

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 131 (B) of 2017

BETWEEN : ALBERTINO SHANKAR

APPLICANT

AND : FIJI HUMAN RIGHTS AND ANTI-DISCRIMINATION COMMISSION

AS INTERESTED PARTY AMICUS CURIAE

AND : THE STATE

FIRST RESPONDENT

AND : COMMISSIONER OF THE FIJI CORRECTIONS SERVICE

SECOND RESPONDENT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A.K. Singh for the Appellant
: Ms S Chand and Ms O. Solimailagi for the First and Second
Respondents
: Mr W. Tokalau for the Amicus Curiae

Date of Hearing : 19 April 2018

Date of Judgment : 30 April 2018

JUDGMENT

1. This is the Applicant's Notice of Motion for:
 - (a) A Declaration that the Applicant's Constitutional rights – Chapter 2, Bill of Rights – has been violated.
 - (b) An Order for the Respondents to give (him) the full benefit and rights under the Fiji Corrections Act (Act) section 27(1) & (2) for a date of release.

2. It is supported by the Applicant's affidavit in which he deposes as follows:
 - (1) He is serving life imprisonment for murder with a recommended minimum term of 17 years.
 - (2) He is not benefitting from a lawful discharge date.
 - (3) His sentence is unlawfully interpreted as unknown.

3. The affidavit in response is affirmed by Tom Smith, the officer in charge of the Nasinu Corrections Centre who says as follows:
 - (1) The Applicant does not have a set discharge date as he is serving a life sentence.
 - (2) He must apply for a Presidential pardon and he will remain as a convicted prisoner in the Corrections Centre until he is pardoned by the President.

4. In his further affidavit, the Applicant says as follows:
 - (1) A Presidential pardon does not apply in his case because it only applies if he applied for a pardon and to remove his conviction and this does not apply to his case.
 - (2) No mercy committee (sic) has been appointed and the Government has currently not appointed a parole body. A Parole Board application is not applicable to his case.
 - (3) Gates J, as he then was, recommended a minimum term of 17 years. From that he is entitled to a one third discount which left 12 years for him to serve. Presently he has served 14 years imprisonment.

- (4) On 16 March 2012, the Chief Justice wrote to the Officer in Charge of the Corrections Centre regarding recommendation of prison terms.
 - (5) His solicitors wrote on 7 October 2017 to the Prison Commissioner.
 - (6) He annexed an unsigned copy of his letter to the Commissioner, Correction Centre.
5. At the commencement of the hearing Ms Chand informed the Court they were not filing any response to the further affidavit of the Applicant.
6. Mr Singh now made his submission. He said the Applicant was sentenced to life imprisonment but he argued that 5 years should be taken off from the 17 years minimum term and the Applicant should be released.
7. Ms Chand then submitted. She referred to rule 3(2) of the High Court (Constitutional Redress) Rules 2015 and said there were no exceptional circumstances provided. This application was filed on 16 October 2017 whereas the Applicant was sentenced on 4 July 2003 and the Applicant delayed in not bringing this application before September 2003. On limitation the application should fail. Ms Chand also said s.27(1) of the Act does not apply to the Applicant as he has been sentenced to life imprisonment. The Applicant had an alternative remedy which is to petition the Mercy Commission. He failed to plead which particular right under the Bill of Rights had been breached. Finally there was no reasonable cause of action. The Court should dismiss the application.
8. Counsel for the Amicus Curiae said that the Applicant had 2 alternative remedies. The Human Rights Commission has a right under s.45(4)(a) of the Constitution to make this Application to the Court for redress.
9. Mr Singh in his reply said he relied on s.44(1) of the Constitution that the Applicant's right was likely to be contravened. The Mercy Commission and the Parole Board do not come into the picture because the sentence here is not a fixed

term. The Court has an inherent jurisdiction to impose a 1/3 remission on the minimum term.

10. The Amicus Curiae obviously thought he would assist the Court by calling its attention to the following points of law and fact that would appear to have been overlooked (Osborn's Concise Law Dictionary). His written submission contained the following salient points:
 - (1) It is the statutory duty of the Fiji Corrections Service (FCS) under s.49 of the Correction Services Act (CSA) to establish the Parole Board and failing to ensure that the Board is in operation is a failure on the part of the FCS (para 21).
 - (2) The High Court must direct the Respondents to fulfill their obligations prescribed by s.49 of the (CSA) (para 24).
 - (3) The Application be struck out as there is an alternative remedy available through the parole procedures (para 25(i)).

11. At the conclusion of the arguments I informed I would take time for consideration. Having done so, I now deliver my decision.

12. The crux of the Application, it appears to me, is that the Applicant considers the root of the matter is the 17 years minimum term and not the life sentence.

13. I turn at once to the Sentence dated 4 July 2003 of the Chief Justice, Gates J as he then was. In para [10] he stated he took the period of remand into account. Then in para [20] he said he arrived at a recommendation for a minimum term to be served. Finally in para [21] he sentenced the Applicant to life imprisonment and recommended he serve a minimum term of 17 years imprisonment.

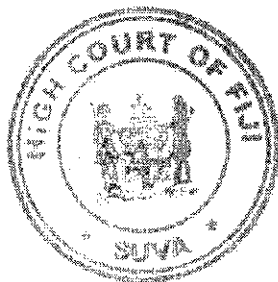
14. So I turn to s.33 of the Penal Code (in force at the material time) which states as follows:

"Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve".

15. The Sentence makes it quite clear that while the sentence is imprisonment for life, the minimum term is 17 years.
16. I do not see any conflict with s.27(2) of the CSA which provides "For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month".
17. Further, I do not see how this helps the Applicant. I reiterate Gates J said "sentenced to life imprisonment". He did not say sentenced to 17 years imprisonment.
18. The Chief Justice's letter dated 16 March 2012 in the case of The State v Timoci Silatolu also does not help the Appellant's case. On the contrary it shows that the release date is to be after the minimum term of 9 years has been served.
19. I think the following examples illustrate the point I am trying to make.
 - (1) 'A' is sentenced to 15 years imprisonment. No minimum term is imposed. 'A' may be considered for release after he has served 10 years (1/3 remission).
 - (2) 'B' is sentenced to 15 years imprisonment. A minimum term of 12 years is imposed. "B" may only be released after serving 12 years and **NOT** 10 years (which is the sentence after a 1/3 remission).
20. Here, if I were to apply the Applicant's submission by way of analogy to "B", 'B' would then be entitled to release after 8 years (1/3 off 12 years) which will be less than the normal 10 year period after a 1/3 remission. This surely cannot be correct.
21. Once the distinction between sentence and minimum term is recognized the Application collapses. Neither the Applicant nor his Counsel can contend he is only obliged to serve 12 years and should have been released. The correct legal position is there can be no consideration of release until the 17th anniversary of the sentence in the year 2020.

22. I am fortified by the decision of Goundar JA in Suresh Chandra AND The State : Criminal Appeal No. AAU 0083 of 2012 (Ruling dated 6 June 2014). In para [11] his Lordship said "After sentencing the appellant to life imprisonment, the learned trial judge imposed a non-parole period of 18 years. The power to impose a non-parole period is given to the courts by the Sentencing and Penalties Decree. The appellant's contention that in cases of life imprisonment, non-parole period serve no purpose is not arguable. The offenders who are sentenced to life imprisonment are eventually released on licence. The decision to release the offenders on licence is made by the Executive. The courts play no role in the Executive's decision to release an offender on licence. But the courts have discretion under the Sentencing and Penalties Decree to prevent an early release on licence by imposing a non-parole period. What this means is that the offender will have to serve the non-parole period before any release by the Executive is considered. That is the purpose of imposing a non-parole period. The sentence appeal is not arguable".
23. My judgment is as follows:
- (1) The Application is premature, misconceived in law and fact and is hereby dismissed.
 - (2) In the circumstances there shall be no order as to costs.

Delivered at Suva this 30th day of April 2018.



David Alfred

JUDGE

High Court of Fiji