

IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0046 OF 1996S
(High Court Civil Action No. JR 9 of 1993)

BETWEEN:

THE COMMISSIONER OF POLICE
THE POLICE SERVICE COMMISSION

Appellants

AND:

DAVID JASWANT SINGH S/O CLAUDIUS SINGH

Respondent

Coram: The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Mr Justice Savage, Justice of Appeal
The Hon. Mr Justice Dillon, Justice of Appeal

Hearing: 24 August 1998

Counsel: Mr. J.J. Udit for the Appellants
Dr. Sahu Khan for the Respondent

Date of Judgment: 23 September, 1998

JUDGMENT OF THE COURT

This is an appeal from the judgment of Sadal J. given in the High Court at Lautoka on 30 August 1996 on an application for judicial review. The respondent, David Jaswant Singh, sought a review of the decision of the appellant, the Commissioner of Police, dismissing him from the Police Force, which decision had been concurred in by the other appellant, the Police Service Commission. Sadal J. granted the application and ordered that the decision of the Commissioner be quashed and he further ordered that the respondent be reinstated in the Police Force. Later, on 11 April 1997, he granted a stay of his judgment pending the determination of this appeal.

The facts of this matter, so far as are necessary for the determination of this appeal, can be stated relatively shortly for, as the learned trial Judge emphasised, judicial review

is not concerned with the merits or otherwise of the decision under review but whether the decision was made in accordance with law. Speaking generally it may be said that on an application for judicial review the court is not concerned with whether the decision is right or wrong; that can only arise where the decision is one that is so unreasonable that no reasonable person acting in accordance with the requirements of the law could have made it.

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp (1948) 1KB.223 at 230. The learned trial Judge's citation from Chief Constable of the North Wales Police v. Evans (1982). 3 A.E.R. 141 at 155 is apt: "Judicial Review, as the words imply, is not an appeal from a decision but a review of the manner in which the decision was made."

We now set out the relevant facts. The respondent, hereafter called David Singh, was a Police Constable and had been so for about seven years. In September 1992, when not formally on duty, he was involved in an episode with a woman named Ana Seleita. Differing accounts of what happened were given but in the end Ana Seleita and her de facto husband made an allegation of rape against David Singh at the Lautoka Police Station. After investigation by the police the file was referred to the Director of Public Prosecutions. The Acting Director concluded that the evidence was "too unreliable" and "too flimsy" to charge David Singh. She recommended however, that he be "defaulted" for conduct to the prejudice of good discipline contrary to Regulation 12(37) of the Police Regulations made pursuant to s.60 of the Police Act Cap.85. He was accordingly charged in the following terms:

"That you on 19.9.92 at Sulua Street. Lautoka, falsely represented that you were taking Ana Seleita to Lautoka Police Station instead you took her to Police Singlemen's quarters and had sexual intercourse with her an offence under Regulation 12(37) of the Police Regulations, Cap 85."

The charge was heard by a Tribunal. S 32 of the Police Act provides for two kinds of tribunal for the trial of disciplinary offences; either by the Commissioner of Police or any "gazetted officer." A gazetted officer, in terms of a Notice made under s.4 of the Act, is any officer of the rank of Assistant Superintendent and upwards. The Tribunal which heard the charge against David Singh was Superintendent C.B. Singh and it was not disputed that he was a gazetted officer. Superintendent C.B. Singh, as the tribunal, gave his judgment, after hearing the evidence, on 29 April 1993 and it concluded as follows:

"After considering all the evidence before me, I am satisfied beyond all reasonable doubt that the defaulter did bring PW1 (Ana Seleita) from Sulua Street under pretence that he was taking her to Police Station for Drunk and Disorderly and instead took her to singlemen's quarters where he had sex with her. Having held that I find the Defaulter Guilty as charged."

The next day, 30 April 1993, after hearing David Singh's submissions in mitigation, he recommended he be dismissed from the Police Force.

It is convenient at this point to note that the punishments that may be imposed for disciplinary offences by officers below the rank of gazetted officers are specified in S.32 of the Act, referred to earlier in this judgment, and include dismissal. They may be imposed by the Commissioner only, and thus if the Tribunal hearing the charge is a gazetted officer and not the Commissioner then the Tribunal makes a recommendation as to punishment to the Commissioner. S.33 of the Act then goes on to provide as follows:

“33.(1) The Commissioner shall review all proceedings heard by any tribunal, other than proceedings heard by himself.

(2) Upon such review, the Commissioner may -

- (a) quash the finding;*
- (b) alter the finding, find the offender guilty of another offence and punish him in accordance with his powers under the last preceding section;*
- (c) confirm the finding and punish the offender in accordance with his powers under section 32;*
- (d) remit the proceedings to the tribunal which heard them or to another tribunal, for re-hearing.*

Returning now to the facts the Commissioner accepted the Tribunals recommendation and on 7 May 1993 he recorded, in writing, the following:

“I agree. I have been through the papers. The judgment by SP C.B. Singh was well considered.

Dismissed from the Force.”

This was clearly the review of the proceedings required by s.33. It was followed by a memorandum dated 27/5/93 from the Commissioner informing David Singh of his dismissal with effect from 7 May 1993. In passing it may be noted that this memorandum also recorded that the Police Service Commission had concurred with the Commissioner’s decision. No issue appears to have been raised at any point in the pleadings in relation to the Police Service Commission’s concurrence.

On 16 July 1993, that is some 6 or 7 weeks later, solicitors acting for David Singh wrote to the Commissioner requesting him to reconsider his decision to dismiss David Singh and

to reinstate him in the Police on the ground that Ana Seleita had made an affidavit in which she admitted she had made a false accusation of rape against David Singh. The Commissioner replied stating he was taking legal advice from the Solicitor-General and on 31 August he wrote advising the Solicitors that he was not prepared to reinstate David Singh in the Force.

There were several grounds raised by David Singh before the learned trial Judge but in his judgment he upheld only three. The first was that the Tribunal, Superintendent C.B. Singh, was not properly appointed; the second was that there had been a failure to observe a procedural requirement of the Police Regulations in the conduct of the hearing before the Tribunal; and thirdly, that there had been a breach of the rules of natural justice. Mr Udit for the appellants argued that the learned trial Judge was wrong in respect of all three of the above grounds; Dr Sahu Khan in his written submissions supported the Judge's findings on all three grounds, and in his oral submissions before us expanded upon the first two but added nothing in respect of the third.

Before dealing with these three grounds of appeal there is one matter which was raised by Dr. Sahu Khan which we propose to discuss. It relates to a supplementary affidavit made by Savenaca Tuivaga, Assistant Commissioner of Police, on the 5th September 1995. It is not entirely easy to follow the course this case took but it does appear that the actual hearing in the High Court commenced on 5 September 1995 and, contrary to usual practice in this kind of proceeding, oral evidence was given. This evidence was not just cross-examination on the affidavits but evidence in chief as well. David Singh was called, as was another witness on his behalf, and then David Singh was recalled to give further oral evidence. The appellant then called Savenaca Tuivaga to give oral evidence. He apparently tendered a copy of the record of

the hearing before the Tribunal. He also gave evidence about the course of events up to the hearing by the Tribunal and subsequent to it. Dr. Sahu Khan then made various submissions as to the appointment of the Tribunal, to an alleged failure to observe various procedural requirements and to an alleged refusal to permit legal representation. There is also a somewhat enigmatic reference to witnesses not called.

Counsel for the appellant then submitted that David Singh should not be permitted to raise the question of the appointment of the Tribunal as it had not been raised in the original motion for judicial review nor the affidavit by David Singh in support of the statement filed pursuant to Order 53 rule 3 setting out the grounds on which judicial review was sought. Dr Sahu Khan sought leave to amend this statement. Counsel for the appellant asked that if such leave were given the appellant be given leave to file a supplementary affidavit. *Sadal J.* gave leave both to the respondent to amend the statement and to the appellant to file a supplementary affidavit. He also ordered written submissions, presumably on the whole case, to be filed by 22 September 1995. Both the documents, that is the amended statement and the affidavit, appear to have been filed on the 6 September 1995. The case then appears to have been called on the 8 September and 22 September, on which date Dr. Sahu Khan asked for more time and there is a note by the Judge: "Disregard all new matters raised in the affidavit." Dr Sahu Khan informed us that the principal purpose of this affidavit was to deal with the question of, and to produce, Force Standing Orders made by the Commissioner. He complained that the affidavit referred to only one of the Standing Orders, that is Standing Order 101, and did not deal with the other Standing Orders. We note in passing that the sequence of these events seems confused. The record shows the affidavit was filed on the 6 September 1995 yet the Judge has made a note on the 8 September relating to Police Standing Orders.

Dr Sahu Khan submitted strongly to us that the affidavit of Savenaca Tuivaga should be disregarded in respect of all the new matter it contained and that no weight could be attached to the paragraph dealing with Force Standing Order 101, and in particular paragraph 15 of that Order, since the other parts of the Force Standing Orders had not been produced. We canvassed this matter with Dr Sahu Khan and he ultimately accepted that the only paragraph in Assistant Commissioner Savenaca Tuivaga's affidavit that should be disregarded was the last paragraph, number 12, which in the event has nothing to do with the issues raised here. As to the paragraphs dealing with Force Standing Orders we do not accept Dr Sahu Khan's submission that they should be given no weight. In our view, if he is correct that the principal purpose of Savenaca Tuivaga's supplementary affidavit was to produce the Force Standing Orders, and if he was handicapped by this not having been done, it was open to him to apply to the Court for a direction that the appellant produce them or, perhaps, more conveniently, obtain them himself. This Court cannot believe that the Attorney-General's Chambers would not have made them available to him for the purposes of the case.

We turn now to the first ground urged by the appellant in support of the appeal that the learned trial Judge erred in law in ruling that the Tribunal was not properly appointed. He recorded that it was common ground that the Tribunal was not appointed by the Commissioner. We note in passing that there is no express provision in the Police Act or the Police Regulations requiring that a Tribunal is to be appointed by the Commissioner. He referred to Savenaca Tuivaga's affidavit which stated that the Assistant Commissioner of Police, Internal Affairs Department, Jone Waisele, had directed and instructed the Divisional Police Commander, Western, (presumably a Police District), to "proceed against (David Singh) for Conduct Prejudicial to Good Order and Discipline of the Force". He then said that the power

of appointment of a Tribunal is vested in the Commissioner. His Lordship referred to some submissions of both Counsel to the effect that the Tribunal was appointed by Assistant Commissioner Jone Waisele. He then referred to various sections in the Act and went on to say that in reality, Senior Superintendent of Police P. Matailevu, the Divisional Police Commander, Western, had appointed D.DPC/W to "hear the proceedings and submit the relevant docket to ACP/IA" and that Savenaca Tuivaga when giving oral evidence had said that Senior Superintendent Matailevu had appointed the Tribunal. In this the learned trial Judge was in error as Savenaca Tuivaga did not say that. What he did say, under cross-examination, was that Assistant Commissioner Waisele was in charge of internal affairs and that Senior Superintendent Ponipasa "set the Tribunal - appointed S.P. Singh". He then held it was quite clear from the evidence before the Court that the Tribunal was not properly appointed to hear and investigate the charge against David Singh.

We think that His Lordship's reasoning, in the light of the submissions put to him by both counsel which were largely concerned with questions of delegation of powers, has led him to approach this matter on a wrong basis.

We think that the starting point should be sections 7 and 8 of the Police Act the relevant parts of which are as follows:-

"7(1) The Commissioner shall have the command, superintendence and direction of the Force and, subject to the provisions of this Act and to the directions of the Minister, may make orders for the general government of police officers in relation to their training, arms, clothing, equipment and other accoutrements, and particular services, as well as their distribution and inspection, and such other orders as he may deem expedient for preventing negligence and promoting efficiency and discipline on the part of police officers in the discharge of their duties.

"8(1) The administration of the Force throughout Fiji shall be vested in the Commissioner;

(2) Subject to the orders and directions of the Commissioner the control of the police in any place shall be vested in such police officer as may be appointed by the Commissioner to be in charge thereof."

In our view s.7 empowers the Commissioner, in carrying out his duty of Commanding Superintending and directing the Force, to make all necessary orders for the general government of police officers, including efficiency and discipline, in the discharge of their duties. S.8 then entrusts the administration of the Police Force throughout Fiji to the Commissioner but goes on to say that subject to specific orders and directions of the Commissioner, the control of the police in any place shall be vested in such police officer as may be appointed by the Commissioner to be in charge of that place. No doubt under this general administration provision the Commissioner has divided the country into divisions or other classifications.

We now turn to s.17 which provides, as far as is relevant,

"17(1) Every police officer shall exercise such powers and perform such duties as are by law conferred or imposed upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the Force or from any other police officer in the same rank as himself but senior in service.

It follows that police officers are required, as members of a disciplined law enforcement body, to carry out orders given them by their superiors in the force in respect of their duties prescribed in this section or as laid down elsewhere pursuant to powers given to the

Commissioner under sections 7 and 8, or other officers in terms of orders and directions given them by the Commissioner under sections 7 and 8.

The affidavit of Assistant Commissioner Savenaca Tuivaga contains the following paragraphs:

"7. THAT pursuant to Section 7 aforesaid the Commissioner of Police has made certain Orders covering internal administration of the Force including matters relating to conduct and discipline. These orders are referred to as Force Standing Orders. Further that the Order in regard to Defaulter Procedure, Force Standing Order 101, is an amplification of the procedure declared in Part V of the Police Act, Cap.85 and section 7 of the said Act."

"8. That paragraph 15 of Force Standing Order 101, entitled "Authority to Try Defaulter Cases" provides as follows:

"By virtue of Section 32, Police Act, Cap.85 any Gazetted Officer may hear as a Tribunal a Disciplinary charges or an offence: Contrary to Regulations 12 of the Police Regulations allegedly committed by a Police Officer other then a Gazetted Officer and if he is found guilty the tribunal will make recommendation to the Commissioner as to the punishment to be imposed." (Sic)

"9. THAT I verily believe that the appointment of the Tribunal in the instance case was fully authorised by the Divisional Police Commander Western pursuant to instruction referred in annexure marked "ST2" herein. Further that on or about 3.2.93, the Divisional Police Commander Western advised Assistant Commissioner of Police/Internal Affairs that the defaulter proceedings against PC 1691 David Singh had yet to be heard. Shown to me and marked "ST3" is a true copy of the memorandum dated 3.2.93. By a copy of the said memorandum, Deputy Divisional Police Commander Western Tribunal herein was directed to hear the proceedings and submit the relevant docket to Assistant Commissioner of Police, Internal Affairs."

In our view it seems clear that the course of events was that the police in the ordinary course of their duties investigated an allegation of rape against David Singh; in the particular circumstances the police chose to refer the file to the Director of Public Prosecutions;

her assistant advised against a prosecution but recommended, disciplinary proceedings, under the Police regulations. The police again in the ordinary course of their duties, accepted her advice which, as the record shows, was addressed to ACP/Crime, presumably the Assistant Commissioner of Police, crime. He minuted the file to ACP/1A, presumably the Assistant Commissioner of Police, Internal Affairs, one Jone Waisele, who sent it to Divisional Police Commander, Western, Senior Superintendent of Police P. Matailevu. He minuted the matter to DDPC/W, presumably the Deputy Police Commander/Western, with the following instruction. "Hear the proceeding and submit the relevant docket to ACP/1A." This was in due course done and, pursuant to s.33, the proceedings were reviewed by the Commissioner who, as noted earlier in this judgment, went through the papers and imposed the punishment of dismissal. Thus it seems clear that in the ordinary course of their duties, as no doubt laid down the Force Standing Orders made by the Commissioner, the appropriate officers at the appropriate levels have carried out their duties. Had a person been directed to hear the matter by the Divisional Police Commander, Western, who was not a gazetted officer then his appointment could be challenged on the basis that he did not have the requisite statutory qualification; but that did not occur in this case.

Dr. Sahu Khan challenged the validity of the Force Standing Orders on the basis that they were "subsidiary legislation" within the terms of s.21 of the Interpretation Act Cap. 7 and should have been published in the gazette but had not been so published. We do not find it necessary to deal with this submission. We do not consider that a direction to a particular gazetted officer to hear and investigate charges against a police officer in term of s.32B must be given by the Commissioner. S.32B says in plain words that "any gazetted" officer shall have the power. Thus it is not necessary to show that the particular direction was authorised by the Commissioner by reason of a provision in a particular Standing Order. In our view provided the

direction to hear and investigate a charge has been given to an officer who is a "gazetted officer" by another officer who is his superior, or otherwise authorised to give such a direction, then until it is shown that the direction was unlawfully given it cannot be called in question. The maxim omnia praesumuntur rite esse acta applies. The burden of showing that the direction given to Senior Superintendent C.B. Singh to hear the charge against David Singh was unlawful or otherwise not properly given was upon the latter and he has not discharge it.

We add, in passing, that we think it unlikely that Force Standing Orders are subsidiary legislation. They are referred to as Standing Orders and an order may be described as an authoritative direction, mandate or instruction. They were apparently made or given by a person with power to make or give them to subordinate officers in a disciplined body the Police Force, who are by statute required to carry out such orders. There may well be, we think, a distinction between subsidiary legislation as defined in S. 2(1) of the Interpretation Act, Cap. 7, and Standing Orders in such a disciplined body. However it is not practicable to determine this question without having the Standing Orders before us to see their form and content. We note that this issue was not raised before the learned trial judge and, as we understood it from Mr Udit for the appellant, had not been previously raised with him. He was thus unable to offer any submissions on the point.

It follows from what we have said that we are satisfied the learned trial judge was wrong on the first ground on which his judgment was based. We turn to the second which was that there had been a failure to observe the requirements of regulation s.13(iv) of the Police Regulations. That regulation prescribed the procedure applicable to proceedings heard by a Tribunal under s.32 of the Act. It covered a number of matters starting with the requirement to supply a copy of the charge before the hearing; the use of documentary evidence; the recording

and evidence in the presence of the accused officer; that it "need not be taken down in full, but the substance and material points thereof must be recorded in writing and read over to the accused"; and a number of other matters. The learned trial judge noted that the record of the hearing did not show that "any part of the recordings were read over to the applicant" except the evidence of one witness, Salome Seniyasi, which he said was "another irregularity." (The other "irregularity" was the matter of the appointment of the Tribunal already discussed.) Dr. Sahu Khan submit that this was not just a procedural irregularity but went to the question of fairness. He was unable, however, when asked point to any particular aspect of such fairness that had disadvantaged David Singh and a consideration of the record of the hearing does not suggest that David Singh was in fact in any way handicapped in his conduct of his case by the omission. It is clear there was a failure to comply wholly with the regulation but we do not think that it alone would justify quashing the decision on the proceedings. From the way the learned trial judge discussed the matter in his judgment we do not think he regarded it as sufficient on its own; he saw it as a make-weight.

The last ground was that there had been a breach of the rules of natural justice. This was dealt with by the learned trial judge on the basis that the Commissioner had the power "to remit the proceedings to the tribunal which heard them or to another tribunal for re-hearing" under s.33(1). He expressed the view that the conclusion reached by the Tribunal was "totally destroyed by the complainant later on saying that whatever allegation she made to the police was false." She did this by affidavit, as is mentioned earlier in this judgment but, said the learned trial judge, no weight appeared to have been placed on that affidavit. The Commissioner simply said he had received legal advice from the office of the Solicitor-General and was not prepared to reinstate David Singh in the force.

As is stated early in this judgment the Commissioner carried out his review of the proceedings on the 7 May 1993. The memorandum to David Singh informing him of his dismissal was dated 27 May 1993. It was on the 16 July 1993 that the solicitors wrote to the Commissioner requesting him to reconsider the decision to dismiss on the basis of Ana Seleita's affidavit. We think it clear that the learned trial judge misconceived the position on this matter. Clearly no question of a denial of natural justice could arise on the review by the Commissioner under s.33. It had been completed on the 7 May 1993 more than two months before the solicitors letter was sent.

It follows that the appeal is allowed and the judgment in the High Court is set aside. Nothing was said about costs before us but ordinarily the appellants would be entitled to an order in their favour, and we fix them at \$1,000 together with disbursements. However the parties may be able to resolve the question between themselves.

M. Casey

 Sir Maurice Casey
 Presiding Judge
R. Savage

 Mr. Justice Savage
 Justice of Appeal
M. Dillon

 Mr. Justice Dillon
 Justice of Appeal

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