

DISCIPLINED SERVICES COMMISSION v COMMISSIONER OF POLICE (ABU0106 of 2005S)

COURT OF APPEAL — APPELLATE JURISDICTION

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WARD P, ELLIS and PENLINGTON JJA

12, 25 June 2007

10 **Administrative law — judicial review — Appellant declared to have acted unlawfully in conducting mitigation hearing — whether there was error in finding that judge had made reviewable error of law in misconstruing s 153(2) of the Constitution — whether there was error in finding that Appellant was not empowered to hold mitigation hearing when its concurrence was sought by Commissioner under s 153(2) — hearing was not required when Appellant exercised function of concurring or not**
 15 **concurring — there was clear guidance to assist Appellant in discharge of its concurrence function — Appellant should make its decision on basis of material supplied by Respondent when he sought its concurrence — court affirmed decision of judge — Constitution ss 111(4), 111(5), 152(2)(b), 153(2) — Police Act (Cap 85) Pt V, ss 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42.**

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Two cases involved disciplining a sergeant and a constable were heard before the assistant superintendent appointed by the Respondent. As both officers held a rank below a senior inspector (or equivalent) and as the Respondent's decisions involved a dismissal from the police force (force) in the case of the constable and reduction in rank in the case of the sergeant, the concurrence of the Appellant was required under s 153(2) of the
 25 Constitution. The Respondent sought a concurrence in each case. In both cases, the Appellant held a mitigation hearing at which both officers were heard. The Appellant did not hear from the Respondent before the original tribunals. The Appellant purported to reinstate both officers without loss of benefit or entitlements. The Respondent was advised through a letter but immediately protested in writing and indicated that he intended to seek
 30 judicial review unless the decisions were reversed, but the Appellant was not moved. In the judicial review of the present case, Coventry J found in favour of the Respondent and made a declaration that the Appellant acted unlawfully in conducting a mitigation hearing and in hearing the argument. He issued a writ of certiorari to bring before the court and quash the decisions of the Appellant. The Appellant then appealed to this court against that
 35 decision.

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Held — (1) When the Appellant exercised the function of concurring or not concurring, a hearing is not required. But while the sergeant and the constable were afforded a hearing before the Appellant, the Appellant did not give that opportunity to either the Respondent or the prosecutors before the original tribunals.

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(2) The Appellant was responsible for the discipline of the senior officers in the force while the Respondent had the same responsibility in relation to all officers below the rank of assistant superintendent. In requiring the Appellant to concur or not to concur in the very serious penalties of dismissal from the force and reduction in rank the Respondent allowed the Appellant to monitor the consistency and uniformity of punishments throughout the whole force.

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(3) The court laid down some clear guidance to assist the Appellant in the discharge of its concurrence function. When the Appellant was seized of a matter requiring its concurrence or non-concurrence the Appellant should make its decision on the basis of the material supplied by the Respondent when he sought its concurrence. If it concurs it should say so and give that advice to the Respondent. No reasons need to be given. If, on the other hand, it does not concur with the Respondent's decision then it should not only
 50 say so but also give the Respondent reasons for its non-concurrence. On receipt of that intimation the Respondent would then need to reconsider the matter. Before making a new

decision, the Respondent must first afford both the officer concerned and the prosecution an opportunity of being heard afresh on penalty. The Respondent would then refer the matter back to the tribunal under s 33(2)(d) of the Police Act. In the event that the new penalty to be imposed by the Respondent is within the terms of s 153(2) of the Constitution then a fresh concurrence of the Appellant would need to be sought. This judgment would enable the Appellant to act in accordance with s 153(2) upon its proper construction. The court affirmed the decision of the judge.

Appeal dismissed.

Case referred to

10 *State v Decision of the Disciplined Services Commission; Ex parte Vakarauwele* HPJ 10 of 2000; [2000] FJHC 76, considered.

D. Sharma for the Appellant

G. Leung for the Respondent

15 [1] **Ward P, Ellis and Penlington JJA.** This appeal raises the issue of the proper construction of s 153(2) of the Constitution and the functions of the Appellant, the Disciplined Services Commission (DSC). In deciding the appeal it will require us to resolve the conflict of authority in the High Court between the judgment under appeal by Coventry J and the judgment of Shameem J in
20 *State v Decision of the Disciplined Services Commission; Ex parte Vakarauwele* HPJ 10 of 2000; [2000] FJHC 76 (*Vakarauwele*).

The disciplinary process in the police

25 [2] We commence this judgment by setting out ss 152 and 153 of the Constitution, which must be read together. Section 153(2) is at the centre of this appeal.

152. (1) The Disciplined Services Commission has the following functions:
- 30 (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:
- 35 (a) the office of the Commissioner of Police; or
- (b) an officer of the Fiji Police Force having the rank of senior inspector (or its equivalent) or a lesser rank.
153. (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.
- 40 (2) The exercise by the Commissioner of Police of his or her powers to:
- (a) remove a person from the Fiji Police Force; or
- (b) reduce the rank of an officer of the Fiji Police Force
45 requires the concurrence of the Disciplined Services Commission.

[3] Thus under the Constitution, the DSC, which was previously known as the Police Commission is the body which exercises, the disciplinary function in relation to the officers above the rank of senior inspector (or its equivalent). The Commissioner, on the other hand, has the responsibility for the organisation and
50 administration of the police, its deployment and the control of its operations subject to any ministerial general policy directions in relation to the maintenance

of public safety and public order. He is not subject to the directions or control of any other person or authority in relation to those matters (see s 111(4)(5)). He exercises the disciplinary function in relation to officers with the rank of senior inspector (or its equivalent) and below (see ss 152(2)(b) and 153(2)). The Commissioner has the equivalent powers of punishment of the DSC in relation to those officers *except* where he decides to impose a punishment of dismissal from the force or a reduction in rank (the two punishments with which we are concerned in the present appeal). In the event that he decides on either of those punishments he must seek the concurrence of the DSC (see s 153(2)).

10 [4] The Police Act (Cap 85) and the Police Regulations were in existence at the time of the 1997 Constitution. They have remained in place.

[5] The disciplinary process, for officers who are the subject of the Commissioner's disciplinary powers and the punishments he can inflict are set out in Pt V ss 27–42 of the Police Act. There is a trial process. When such an officer is alleged to have committed a disciplinary offence the Commissioner appoints a tribunal to hear the case.

15 [6] The tribunal is a police officer of or above the rank of assistant superintendent. He hears and investigates the charge (see s 32(1)(B)). The tribunal has power to summon and examine witnesses (see s 34(1)). No officer can be convicted of a disciplinary offence unless the charge has been read to him and investigated in his presence and he has been given sufficient opportunity to put forward his defence (see s 32(2)). If the tribunal finds the accused officer guilty of an offence against discipline he makes a recommendation to the Commissioner as to the punishment to be imposed (see s 32(1)(B)).

25 [7] The Commissioner then reviews the proceedings heard by the tribunal. At that stage the Commissioner may (see s 33(2)):

- (a) quash the finding;
- (b) alter the finding, find him guilty of another offence and inflict a punishment within his powers which are set in s 32;
- (c) confirm the finding and inflict a punishment within his powers;
- (d) remit the proceedings to the tribunal or to another tribunal for rehearing.

30 [8] If the Commissioner decides to dismiss the officer from the force or reduce him in rank then under s 153(2) of the Constitution he must seek the concurrence of the DSC. Otherwise his powers to inflict lesser punishments are not circumscribed.

[9] Part VIII of the Disciplined Services (Police Service) Commission Regulations deals with the discipline of officers who are the subject of the DSC's disciplinary powers. They are called "gazetted officers" in the Regulations. That term is defined as an officer of or above the rank of assistant superintendent which is the rank immediately above a senior inspector, the rank referred to in ss 152(2)(b) and 153(1) of the Constitution. The regulations set out the punishments which the DSC can inflict (see reg 28).

40 [10] The regulations distinguish between the situation where the Commissioner considers that disciplinary proceedings should be taken against a "gazetted officer" for dismissal and the case where he considers the alleged misconduct does not warrant dismissal. In the former case the Commissioner forwards a report to the DSC. It decides whether there should be a disciplinary inquiry. If it does, the Secretary of the Commission forwards the charge and a brief statement of the allegations upon which the charge is based to the officer. The officer, if he so wishes, may make a statement setting out the exculpatory grounds upon which

he relies. Unless he makes an admission, the Secretary of the Commission appoints a committee consisting of a judge or magistrate or person possessing legal qualifications as chairman and at least two others (but excluding the Commissioner or any police officer). A hearing is then held. Thereafter the committee is required to report to the DSC. Regulations (8) and (9) state the procedure thereafter.

- (8) 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.
- (9) 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.

[11] In a case in which the Commissioner considers that the alleged misconduct of a “gazetted officer” does not warrant dismissal he reports to the DSC and if it agrees the officer is informed of the charge. He is given an opportunity to answer the charge in writing and put forward anything further which he desires to urge on his own behalf (see s 27(1)(2)). There is a proviso to reg 27(2) to the effect that:

... such proceeding shall be carried out in such a manner that the officer shall know the whole case against him and shall have an adequate opportunity throughout of making his defence.

[12] Standing back and looking at the procedures prescribed for the disciplining of the upper and lower echelons of the force it is evident that they are very similar. It is clear that the accused officer irrespective of rank must be given the charge and an opportunity of responding. There is a hearing in the case of officers under the disciplinary powers of the Commissioner and of a “gazetted officer” in cases warranting dismissal. The accused officer is given the opportunity of being heard as to the facts and penalty. Upon completion of the hearing the opinion of the tribunal goes forward to the Commissioner for his decision. Likewise the decision of the committee (in the case of a gazetted officer) goes to the DSC for decision. In the case of a dismissal or reduction in rank of an officer having the rank of senior inspector (or its equivalent) or below then the concurrence of the DSC must be sought by the Commissioner.

40 **Sergeant Nasegai and Constable Jitoko**

[13] This case involves the disciplining of a Sergeant Nasegai and a Constable Jitoko.

[14] Sergeant Nasegai was charged with four counts of conduct prejudicial to good order and discipline. The Commissioner appointed an assistant superintendent as the tribunal to hear the charges. A hearing took place before the assistant superintendent. The sergeant pleaded not guilty to all the charges. After hearing evidence from the prosecution and the defence the tribunal found the sergeant guilty on all charges. The sergeant was given an opportunity to mitigate but he refused to make any submissions. The assistant superintendent recommended a reduction to the rank of corporal. The Commissioner, having

considered the proceedings before the tribunal and the recommendations made by the assistant superintendent, imposed the punishment of reduction to the rank of corporal.

5 [15] Constable Jitoko was charged with seven counts of absence of without
leave. A superintendent was appointed by the Commissioner as the tribunal to
hear the charges. A hearing took place before the superintendent. The constable
pleaded guilty to all charges; he then presented material in mitigation of penalty.
The superintendent reported to the Commissioner. He recommended that the
10 constable be fined and required to forfeit pay on each count. The Commissioner
did not accept this recommendation. Instead after taking into account the past
record of the constable and the circumstances of the present offending the
Commissioner imposed the penalty of dismissal from the force.

15 [16] As both officers held a rank below a senior inspector (or equivalent) and
as the Commissioner's decisions involved a dismissal from the force in the case
of the constable and reduction in rank in the case of the sergeant the concurrence
of the DSC was required under s 153(2). Accordingly the Commissioner sought
a concurrence in each case.

20 [17] In both cases the DSC's concurrence was not forthcoming. When it
became seised of the two cases, it held a mitigation hearing at which both officers
were heard. The DSC did not hear from the Commissioner or the police
prosecutors before the original tribunals. At a meeting on 4 February 2005 the
DSC purported to reinstate both officers without any loss of benefit or
entitlements. The Commissioner was advised by letter dated 7 February 2005 of
25 the DSC's decisions. He immediately protested in writing. He indicated that he
intended to seek judicial review unless the decisions were reversed. The DSC
was not moved. In a letter dated 14 March 2005 the Chairperson of the DSC
advised the Commissioner:

30 DSC
DISCIPLINED SERVICES COMMISSION
Reference: DSC 4/1-5
The Commissioner of Police
Police Headquarters
P O Box 239
35 SUVA
Dear Commissioner
*REINSTATEMENT OF SERGEANT MARIKA NASEGAI AND PC 1129 VILIAME
JITOKO*

40 Thank you for your letter of 14th February on the above subject.
The Officers, Sergeant Marika Nasegai and PC Viliame Jitoko were called to appear
before the Disciplined Services Commission to mitigate in accordance with the
principle of natural justice. The Commission at the end of the officers' presentations was
persuaded not to concur with your recommendation and took the decisions, which were
conveyed, to you on 07 February 2005.

45 The Commission fully appreciates your efforts to enforce high professional standards
in the Force, in this regard you have its support. However, the Commission is also
mindful of its Constitutional functions under Section 152 of the Constitution, which
role, the Commission takes very seriously.

Whist you are quite entitled to your view, you may wish to reflect on what other
avenue is available to resolve any differences.

Please feel at ease to discuss further with me and I can consult with my members if necessary.

Yours faithfully

[Fatiaki Misau]

5 *Chairperson, Disciplined Services Commission*

Judicial review in the High Court

10 [18] The Commissioner thereupon, in order to clarify the legal position, commenced proceedings and obtained leave ex parte to seek judicial review. In his affidavit in support of the application the Commissioner deposed inter alia:

15 3. Since I assumed office I have 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 when there were instances of lawlessness and disobedience to authority in Fiji. In this regard the Police Force which I now head was similarly affected. 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.

20 4. WHENEVER I exercise my powers to discipline an officer below the rank of Senior Inspector with either dismissal or reduction in rank I have to seek the concurrence of the Disciplined Services Commission (“DSC”). This usually follows a decision made after a hearing following an investigation of a complaint.

25 An internal police Tribunal constituted according to procedures laid out in the law conducts the hearing. The officer being disciplined gets a chance to explain his side of the story and to offer an explanation in regard to the conduct which is subject of the charge before the Tribunal.

The decision of the Tribunal is then forwarded to me for review. If I am satisfied with the conduct of the Tribunal and its recommendation I endorse the decision otherwise I can substitute the punishment or order a re-hearing.

30 [19] Before the trial judge Coventry J the Commissioner argued that the DSC had no power to receive further evidence or other material or hold a mitigation hearing or hear argument or reinstate the officers or to act as it did. The Commissioner contended that for the officers of the rank of senior inspector (or its equivalent) or below the DSC could only say whether it concurred or agreed with the Commissioner’s punishment or whether it did not concur or agree. 35 Alternatively the Commissioner argued that if the previous contention was wrong and argument was permitted before the DSC then the Commissioner should also have the opportunity of being heard.

40 [20] The DSC, on the other hand, argued that the contentions of the Commissioner ran counter to the principles of natural justice and that as a safety check the DSC should have the power to hear argument and evidence before a proper conclusion on punishment could be reached.

The judgment of Coventry J

45 [21] In a most comprehensive judgment Coventry J found in favour of the Commissioner and made a declaration that the DSC acted unlawfully in conducting a mitigation hearing for Sergeant Nasegai and Constable Jitoko and in hearing the argument. He issued a writ of certiorari to bring before the court and quash the decisions of the DSC of 4 February 2005 and the chairperson of 50 the DSC of 14 March 2005 to reinstate the sergeant and constable without loss of benefits for their entitlements. The judge, as well, issued a writ of mandamus

to the DSC to consider, in accordance with law, whether or not it concurs with the penalties imposed by the Commissioner on the sergeant and the constable.

[22] Coventry J focused on the meaning of the word “concurrence” in s 153(2) which is not defined in the Constitution. He was of the opinion that
5 “concurrence” meant “agreement”.

[23] He then went on to hold, in relation to the functions of the DSC:

On a plain reading of the words this means concurrence is required in relation to the punishment to be meted out and not as to the procedures giving rise to the finding of
10 guilt or the finding of guilt itself. Accordingly the DSC has no powers as regards the findings of guilt.

[24] Coventry J then considered the decision of Shameem J in *Vakarauwele* (above). In that case Shameem J was faced with a similar factual situation to the present case. The officer concerned was found guilty by a tribunal appointed by
15 the Commissioner. He put forward matters in mitigation. The Commissioner subsequently decided to dismiss him from the force. The Commissioner then sought the concurrence of the DSC. The latter concurred in the Commissioner’s decision to dismiss. It did not give the officer an opportunity of making any representations to the DSC when it came to consider whether or not it concurred
20 in the Commissioner’s decision. Shameem J found against the DSC and in favour of the police officer who was to be punished. She quashed his dismissal from the force. She held:

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
25 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 charge, and that he had an opportunity to make further representations to the Commission. Concurrence is not a rubberstamp. It is the exercise of a discretion with potentially adverse consequences on the person affected.

[25] Coventry J considered that the DSC was not exercising an appellate or review function. Otherwise different words have been used to the word
30 “concurrence” Coventry J was of the opinion that an officer is accorded, under the procedure which we have earlier summarised, natural justice by being given the opportunity to put forward all aspects of his case at the tribunal stage before
35 the matters reaches the DSC for its concurrence (or otherwise). Such procedures were in place when the 1997 Constitution was enacted. The judge then went on to say:

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
40 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
45 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 that 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
50 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.

5 And a little later:

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.
10 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 exercisable 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.
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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
20 the Commissioner.

[26] In reaching these conclusions Coventry J disagreed with the reasoning of Shameem J in *Vakarauwele* when she held that an officer should be allowed urge matters in to mitigation before the DSC on account of natural justice.

25 The appeal

[27] The DSC then appealed to this court against the decision of Coventry J.

[28] The various grounds of appeal put forward in the notice of appeal heralded a re-run of the DSC's arguments in the High Court. The DSC complained that the
30 judge had erred in finding that the judge had made a reviewable error of law in misconstruing s 153(2) of the Constitution and in finding that it was not empowered to hold a mitigation hearing when its concurrence was sought by the Commissioner under that provision.

[29] At the hearing before us, however, as Mr Sharma, counsel for the
35 Appellant developed his argument and answered questions from the bench he, in effect, conceded the correctness of Coventry J's decision and his reasons and was unable to support the appeal. We commend Mr Sharma for his candour.

[30] First Mr Sharma accepted that the meaning to be ascribed to the word
40 "concurrence" was "agreement" and that that meaning determined the scope of the DSC's powers when it was called on by the Commissioner to indicate whether it concurred or not with his decisions to dismiss from the Force or reduce an officer in rank, as the case may be. Counsel accepted that the DSC was not exercising an appellate function and that it was not concerned with the finding of
45 guilt or the procedure leading to that result.

[31] Second, Mr Sharma conceded that the DSC had "gone too far" in the cases of Sergeant Nasegai and Constable Jitoko in holding a mitigation hearing. He accepted that when the DSC became seised of a case requiring its concurrence (or otherwise) it was limited to that one function only namely to concur or not to
50 concur and the carrying out of that function did not allow it to hold a mitigation hearing or receive any further material from the officers concerned.

[32] Third, Mr Sharma accepted the force of the judge's reasoning that if the lower ranks were allowed a hearing before the DSC that would give them an opportunity to argue their case which the senior officers (who are the subject of the disciplinary powers of the DSC) do not have.

5 [33] Fourth, Mr Sharma accepted, as the judge found when he disagreed with Shameem J in *Vakarauwele*, that an officer who is subject to the disciplinary powers of the Commissioner was afforded natural justice by the procedure laid down in the Police Act which we have summarised above. He has a full hearing before the tribunal both on the allegations made against him and, if found guilty,
10 in mitigation.

The tribunal finds the officer not guilty or guilty and, if the latter, makes a recommendation to the Commissioner as to penalty. The matter then goes to the Commissioner to review the tribunal's findings and for him to make his decision as to penalty. In the event that the Commissioner decides to dismiss the officer
15 from the force or reduce him in rank the concurrence of the DSC must then be sought by the Commissioner.

[34] In our view the concessions made by Mr Sharma were properly made and dispose of the appeal. We are in complete agreement with the decision of the judge and the reasons which he gave. We too, with respect disagree with the
20 reasoning of Shameem J in *Vakaurawele* for the reasons given by Coventry J.

[35] We conclude that, when the DSC exercises the function of concurring or not concurring, a hearing is not required. We note in passing that in this case while the officers were afforded a hearing before the DSC, the latter did not give
25 that opportunity to either the Commissioner or the prosecutors before the original tribunals.

[36] Like the judge we see the concurrence function as a safeguard. The DSC is responsible for the discipline of the senior officers in the force while the Commissioner has the same responsibility in relation to all officers below the
30 rank of assistant superintendent. In requiring the DSC to concur (or otherwise) in the very serious penalties of dismissal from the force and reduction in rank it allows the DSC to monitor the consistency and uniformity of these punishments throughout the whole force.

[37] At the hearing of the appeal both sides asked this court to lay down some clear guidance to assist the DSC in the discharge of its concurrence function. We
35 are of the opinion that when the DSC is seised of a matter requiring its concurrence (or otherwise) it should make its decision on the basis of the material supplied by the Commissioner when he seeks its concurrence. If it concurs it should say so and advise the Commissioner that it concurs. No reasons need to
40 be given. If, on the other hand, it does not concur with the Commissioner's decision then it should not only say so but also give the Commissioner reasons for its non-concurrence. On receipt of that intimation the Commissioner would then need to reconsider the matter. Before making his new decision the
45 Commissioner must, first, afford both the officer concerned and the prosecution an opportunity of being heard afresh on penalty. He would then refer the matter back to the tribunal under s 33(2)(d) of the Police Act. In the event that the new penalty to be imposed by the Commissioner is within the terms of s 153(2) then a fresh concurrence of the DSC would need to be sought.

[38] This judgment will now enable the DSC to act in accordance with s 153(2)
50 upon its proper construction. For the reasons given the judgment of Coventry J and the orders made by him are affirmed.

[39] While the appeal fails it was accepted both sides had sought the guidance of this court as to the proper construction of s 153(2), the resolution of the conflict between two High Court decisions and the procedure to be followed in the future. Accordingly in the circumstances an order for costs is not required.

5 **Result**

[40]

- (1) The appeal is dismissed.
- (2) The orders made by Coventry J are affirmed.
- 10 (3) There will be no order as to costs.

Appeal dismissed.

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