh found a discretion in the Regulation which did not exist, but even so it is perfectly proper to ask what purpose the draftsman sought to serve by including the word in the Regulation. In my view, the answer is to be found in Regulation 25 (1).

C Regulation 25 (1), entirely reasonably, envisages a set of circumstances in which a gazetted officer behaves in a manner which involves him committing not only a criminal offence or offences but also one or more disciplinary offences as defined by Regulation 18. A simple example would be stealing from the police canteen (Penal Code section 262 - 5 years imprisonment) and then spending the proceeds on an overseas trip (going absent without leave Regulation 18 (7)). In these circumstances Regulation 25 provides that after acquittal following criminal proceedings disciplinary proceedings must not be taken in respect of the same facts as those upon which the criminal proceedings were based but there is no objection to disciplinary proceedings in respect of facts which did not form the basis of the criminal charge. In our example therefore, following acquittal on the theft charge there will be nothing to prevent disciplinary proceedings in respect of the absence without leave. It is for that reason, I suggest, that the "disciplinary proceedings" mentioned in Regulation 23 will not normally be taken until the entirely separate "criminal proceedings" have been concluded.

F As already seen the second fundamental propositions advanced by Mr. Singh were that the Commission "had powers under Regulation 23 (2) to dismiss the Applicant forthwith" and that prior to that Applicant being dismissed "pursuant to Regulation 28" the "correct procedures were followed pursuant to Regulation 26 (1)" (see final sentence to the written submission).

G During the course of the hearing it emerged that when the matter first came to the attention of the Respondent the Respondent had probably not decided that a disciplinary enquiry be held (see Regulation 26 1 (a)). Unfortunately there was no evidence on the point. I was somewhat concerned and accordingly adjourned the hearing briefly to enable both Counsel to take further instructions. When the hearing resumed I was advised that no disciplinary enquiry had been held and that accordingly no Committee had been appointed (Regulation 26 (2) (a) et seq). Furthermore no report by a Committee had ever been prepared

and considered by the Respondent (Regulation 26 (8)). Apparently, the Respondent was of the same view as Mr. Singh namely that Regulation 23 gave power to dismiss forthwith. His instructions were that "no disciplinary hearing was held - they (the Respondent) simply relied on the dismissal of the Appeal by the Fiji Court of Appeal".

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Unfortunately, neither Counsel addressed me on the precise point which had emerged. Mr. Gates confined his submissions to Regulations 23 and 24 and Mr. Singh simply stood by his written submission without offering any explanation at all of how Regulation 23 could give the Respondent or anyone else the power to dismiss anyone given that neither the Respondent nor dismissal are even mentioned in it. Neither did he explain how the procedures laid down by Regulation 26 (1) could possibly have been followed given that the Respondent never received a report from the Commissioner pursuant to Regulation 24 (the Appeal procedure not having been completed) and could not do so under Regulation 23 since that Regulation does not empower anybody to send anything to anybody at all.

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There are also two minor curiosities. The first is that the Respondent believed that it was acting following a report received under Regulation 24 (see exhibit C to the Order 53 statement) and *not* under Regulation 23 as was suggested by Mr. Singh. The second is the action required by Regulation 22 to be taken "in accordance with Force Standing Orders" Examination of the Orders does in fact mention offences by Police Officers (107 (8), 108, 292 and 315) but unlike the armed forces and civil servants (307, 308 and 309) no special procedures for investigating them seem to have been laid down.

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In the absence of legal submissions from Counsel and in the absence of any mention of the Regulation 26 procedure in the Order 53 Statement I do not propose to make any finding on the requirement to hold a disciplinary inquiry even following a final criminal conviction but it will already be obvious that I have the gravest doubts as to whether the Respondent could act under Regulation 28 except following consideration of a report provided to it under Regulation 26 (7). I am however entirely satisfied that Regulation 23 provides no procedure for dismissal, or for forwarding any report by the Commission to the Respondent, that Regulation 24 only becomes operative following the exhaustion of the whole and entire appeal procedure available to an Appellant and that the actual dismissal procedure by the Respondent must commence with a consideration by the Respondent of the report furnished to it under Regulation 24 following which it must decide whether or not a disciplinary inquiry should be held.

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It is interesting to note that convictions for a criminal offence by a gazetted officer do not necessarily result in dismissal although the idea that a very senior police officer could be found guilty of a "serious crime" (Force Standing

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A Orders - supra) and not suffer dismissal seems strange. Regulation 24 requires the Commissioner to report the conviction to the Respondent "together with his recommendation as to punishment, if any" (emphasis added). Presumably if the recommendation is that there should be no punishment then no disciplinary inquiry will be held. But I find Mr. Singh's suggestion, made more than once at the hearing, that the disciplinary inquiry and hearing procedure laid down in Regulation 26 is only necessary in the case of minor offences singularly hard to accept.

B I made Orders in terms of paragraphs (a), (b) and (c) of the Order 53 Statement and will hear Counsel on the question of costs.

*(Motion granted.)*

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