IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM No. 2010 HCVO 01286

In The matter of an application by Courtney Ellis for an Administrative Order for Judicial Review

R v The Commission of Police *Ex parte* Courtney Ellis

Mr. Barrington Frankson and Miss Jodian Hammitt for the Applicant

Miss Lisa White and Mr. Harrington McDermott for the Defendant

Heard: October 5, 6 and December 17, 2011

Sinclair-Haynes J

[1] In a determined effort to purge the Jamaica Constabulary Force of the toxicity of corruption, the Commissioner of Police refused Constable Courtney Ellis' application for re-enlistment in the Jamaica Constabulary Force. The reason given by the Commissioner of Police was that the Jamaica Constabulary Force had lost confidence in his ability to perform the duties of the office of Constable with professionalism and integrity. Anonymous and hearsay complaints of the vilest nature form the pith of the reason for his refusal.

[2] Constable Ellis has challenged the Commissioner's decision. His application is for Judicial Review of the decision of the Commissioner of Police. He seeks:

(1) An Order of Certiorari to quash:

Letter of the Commissioner of Police dated September 29, 2009 as communicated to the claimant and Force Orders dated December 3, 2009 which ordered, *inter alia* that the claimant was discharged from and not permitted to re-

enlist to the ranks of the Jamaica Constabulary Force with effect from October 1, 2009.

(2) An Order of Mandamus:

> To command or compel the Commissioner of Police to reinstate him to active duty in the Jamaica Constabulary Force, and to pay him all salary and allowances outstanding from September 25, 2009.

BACKGROUND

[3] Constable Ellis became a member of the Constabulary Force on October 2, 1989. He was stationed at the Freeport Police Station in the parish of St James from November 2008 to September 2009. On July 16, 2009, he applied for re-enlistment for a further term of five years.

[4] Sometime in August 2009, Superintendent Robinson, held a meeting with Private Corporal (PC) Ellis, Deputy Superintendent Michael Garrick, and Inspector Louis Brown. At that meeting Constable Ellis was informed that his motor vehicle was involved in a number of robberies in the parishes of St James, St Elizabeth and Hanover. He denied the allegations and informed them that his vehicle was in the garage. He was admonished by Superintendent Robinson to be careful of the co-workers he kept as friends. He was advised that the matter would be referred to the Anti-Corruption Branch for Investigation.

[5] On the September 23, 2009, he received a letter dated September 21, 2009 from the Superintendent Robinson. The letter informed him that he was not recommended for re-enlistment and outlined the allegations:

> *"A number of phone calls have been received by your Commanding Officer from members of the public as also information from police personnel and a letter alleging your involvement in criminal activities. It is reported that a letter with similar contents as that addressed to your commanding officer was received at the office of the Assistant*

Commissioner of Police, Anti-Corruption Branch.

i. It is alleged that in April 2006, you along with other police personnel went to a house in Wiltshire, St. James occupied by Marcia 'Girlie' Baker and behaved in an unprofessional manner as it relates to a quantity of cash and cocaine taken from the premises.

ii. In August 2009, you along with Detective Constable V. Reid reportedly arrested one James Clayton of Blue Lagoon Resorts, Freeport, St. James claiming that he was wanted in the United States of America and thereafter allegedly demanded the sum of J$500,000.00 for his release.

Your alleged links to the underworld and involvement in robberies committed in the St. James, Hanover and St. Elizabeth Divisions is having a negative impact on the hardworking police personnel in the Division who reportedly find it difficult to interact with you.

You were confronted with this allegation by your Commanding Officer and you reportedly vehemently denied same. It is however noted that the management team of the Division, at one stage, had to take measures to curtail your movements whilst at work due to your alleged involvement in robberies.

Whilst your work, worth and conduct are described as satisfactory by your immediate supervisors, you are also assessed as a "smart and slick" police who has to be watched closely.

In view of the foregoing, it is apparent that whilst you have displayed the capacity to perform your duties effectively, you have lost the confidence of members of the public, your co-workers and the Jamaica Constabulary Force in your ability to serve, protect and re-assure the citizens of this country…"

[6] On September 28, 2009, he responded by way of letter. On September 30, 2009 he received a letter dated September 29, 2009. The author of that letter was the Assistant Commissioner of Police. It informed him that his application for re-enlistment was not approved. The letter invited him to attend either alone or with an attorney upon the Commissioner to show cause why he should not be dismissed. It advised that if he

decided to attend, he was required to indicate in writing within seven days. He continued working until October 6, 2009, when he was informed by Deputy Superintendent Artnell Colley that he should cease performing his duties.

[7] On October 6, 2009, he wrote to the Commissioner of Police in response to the letter dated September 29, 2009 that he received. He was summoned by way of a telephone call to attend a meeting on November 3, 2009 with the then Commissioner of Police, Hartley Lewin. Commissioner Lewin resigned before the date scheduled for the meeting. On November 28, 2009, acting upon instruction, he attended a meeting with the Acting Commissioner of Police Owen Ellington (now Commissioner) who informed him that upon his perusal of the documents implicating him and his (Constable Ellis') response, he found nothing which would cause him to reverse the decision.

[8] He enquired of Constable Ellis whether he wished to say anything in addition to what was contained in his statement. Constable Ellis asked him whether allegations could be arbitrarily made against him and he not be afforded an opportunity to disprove them. The Commissioner informed him that he had seen his (PC Ellis') response that he would seek redress through the Courts and he should channel his appeal in that direction. He informed him that he was dismissed from the Force. Force Orders published on December 3, 2009 stated that the reason for his discharge from the Force was that the JCF had lost confidence in his ability to perform the duties of the office of constable with professionalism and integrity

[9] On December 3, 2009, it was broadcast on the radio and television that he was one of three Police Officers booted from the Force for "NO CONFIDENCE".

CLAIMANT'S CASE

[10] Constable Ellis' claims that the letter from the Commissioner of Police dated September 29, 2009 and the Force Orders published on December 3, 2009 were unlawful and in breach of the Constabulary Force Act and the Police Regulations 1961 and/or in breach of the principles of Natural Justice, The Constitution of Jamaica and

the rule of law. Further they are unjust, capricious, arbitrary, and null and void for the following reasons:

[a] He was deprived of a fair hearing;

[b] The allegations against him were not substantiated and no disciplinary proceedings were brought against him;

[c] He was not in breach of any rule or provision of the Jamaica Constabulary Force Act or any Law of Jamaica.

[11] He further contends that:

He was denied the legitimate expectation of being heard in respect of the charges brought against him. The letter and/or Orders of the Commissioner of Police are unreasonable and/or irrational and/or without foundation.

SUBMISSIONS BY MR. BARRINGTON FRANKSON ON BEHALF OF THE APPLICANT

[12] Mr. Frankson submits that the **Police Service Regulations**, 1961 were breached and in particular section 47 of the Regulations because the procedure prescribed by the Regulations regarding investigations was not complied with. The decision to dismiss was taken before the Commissioner had sight of the Applicant's response to the Notice regarding the non-recommendation of his re-enlistment dated September 21, 2009.

[13] On September 23, 2009, the Applicant received the communiqué. He submitted his response to the Montego Bay Police Station on September 29, 2009. It was forwarded to the Commissioner of Police on September 29 and was received on October 5, 2009. The decision to dismiss was taken without considering the Applicant's response to the allegations and before he was invited to appear before the Commissioner to show cause why he should not be dismissed.

BREACH OF NATURAL JUSTICE

[14] He submits that the decision of the Commissioner of Police to dismiss the

Applicant was not conducted in accordance with the provisions **The Police Regulations** made under the **Constitution** and the rules of Natural Justice because he was not given a fair hearing. Advance notice of the charges or accusations was not given and he was deprived of the right to make representations. In breach of the rules of Natural Justice, the Applicant was not given a fair opportunity to see any factual evidence in the possession of the Commissioner of Police. Although he denied the allegations he was not given an opportunity to test any evidence regarding the allegations.

[15] In support of his contentions he relies on the statements made by Langrin J as he then was in the Full Court decision in the case of **R v The Commissioner of Police, Ex Parte Keith Augustus Pickering et al** unreported **decision of the Supreme Court delivered on the 13, 14, March and 7, April 1995** and on the case of **Ridge v Baldwin** [1964] AC40.

DENIAL OF HIS LEGITIMATE EXPECTATION OF HAVING ALLEGATIONS CONSIDERED FAIRLY

[16] He was denied his legitimate expectation of having the allegations considered fairly by the Commissioner of Police. His legitimate expectation emanated from his knowledge of what was the general practice. He relies on the cases of **O'Reilly v Mackman** [1982] 3 All ER 1124 and **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374. The applicant's employment exposed him to procedural propriety and he expected the same rules of fairness to be extended to him in the circumstances.

[17] Further, he submits that the decision by the Commissioner of Police to dismiss the Applicant was unreasonable. He submits that the principle espoused in the case of **Associated Provincial Picture House v Wednesbury Corp** [1948] KB 223 and **Bromley London Council Borough v Greater London Council** [1983] AC768 was ignored.

SUBMISSIONS BY MS. LISA WHITE FOR THE DEFENDANT

APPLICATION TO QUASH DECISION IS ACADEMIC

[18] She submits that the Court is asked to quash the letter dated September 29/30, 2009 and to quash the Force Orders. Having appealed the decision communicated to him by meeting with the Commissioner of Police, the Court would be embarking on an academic exercise and/or an exercise in futility in deliberating on whether the initial decision as communicated in the letter should be quashed. She relies on the **Tindall v Wright** Times Law Reports, May 5, 1922 and **Ainsbury v Millingen** [1987] W.L.R. 379.

FAILURE TO PROVIDE COURT WITH DECISION TO BE QUASHED

[19] The claimant has not placed the decision he wishes to be reviewed before the Court. The Court cannot be asked to quash the letter dated September 29/30, 2009. That letter merely communicated the decision but it is not the decision itself. The claimant must exhibit to the Court, what decision he is seeking to quash. The Force Orders are a means of general communication within the Jamaica Constabulary Force. They do not constitute Notice and cannot be seen as an official means of communication. The Court cannot quash a Force Order which does not bear the weight of a Notice. Further, the Force Order is not the decision itself. It is noteworthy that the Claimant is not seeking to quash the final decision of the Commissioner of Police although after meeting with the Commissioner of Police, the Commissioner informed him that having heard him he would not change his initial decision.

[20] She further submits that the Administrative Court exists to adjudicate upon specific challenges to discrete decisions. It does not exist to monitor and regulate the performance of public authorities She relies on **R (P) v Essex County Council** [2004] EWHC 2027 (Admin) at [33]). The focus of the Court of Judicial Review should be on actions having substantive legal consequences, not preparatory steps. The Claimant's case, she submits would fail in the circumstances. She cites as authority **R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government** [2008] 3 All ER 548 at [32] – [36]).

APPLICANT WAS DISCHARGED, NOT DISMISSED

[21] It is her submission that the applicant was not dismissed from the Jamaica Constabulary Force. He was discharged. There is no mention in the Force Order that he or any of the other members listed in the Jamaica Constabulary Force was dismissed. Any reference to a dismissal should be disregarded by the Court. In the alternative, same should be struck from the Fixed Date Claim Form.

[22] Dismissal from the Jamaica Constabulary Force engages a distinctly different statutory framework. The relevant law is Section 3(2) (a) of the Jamaica **Constabulary Force Act and** the **Book of Rules for the Guidance and General Guidance of the Jamaica Constabulary Force** (made pursuant to the **Constabulary Force Act**) **(the Book of Rules),** particularly Rules 1.1, 1.9 and 3.1. She relies on the unreported cases of **Kenyouth Handel Smith v The Police Service Commission et al** SCCA 60/2005, decision dated November 10, 2006 and **Nyoka Segree v Police Service Commission** SCCA 142/2001, decision dated March 11, 2005.

[23] She submits that it is erroneous to say that the decision not to grant the Claimant's application for re-enlistment is unlawful and in breach of the **Constabulary Force Act** and/or the **Police Service Regulations** as those pieces of legislation are not relevant. The issue of re-enlistment is not mentioned in the **Police Service Regulations**.

[24] A proper construction of Section 5 of the **Constabulary Force Act** and rules made pursuant to the legislation show among other things that the Commissioner of Police has sole operational command and superintendence of the Jamaica Constabulary Force. The discretion to re-enlist is not exercised by the Police Services Commission. His function is administrative.

[25] Constables may be enlisted for a term of five (5) years in the Jamaica Constabulary Force. The period of enlistment comes to a natural end after the passage

of five years. In order to renew his enlistment, the Constable must to apply to enlist for a further period of five years. The mere submission of an application for re-enlistment does not mean that the application must be granted. There is no obligation placed on the Commissioner of Police to re-enlist. There is no stipulation of what, if anything, the Commissioner of Police must take into consideration before determining that a Constable's application for re-enlistment should or should not be granted. Regarding the jurisdiction of the Commissioner of Police, she relies on the case of **Corporal Glenroy Clarke v. Commissioner of Police and the Attorney General of Jamaica** (1996) 33 JLR 50, CA. She submits that he did not act *ultra vires* the legislation.

WHETHER APPLICANT RECEIVED A FAIR HEARING

[26] She submits that it is not correct to say that he did not receive a fair hearing. The Applicant was heard by the Commissioner of Police. He met with him in the presence of another officer. The Claimant indicated that he would attend the hearing with his attorney but did not. It must be taken that he was satisfied that he could proceed without his attorney. He did not indicate that he would request an adjournment of the hearing to facilitate the presence of his attorney.

[27] The Claimant was apprised by the various notices of the reasons for the non-recommendations. The onus was on him to advance cogent counter-arguments as a basis for the Commissioner of Police to exercise his discretion in his favour. Having failed to do so, the Claimant cannot complain about the manner in which the Commissioner of Police exercised his discretion. His discretion was exercised based on the material advanced to him about the conduct and integrity of the Claimant as a police officer.

[28] Intelligence about the Claimant's misconduct could be taken into consideration by the Commissioner of Police. The claimant was not charged, if he were, the charges would have had to be proved against him beyond all reasonable doubt before the Commissioner of Police could exercise his discretion not to grant an application for re-

enlistment.

[29] There are no rules which govern the Commissioner of Police in the exercise of his discretion. The Commissioner of Police, having met with the Claimant, clearly formed the view that the Claimant had not demonstrated the accepted standards of behaviour required of a Constable in the Jamaica Constabulary Force and therefore was not a fit and proper person to be re-enlisted.

[30] The Commissioner‘s exercise of his discretion was reasonable and rational. His decision was based on the affidavits before him. He did not consider irrelevant matters. He complied with the requirements outlined by Greene, M.R. in **Associated Provincial Picture Houses, Limited v Wednesbury Corporation** [1948] 1 K.B. 223, CA.

[31] The question which confronted the Commissioner of Police was whether the applicant, as at the date of the application, was a fit and proper person to be re-enlisted in the Jamaica Constabulary Force. The Commissioner of Police must assess the information presented to him and determine whether this member of the Jamaica Constabulary Force still has the support and confidence of other members of the organization and members of the public. He must also consider if there are implications for national security.

[32] The question for this Court of Judicial Review is whether the Commissioner of Police, in considering Constable Ellis’ application for re-enlistment, followed the correct procedure. This Court’s remit is not the merits of the Commissioner’s decision. In the matter of **R. v Commissioner of Police, ex parte Clarke** (1994) 31 JLR 571 and **Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica** (1996) 33 JLR 50, neither the Full Court nor the Court of Appeal in dealing with the question of fairness and principles of natural justice, assessed the nature of the information considered by the Commissioner of Police. Those courts did not place stock on whether the incidents referred to were proved or not or whether the applicant had had an opportunity to “defend” himself in relation to the reports made against him.

Those courts assessed the fact that the confidential reports were made to the Commissioner of Police and determined that the Commissioner could take them into consideration.

[33] Interestingly, neither Court stated that had the other aspects of the information before the Commissioner not existed, the reports made by witnesses who were too afraid to come forward to formalize their reports would not have been cogent information which the Commissioner could use to arrive at his decision. Also, neither Court in delivering its judgment reasoned that the nature of the reports furnished to a Commissioner of Police would negatively or positively affect the discretion of the Commissioner to make his decision.

[34] It was not relevant whether the Court of Appeal in the **Clarke** matters was perceived as having no other choice but to refuse the orders sought by that applicant. The court in that matter did not look at or assess the weight of any aspect of the information presented to the Commissioner of Police. This Court should not seek to look at the nature of the information in the Commissioner's possession as the Court would be looking at the merits of the Commissioner's decision.

[35] In the instant matter, the complaint of the Applicant is not that the Commissioner of Police took irrelevant things into consideration but that he did not get a fair hearing. A question for the Court, is whether the Commissioner of Police exercised his discretion fairly; that is, whether he gave Constable Ellis the opportunity to be heard. The question is not whether Constable Ellis had the opportunity to test the information presented to the Commissioner of Police. Should this Court question whether Constable Ellis got an opportunity to "defend" himself in respect of the reports or "test" the information, the Court would have asked the wrong question. The Courts in the **Clarke** matters did not stipulate that that applicant ought to have had an opportunity to "test" the information as alleged or at all.

Based on the evidence before this Court, PC Ellis had and used the opportunity to be

heard by writing to and appearing before the Commissioner of Police. The onus was on Constable Ellis to supply the Commissioner of Police with information beyond his assertions that he did not do the things outlined in the reasons for refusal.

[36] This Court is constrained to assess what is the proper procedure for a fair hearing to have been conducted. The question is whether the Commissioner of Police could consider the information presented to him, in exercising his discretion to grant or not grant an application for re-enlistment. The question is not whether the information presented to the Commissioner (in a context where there is not a trial for he is not exercising a judicial or quasi-judicial function) meets the standard to make this information admissible. Should the Commissioner of Police impose upon himself the requirement that the applicant should "test" the information, he would be fettering his discretion to pronounce on the application before him.

[37] Constable Ellis had opportunities to be heard but while he had audience with the Commissioner of Police, he did not bring counsel with him as he had advised he would. Nor has he deposed that he asked the Commissioner of Police for the opportunity to "test" the information presented to the Commissioner and that that request was refused. He cannot now complain that he did not get to "test" the information and use that as a measure to say that he did not get a fair hearing. The Commissioner of Police was not obliged to supply him with the confidential reports made.

[38] There is no requirement in law for the Commissioner to disclose the information. Having provided Constable Ellis with an opportunity to be heard and Constable Ellis, having taken advantage of that opportunity, the principles of natural justice and fairness were observed by Commissioner Ellington.

DECISION

IS THE MATTER NOW ACADEMIC?

THE LAW

[39] Distilled from the cases of **Tindall v Wright** Times Law Reports, May5, 1922 and

Ainsbury v Millingen [1987] WlR 379 is the principle that the courts will not decide on points of law which have become academic. The courts decide disputes between parties. They do not pronounce on abstract questions of law when there are no disputes to be resolved.

[40] The letter of September 23, 2009, from the Assistant Commissioner of Police who subsequently became the Acting Commissioner of Police, informed Constable Ellis of the intention not to re-enlist him and invited him to respond. He duly responded. He was further informed by letter dated September 29, 2009, which was written by the Assistant Commissioner that his application was refused. He was invited, if he desired, to attend before the Commissioner to show why he should not be dismissed.

[41] The Commissioner was the decision-maker. The Applicant was entitled to a hearing. The cases of **Wright v Tindall** and **Ainsbury v Miiligen** relied upon by Miss White are irrelevant. Her submission that his attendance upon the Commissioner was an appeal which now renders the matter academic is specious.

[42] In hearing the applicant and reviewing his decision, the Commissioner exercises an administrative function. The following statement of Carey J clarifies the role of the Commissioner:

> *"Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application of the member for re-enlistment the Commissioner is obliged, in fairness, to supply the reasons for his decision and allow the officer affected, an opportunity to be heard in relation to that material if the officer requests it...Any right which the appellant had to be heard could only arise after the appellant had been advised of the decision not to approve and the reasons therefor. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in the light of any submissions made to him by the officer or his attorney. The reasons having been supplied, must then be answered by the attorney. Consequently, the exercise is akin rather to an appeal process than to a trial process. The onus is thus on the officer to show cause why he should be allowed to re-enlist."*

[43] It is wholly untenable to argue that his meeting with the Commissioner was an appeal of the decision which rendered the matter academic. Although the process is compared to an appeal process, it is not indeed a judicial appeal. The process was simply contrasted to that of a trial process. Attendance upon the Commissioner was a right conferred upon him by the legislature and indeed the rules of natural justice. By exercising his right to be heard it cannot be argued that he has forfeited his lawful right to judicial review. In any event Miss White cannot reprobate and approbate simultaneously. It is her correct submission that the Commissioner was engaged in an administrative exercise, not a judicial or quasi-judicial function for her to now submit that his attendance upon the Commissioner was an appeal is forbidden (See **Evans v Bartlam** (1937) AC 473).

THE PROPER STATUTORY FRAMEWORK

[44] Counsel for the Applicant cited and relied on **The Police Service Regulations** made under the Constitution of Jamaica and a number of authorities that are not germane to the Applicant's circumstances. The Applicant is a Constable of Police. His tenure is governed by Section 5 of the Constabulary Force Act. Section 5 the Constabulary Force Act states that "Sub-Officers and Constables of the Force may be enlisted for a term of five years."

[45] PC Ellis' contractual period had concluded. There was no automatic entitlement. Section 5 of the **Constabulary Force Act** required him to make an application for re-enlistment. He was not permitted to re-enlist. The result is that he was discharged. The procedure under that regime is markedly different from that of dismissal. **The Police Service Regulations** made under the **Constitution of Jamaica** govern the dismissal of a police officer from the service.

[46] The case of **Glenroy v Clarke** has pertinence. In that case, Corporal Clarke had successfully re-enlisted twice. However, in 1993 his application to re-enlist was not approved by the Commissioner. The chairman of the Police Federation unsuccessfully intervened on his behalf. Corporal Clarke was thereafter interviewed by the

Commissioner who remained adamant. The Court of Appeal held *inter alia* that:

(a) the decision not to re-enlist Corporal Clarke was not a dismissal but a removal from further service;

(b) the Commissioner was exercising an administrative and not judicial function;

(c) the Applicant was not on trial;

(d) the Commissioner is obliged to provide the Applicant with the reasons for his decision and to afford him an opportunity to be heard.

IS THE COURT PROVIDED WITH THE DECISION TO BE QUASHED?

[47] The Order of Certiorari is sought to quash letter dated September 29, 2009 and the order or decision of the Commissioner communicated by Force orders dated December 3, 2009 which stated that the applicant was dismissed from or not permitted to re-enlist to the ranks of the Jamaica Constabulary Force. It is the decision and/or order which is contained in the letter that a court has the power to quash, not the letter.

[48] The Commissioner's intention not re-enlist the Applicant, was communicated to him by means of letter dated September 29, 2009 and Force Orders dated December 3, 2009. At the meeting with the Commissioner, the Commissioner informed him that he would not change his decision, that is, the decision which was communicated to him via the letter of September 29, 2009. If Miss White is aware that there exists some other or more 'official' means of notification, the court was not provided with the same. In the absence of any such notice to the contrary, the court holds that the letter of September 29, 2009 contained the decision not to re-enlist the Applicant and was the means by which he was officially notified of his discharge.

WHETHER APPLICANT HAD A LEGAL EXPECTATION TO BE RE-ENLISTED

[49] It is now a settled principle that where a group of persons or a person has come to expect that they will derive a certain benefit or concession although they have no legal right to it, the court will not lightly allow its denial or withdrawal unless it offends public interest.

[50] Chief Justice Sir David Simmonds in the case of **Leacock v Attorney General of Barbados** HCV No 1712 of 2005 held that a police officer who had embarked on studies to qualify as an attorney at law, and had completed the LL.B programme had a legitimate expectation that he would be granted leave to attend the Hugh Wooding Law school to complete his studies as this had been a long standing practice.

Forte JA in the matter **of Corporal Glenroy Clarke v Commissioner of Police and the Attorney General of Jamaica** also expressed that Corporal Clarke had a legitimate expectation to be re-enlisted. Miss White's submission to the contrary is clearly unsustainable.

WAS CONSTABLE ELLIS AFFORDED AN OPPORTUNITY TO BE HEARD?

[51] Constable Ellis was invited, by way of letter from the then Acting Commissioner of Police to attend a meeting on November 3, 2008, to show cause why he should not be dismissed. He attended and was informed by the Acting Commissioner that upon perusal of the documents he was not persuaded to alter his decision. He nevertheless asked him if he wished to add anything to his written report. Constable Elis' retort was in the form of a question, that is, whether someone could arbitrarily make allegations against another without giving the person a chance to disprove them. The Acting Commissioner informed him that he had seen his letter in which he stated he would seek redress through the Court and told him he should channel his appeal in that direction. It is evident that the Commissioner had read his response and had considered its contents before his meeting with the Applicant on November 3, [2008]. In light of his evidence that at that meeting the Commissioner informed him of what was contained in his response, the complaint that the decision not to re-enlist the Applicant for a further period of five years before the Commissioner had sight of his response is unjustified.

[52] Constable Ellis attended the meeting without an attorney. The letter, however, allowed him the option to attend with or without an attorney. It was his decision to attend without an attorney. It cannot therefore be seriously argued that he was not given an opportunity to be heard.

WAS HE GIVEN A FAIR HEARING?

[53] The issue is whether the process was fair and adequate. In the case of **Corporal Glenroy Clarke,** Carey JA as he then was, said: "In cases of re-enlistment, the Commissioner is exercising administrative functions in which case it is trite law that he must act fairly."

[54] What constitutes fairness is prescribed by Lord Mustill in **R v Secretary of State for the Home Secretary, *ex parte* Doody** [1994]1 AC531, at page 560. His speech was cited with approval by Lord Brown in **Bari Naraynsingh v The Commissioner of Police** a judgment of the Privy Council from Trinidad and Tobago which was delivered on the 20th April 2004 Lord Brown said at paragraph 16:

> "As for the demands of fairness in any particular case, their Lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in **R v Secretary of State for the Home Secretary, ex parte Doody** [1994] 1 AC531, 560:
>
> *'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derived that:*
>
> *(1) Where an act of parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*
>
> *(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.*
>
> *.*
>
> *(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this to be taken into account in all its aspects.*
>
> *(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the*

shape of the legal and administrative system within which the decision is taken.

(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected cannot make worthwhile the mere representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."'

[55] Can it be said that the Acting Commissioner in the instant matter exercised his power in a manner which was fair in all the circumstances? Would the principles of fairness not require more than the mere word of the Commanding Officer that he received telephone calls from members of the public and information from police officers of Constable Ellis' involvement in criminal activities? Should not there be specifics regarding the reason/s for which why steps were taken to allegedly curtail his movements?

[56] The total reliance by the Commissioner on alleged hearsay and oral statements from undisclosed police officers cannot be considered fair. Such reliance can result in serious miscarriage of justice. The principles of fairness required the Commanding Officer to have conducted investigations rather than rely entirely on anonymous calls. Even if he failed to receive assistance by that method, he certainly could have caused the police officers to reduce their oral reports to writing. He needed not disclose the identities of the officers to the Applicant if he felt their safety would have been jeopardized.

[57] The Acting Commissioner would have had, in the circumstances, more than just the Superintendent's *ipse dixit*. The fact of the reports would have had a more credible

ring. The unease created by the Superintendent being the sole repository of information concerning the allegations would be reduced and the probative value of the information allegedly received by Superintendent Robinson would strengthen.

[58] True there was a letter but that letter was also anonymous. Assuming that persons were determined to fabricate or concoct evidence against Constable Ellis, the writing of an anonymous letter to buttress false allegations would not be difficult. Understandably, the safety of the informants was a consideration. As Carey JA as he then was said in **Clarke:**

> *"...a balance has to be struck between the interests of the individual concerned and the national interest. By national interest I am to be understood as saying that the maintenance of the Force as a body of efficient and disciplined persons of integrity is in the national interest. The divulging of such confidential information might dry up the Commissioner's sources of information his intelligence reports and, in the present environment in Jamaica might well lead to the elimination of these sources."*

[59] The Acting Commissioner enquired of him whether he wished to add to his written response. Apart from a mere denial, Constable Ellis could hardly offer any counter if the allegations were fabrications but to respond in the manner he did. Hypothetically, assuming a supervisor had aught against an employee and in order to get rid of the employee, he concocts tales of receiving anonymous calls which implicates the employee, the employee is entirely ignorant of and innocent of the allegations, outside of a bare denial, what could such an employee be expected to do? Similarly, in the instant case, assuming Constable Ellis is innocent, apart from a bare denial of the allegations, what more could he have said in his defence? Dates of the commission of the offences were not provided. In the circumstance, he would be handicapped if he sought to provide evidence of his whereabouts.

[60] I am cognizant of the challenges and difficulties which confront a Commissioner in his fight against crime and the protection of the citizens when he is faced with

corruption and criminality among his own officers. I am also in agreement with the advice of the former president of the CCJ Michael de la Baptiste that judges should respect the right of public officers. Indeed his very sage observation is noted that: "excessive interference by judges in the business of administration will create a loss of efficiency and effectiveness in administration not to mention frustrations and tension."

[61] As far as is just, the Commissioner of Police must be allowed to 'exercise the decision-making powers which the law has vested in him'. However, it is recognised that the court must intervene where it is necessary to prevent injustice and to secure compliance with the law. The courts have always recognised that the requirement of a fair procedure is independent of the eventual decision arrived at (See **R v Thames Magistrate Court ex parte Poemis** (1974) 2 All ER 391).

[62] In determining whether the Acting Commissioner, in relying on the allegations against the Applicant, acted fairly and adequately, the facts of the Privy Council case of **Bari Naraynsing** and the comments of Lord Brown are helpful. A firearm was allegedly found at the house of the Applicant. The circumstances under which it was found were never disclosed to the Applicant who contended that it was planted there. His firearm licence was revoked. No statement was ever taken from the police constable who received the firearm. Further, the police constable failed to attend court to prosecute the case.

[63] The question the Board considered pertinent was whether the Commissioner acted fairly in those circumstances in reaching his conclusion that the Applicant's licence should be revoked. Lord Brown asked the following question:

> *"Could he properly think [it] fit to revoke the licence without making any enquiry into the matter and without giving the appellant any further or better opportunity of contesting the allegation that a second firearm had indeed been found at his house rather than, as he himself was alleging been planted there?"*

[64] He adopted Lord Mustill's view that the standard of fairness ought not to be applied by rote identically in every situation. He opined that the nature of the Commissioner's enquiry into the facts was perfunctory and did not satisfy the requirements of fairness. He posed the question of whether the Commissioner was entitled to reject the Applicant's allegation of "plant" without more simply on the basis of the material before him. He answered thus:

> *"In their Lordship's opinion he was not. Substantially more by way of investigation was required than was undertaken here…To this day nothing has been ascertained about precisely where and in what circumstances and by whom the second firearm and ammunition were allegedly found and as to whether anyone else was said to have been present at the time of the finding. All that is known is that the unlicensed items were presented to the appellant and PC Lengendre outside the premises and that the appellant immediately denied all knowledge of them. Further enquiries plainly could have and should have been made. Not having made such further inquiries, all that the Commissioner could put by way of the 'gist of the case which [the appellant had] to answer" (Doody) was that the unlicensed items "were found in your possession… All therefore, that the appellant could say in response when afforded the opportunity to make representations was that it cannot have been so: Who knows what other and more telling responses might have been open to him had a properly detailed account of the alleged finding been put to him? And who knows what view might have been taken of the probative value of the Senior Superintendent's report had it not been confined, as it was, to the barest of accusations?"*

[65] In the quest for a just determination of this matter, I must advert to the required standard of fairness to be applied to the facts of this particular case. I am guided by Lord Mustill's aforesaid statement in **R v Secretary of State for the Home Secretary** that regard must be had to the mutability of the standard of fairness and Carey JA's following statement:

> *"The rules of Natural Justice which are not inflexible must be applied having regard to all the circumstances of the case."*

Miss White likens the instant case to that of **Corporal Glenroy Clarke**. She submits that the Acting Commissioner, quite properly had regard to the intelligence provided to him as did the Commissioner in the **Clarke** matter. However, the circumstances of the **Clarke** case are quite distinguishable although there are some similarities.

[66] In the **Clarke** case, apart from intelligence, there was a plethora of solid, substantiated material upon which the Commissioner rightly relied in arriving at his decision. It is helpful to enumerate them.

[67] In 1979 Corporal Clarke, abandoned his patrol duty along the Norman Manley Boulevard and went to the house of Merlene Shaw at Sheffield District. Leslie Boodram arrived from Portland to visit his girlfriend and baby's mother. Clarke used his service revolver to fatally shoot Mr. Babooram in his head claiming Babooram attacked him with a machete. The matter was investigated and eventually sent to the Coroner who ultimately ruled that no one was criminally responsible.

[68] In 1982 he arrested David Peters for Larceny from the person. While arresting him he gun-butted him on the left side of his head him with his service revolver causing him injury. Mr Peters successfully instituted legal proceeding against Corporal Clarke and the Attorney General. He sought to deny the allegations but in the face of supporting evidence and a medical certificate he was found liable and judgement in the sum of $11,643 was entered.

[69] In 1983 one Hugh Reid reported that he had brutally assaulted him. The matter was investigated but eyewitnesses refused to give written statements. They expressed fear of reprisal because of his aggression.

[70] In August 1993, he fatally shot Delroy Palmer. The circumstances surrounding the shooting were so vile that he was charged for murder. The witnesses could not be

found. As a result a *Nolle Prosequi* was entered.

[71] In July 1988, a Court of Enquiry was convened to enquire into an allegation that Corporal Clarke chased Desreen Slowley from the Santa Cruz Police Station along the main road with a gun in his hand. Miss Slowley refused to give a statement which resulted in the President returning a verdict of 'Not Proven'.

[72] He was also tried by a Court of Enquiry in 1992 and deprived of a day's pay for leaving the island without permission. It was reported that he was frequent user of indecent language to and in the presence of members of the public. The Commissioner also considered 'certain intelligence reports'.

[73] The reasons advanced for his non-approval for re-enlistment were that his conduct demonstrated that he had a very aggressive and violent nature and many law abiding citizens had expressed fear of his 'hostile behaviour', which was not in the best interest of the Force.

[74] The Commissioner was entitled to consider Corporal Clarke's history while he was in the Force. He could properly take account of previous charges and disciplinary actions taken against him in determining whether he was a fit and proper person to remain a 'guardian and preserver of the peace' (See page 53 of judgment).

[75] In light of Corporal Clarke's history, there ought not to have been any quarrel with that assessment. Issue was also taken with the Commissioner's reliance on 'certain intelligence reports.' Patterson J in the decision of the Full Court reported at (1994) 31 JLR 570 at page 579 in the said:

> "*Even if the Commissioner committed a breach of the rules of Natural Justice by not informing the applicant of the nature of the intelligence reports and to afford him a fair hearing on that point, nevertheless the other reasons given are so compelling that by themselves, there can be no doubt that the Commissioner would have arrived at the same decision.*"

[76] In the instant case, however, the decision making process was unfair. The (vital) principles of natural justice were disregarded. 'Fairness' dictated that substantially more by way of investigation was required. I must, however, refuse the applicant's request to grant an Order of Mandamus to command or compel the Commissioner of Police to reinstate the applicant to active duty in the Jamaica Constabulary Force and to pay him all salary and allowances outstanding from September 25, 2009. This court does not have the requisite jurisdiction to so order. Any such order of this court must be deemed *ultra vires*.

[77] In the circumstances this court holds that:

The decision of the Commissioner of Police communicated to the applicant by letter dated September 29, 2009 which ordered *inter alia* that the applicant was dismissed from and/or not permitted to re-enlist to ranks of the Jamaica Constabulary Force effective October 1, 2009 is hereby quashed.

Half-cost to the applicant to be agreed or assessed.