IN THE HIGH COURT OF FIJI AT LABASA

Action No. HBM 02 of 2019

IN THE MATTER OF AN APLICATION FOR CONSTITUTIONAL REDRESS PURSUANT RULE 3(1) OF THE HIGH COURT (CONSTITUTIONAL REDRESS) RULE 2015

AND

IN THE MATTER OF SECTION 44 (1) AND (2) OF THE CONSTITUTION OF THE REPUBLIC OF IN REGARDS TO CRIMINAL CASE No. 049 OF 2008

BETWEEN

SHEIK MOHAMMED

APPLICANT

AND

THE ATTORNEY GENERAL'S OFFICE

FIRST RESPONDENT

AND

THE SOLICITOR GENERAL'S OFFICE

SECOND RESPONDENT

AND

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

THIRD DEFENDANT

AND

THE COMMISSIONER OF CORRECTIONS

FOURTH RESPONDENT

Counsel	:	Mr. A. Sen for the Applicant Mr. J. Pickering for the 1st, 2nd & 4th Respondents Ms. A. Vavadakua for the 3rd Respondent
Date of Hearing	:	25th October, 2019
Date of Ruling	:	29th November 2019

RULING

(On the application for striking out)

[1] The applicant instituted these proceedings alleging that his rights guaranteed by section 44(1) and (2) of the Constitution. The applicant was convicted by the High Court of Lautoka on 17th August 2011 and sentenced him to nine years imprisonment with a non-parole period of seven years. His sentence was to run concurrently with the sentence of ten years imposed by the Labasa High Court on 10th August 2011.

[2] The applicant's position is that he was not released from the prison on the day he was due to be released taking into consideration the parole period and the remission of sentence.

[3] The respondents made the present application for striking out pursuant to Order 18 rule 18(1) of the High Court Rules 1988 which provides as follows:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
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> *(a)* it discloses no reasonable cause of action or defence, as the case may be; or
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> *(b)* it is scandalous, frivolous or vexatious; or
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> *(c)* it may prejudice, embarrass or delay the fair trial of the action; or
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> *(d)* it is otherwise an abuse of the process of the court;
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[4] At the commencement of the hearing the application of the applicant against the 3rd respondent was struck out of consent.

[5] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held;

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In the case of **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761 it was held:

It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

In **Narawa v Native Land Trust Board** [2003] FJHC 302; HBC0232d.1995s (11 July 2003) the court made the flowing observations:

In the context of this case I find the following statement of Megarry V.C. in **Gleeson v J. Wippell & Co.** [1971] 1 W.L.R. 510 at 518 apt:

> "First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".

[6] From the decisions cited above it is clear that the power to strikeout a claim is a discretion conferred upon the court and the court must exercise such discretionary power with great caution and only in an exceptional case.

[7] The main ground on which the striking out is sought is that the application does not disclose a reasonable cause of action. The application is also objected to by the respondents on the ground that it has been filed out of time.

[8] Rule 3 of the High Court (Constitutional Redress) Rules 2015 provides:

> (1) An application to the High Court by section 44(1) of the Constitution may be made by a motion supported by affidavit –
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> *(a)* claiming declaration;
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> *(b)* praying for an injunction;
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> *(c)* claiming or praying for such other order as may be appropriate.
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> (2) An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a

Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.

[9] The applicant's position is that taking into consideration the parole period and the remission of sentence he should have been released from the prison on 15th February 2018. From the contents of the affidavit of the applicant the matter at issue arose on 15th February 2018. This application for constitutional redress was filed on 20th May 2019 which is clearly out of time.

[10] The applicant has not given any reason of the delay in coming to court and therefore, the court does not have any grounds to act under rule 3(2) of the High Court (Constitutional Redress) Rules 2015 and to hear the application made outside the period of time prescribed by the said rules.

[11] For the above reasons the application of the applicant must necessarily fail and is liable to be struck out.

[12] The next issue for determination is whether the applicant was deprived of his right to be discharged from the prison. The applicant's claim is based on the argument that he was entitled to be released from the prison after serving the non-parole period and also that he was entitled to 1/3rd remission of the sentence.

[13] The question for determination here is whether a prisoner has a right to be released after serving the non-parole period and whether he should be granted 1/3rd remission of the sentence as of a right.

[14] Whether a prisoner is qualified to be released during the parole period of the sentence is a matter for the Parole Board. There is no law which says that after serving the non-parole period every prisoner should be released. If that is the law there is no purpose of recommending a parole period by the court.

[15] The applicant in support of his argument relied on the decision of the Supreme Court in **Tora v State** [2015] FJSC 23; CAV11.2015 (22 October 2015). In that decision the court does not say that a prisoner has a right to be released after serving the non-parole period of the sentence but the court has discussed how the parole period should be ascertained.

The Supreme in its judgment has cited the following paragraph from the decision of the Court of Appeal:

> It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

[16] The applicant submitted that when considering the 1/3rd remission of sentence the applicant was supposed to have been discharged earlier than 15th July 2016.

[17] It appears even from the above decision that one third remission of the sentence is not a right a prisoner has. It is a mater within the discretion of the Commissioner.

[18] For the above reasons the court makes the following orders.

ORDERS

1. The application of the applicant for constitutional redress is struck out.
2. There will be no order for costs.

HIGH COURT OF FIJI SUVA

Lyone Seneviratne

JUDGE

29th November 2019