

**IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CIVIL JURISDICTION**

**CIVIL ACTION NO.: HBC 275 of 2019**

**BETWEEN : DESHWAR KISHORE DUTT  
PLAINTIFF**

**AND : SAKEASI VEVIWILI  
FIRST DEFENDANT**

**: MELI TAITO  
SECOND DEFENDANT**

**: FRANCIS BULE KEAN  
THIRD DEFENDANT**

**: THE ATTORNEY GENERAL  
FOURTH DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF : Appearing In Person**  
**DEFENDANTS : Mr B Ram [Attorney-General's Chamber]**  
**RULING BY : Master Ms Vandhana Lal**  
**DELIVERED ON : 15 AUGUST 2023**

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**INTERLOCUTORY RULING**

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1. The Defendants seeks to have the writ of summon and statement of claim filed by the Plaintiff struck out under Order 18 Rule 18 (1) (d) of the High Court Rules.
2. The Plaintiff's claim is for wrongful confinement. He alleges the Defendants failed to release the Plaintiff from the Lautoka Correctional Centre on 19<sup>th</sup> April 2015 upon expiry of the Plaintiff's non-parole term.

According to the Plaintiff, the First and Second Defendants violated the Plaintiff's rights under Sections 9 and Section 13 and Section 24 and 26(1);(2);(3) and (7) of the Constitution of Fiji and hence seeks damages for the wrongful confinement.

3. According to the Defendants, they exercised lawful authority in detaining the Plaintiff from 19<sup>th</sup> April 2015 till 19<sup>th</sup> August 2016. This was under warrant number 213 of 2015 for case number 338 of 2012 for a period of one year and six months with a non-parole period of one year.

Calculation of remission was applied on the remaining portion of the sentence. Two months was set aside from date of sentence and the Plaintiff was required to served one year and four months.

And since the Plaintiff's claim is for breach of his constitutional rights under sections 9 (1)(a); 11(1) and (2); 13 (1) (a-1) and (c) (i); 24 (1) (c) and section 26 (1)(2) and (3) and (7) of the Bills of Right and he is seeking damages, Section 44 of the Constitution of the Republic of Fiji applies.

Hence under Section 3 of the High Court (Constitutional Redress) Rules 2015 an application should have been made for redress by way of a motion and affidavit within 60 days from the date when the matter arose.

According to the Defendants, the Plaintiff should have first sought a declaration whether the rights were actually violated or not.

4. Section 44 (1) of the Constitution reads:

*"If a person considers that any of the provisions of this chapter has been or is likely to be contravened in relation to him or her (or in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then*

*that person (or the other person) may apply to the High Court for redress."*

5. I do not find the Plaintiff is seeking redress under Section 44 of the Constitution but rather the claim by the Plaintiff is claim for damages in tort for wrongful confinement.
6. The issue to determine is what remission was to be applied and whether the officer in charge forfeited the Plaintiff's right to remission under Regulation 18 of the Corrections Service Regulations 2011?
7. In *Timo –v- State* a Supreme Court Criminal Petition No CAV 0022 of 2018 (delivered on 30<sup>th</sup> August 2019) Gates J. made following observations on remission and parole period:

*"(5). ..... Remission is not a right but an entitlement to be earned, the initial classification of a prisoner calculates the possible release date after remission of one third of the term of imprisonment has been deducted. That advantage can only be attained if the prisoner is of good behavior during his term and in other respects complies with commissioner's orders.*

*(6) However as Lokur J. points out in his following judgment, the legislation schemes for remission and for parole are different. This means that remission remains to be calculated as set out in the Corrections Service Act (sections 27 and 28) and in no other way.*

*(7) But remission earned cannot be entered upon until the period of non-parole ordered by the court is over. Once that bar or impediment, the ineligibility for consideration for parole, has gone, and the*

*period of ineligibility served, then the prisoner may proceed on the remission earned by good behavior and other compliances."*

8. Further in the judgment Lokur J. has stated the following regarding understanding the non-parole period and its implication;

"20. .... This court said in *Bogidrau [Bogidrau v. State [2016] FJSC 5]* that: "The non-parole period was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission.

21. The reason for incorporating a non-parole period in a sentence awarded to a convict was explained in *Matarino Raogo –v- State Criminal Appeal CAV 003 of 2010 (delivered on 19 August 2010) (endorsed by this court in Paula Tora –v- The State [2015] FJSC 23* in the following manner: "The mischief that the legislature perc..... was that in services cases and in cases involving serial and repent offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences." **Unfortunately, this new erroneously assumes that remission is a matter of right and will always be granted and most (if not all) convicts are recidivists.**

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28. This question is important because the effect of a Court directing a non-parole period on a convict is that the convict cannot be released prior to completion of the non-parole period. This could

*impact on the delivery and administration of justice in several ways – not only for the convict through a curtailment of his or her human right of personal liberty, but also for the Executive through a curtailment of its statutory power of granting remission and encroaching on its powers of early release of prisoners under the Correction Service Act 2006 read with the Corrections Service Regulation 2011. It could also have an impact on society and its safety and well-being.*

***Parole from the perspective of the convict***

29. *Section 2 of the Corrections Service Act 2006 defines “competent authority” as an authority authorized under this Act or any other written law to release prisoners on parole.*

30. *Section 48 provides that every officer in charge shall be responsible for ensuring that every prisoner is discharged, inter alia, in accordance with any decision made by any competent authority authorizing a prisoner's release on parole.*

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33. *A reading of these provisions of the Corrections Services Act 2006 (Section 49 and 49(A) makes it explicit that grant of parole is subject to the recommendation of the Parole Board. The Parole Board may even grant parole to a person serving a life sentence. However, the recommendation of the Parole Board is subject to the decision of the Minister who may or may not accept the recommendation. Therefore, parole is not a right that a convict can avail of, but surely a convict has a legitimate expectation that if he or she maintains ‘good behavior’ in custody, the convict might*

*be considered and perhaps released on parole subject to conditions.*

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***Understanding Remission***

39. *Parole means the conditional release of a prisoner from prison. The conditional release of a prisoner from imprisonment before the full sentence has been served and although not available under some sentences, parole is usually granted for good behavior on the condition that the parolee regularly report to a supervising officer for specified period. As against this, **Remission** means cancellation of a part of a prison sentence. A pardon granted for an offence or a relief from a forfeiture or penalty.*

40. *Parole and remission are two different and distinct concepts that appear to have been inadvertently mixed up as is evident from the written submissions of the State. We have already adverted to the concept of parole and fixing a non-parole period.*

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45. *The remission provisions indicate that remission is also not a right that could be exercised by a convict. The provisions also indicate that the period of remission in a given case could exceed one-third of the sentence awarded. These provisions also indicate that the Court has nothing whatsoever to do with remission of a sentence and it is solely within the domain of the Executive.*

46. *Unfortunately, a practice has evolved through which remission has been made dependent on the non-parole period fixed by the Court,*

*despite the two powers and concepts being distinct and independent. This was noted in **Paula Tora v. The State [2015] FJSC 23** in the following words:*

*"....., 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."*

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48. *We are afraid that through this process, the Executive is surrendering its power to grant remission of sentence to a prisoner in an appropriate case by subordinating it and making it dependent on the non-parole period. This does not seem to be the intent of the Corrections Service Act 2006 and the Corrections Service Regulations 2011 which places the two concepts in different compartments and both have to operate in conjunction and harmoniously.*

49. *Since remission and parole or non-parole period are completely different in content and meaning, mixing them up leads to the confusion that is evident from the view taken by the Legal Counsel, which does not have the sanction of law and acts to the detriment of the personal liberty of a convict by requiring him or her to remain in custody for a period longer than necessary. The correct position in law is that if a convict is given remission of sentence, it will have full play but subject to any order that might be passed by the Court with regard to the non-parole period. In other words, the remission period is dormant or kept in abeyance till the expiry of the non-parole period.*

***Impact on a convict by mixing up parole and remission***

50. *The calculation of the remission period in the case of the Petitioner illustrates the inequity of the practice adopted by the State. The Petitioner was sentenced to 13 years imprisonment. He had already been in custody for 11 months. Therefore the balance period of imprisonment or the head sentence was 12 years 1 month. The non-parole period fixed was 11 years 6 months. Therefore, there are two possible scenarios: (i) The period of one-third remission is calculated on the basis of 12 years 1 month minus 11 years 6 months that is 7 months of which one-third would be (say) 2 months. In other words, out of a total of 12 years 1 month sentence of imprisonment, the Petitioner would get remission of about 2 months and would be in custody for about 11 years 10 months plus 11 months set off period, making a total of 12 years 9 months incarceration out of 13 years. This is as per the understanding of the State. (ii) The period of one-third remission is calculated on the basis of 13 years minus 11 years 6 months, that is 18 months of which one-third would be 6 months. Therefore, the Petitioner would have a remission period of 6 months as against a remission period of 2 months in scenario (i). The convict would therefore be in custody for 12 years out of a sentence of imprisonment of 13 years. As mentioned above, scenario (i) above is the practice followed by the State, which is stated to be in consonance with decisions rendered by the Courts, though not having any legislative sanction.*

51. *However, if the remission period is kept separate as it should be according to the statute, the Petitioner would get remission of 4 years 4 months out of a term of 13 years. Therefore, on completing 11 years 6 months non-parole period, the Petitioner would be free to walk out of prison (subject to good behavior). The benefit to the*



*Petitioner would be 1 year 6 months as against the practice followed which would give him a benefit of about 2 months on the calculation made by the State. Either way, the Petitioner would be in custody for several months more than necessary (assuming he gets one-third remission). Should this be permitted particularly when the Constitution recognizes personal liberty as fundamental right? The answer is in the negative.*

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53. *Unfortunately, the "considered submissions" on behalf of the State do not take us very far in as much no legislative sanction has been shown to us for the practice adopted by the State. We are therefore left with no alternative but to 'take the initiative' and declare that the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period is statutorily impermissible and constitutionally invalid and having no legislative backing. In other words, the practice followed by the State as mentioned in the communication dated 23<sup>rd</sup> July, 2019 sent by the Legal Counsel is not in accordance with law and must be stopped forthwith. The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court. We may add that despite our reluctance to do so, we have had to 'take the initiative' having been left with no other alternative.*

9. In the current proceeding, the Plaintiff states he was sentenced for one year and six months with a non-parole period of one year.

10. According to the Defendants, the calculation of remission was applied on the remaining portion of the sentence that the non-parole period did not cover. Hence a period of two months was set aside.
11. Section 27 (2) allows classification of date of release calculated on the basis of a remission of 1/3 of sentence for any term of imprisonment exceeding one month.
12. However, Section 28 (1) of the Corrections Service Act read:  
*The remission of sentence that is applied at the initial classification shall thereafter be dependent on the good behavior of the prisoner and it may be forfeited and then restored in accordance with commissioners orders.*
13. As outlined by the Supreme Court in Timo (supra), this practice by the officer in charge is statutorily impermissible and constitutionally invalid and had no legislative backing.
14. Hence 1/3 remission was to be applied to the full term of one year and six months which comes to 06 months and the Plaintiff was to be released after serving the non-parole period unless the officer in charge was exercising powers under Correction Service Regulation 2011 to forfeit the remission for misbehavior (Regulation 18).
15. Nothing in the pleading suggests the officer in charge exercised powers under section 18 of the Regulation and that the Plaintiff's remission period was forfeited.

### **Orders**

16. The claim by the Plaintiff is not an abuse of the process of the court as he claims damages in tort for wrongful confinement and not for constitutional redress under Section 44 of the Constitution of the Republic of Fiji.

17. There is a cause of action by the Plaintiff, as the officer in charge wrongfully calculated the remission period on the balance sentence only after the non-parole period, which practice was found to be constitutionally invalid in the case of Timo.
18. The Defendant's application dated 30<sup>th</sup> March 2022 is struck out.
19. Cost in cause.



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Mandhana Lal [Ms]  
Master of the High Court  
At Suva.

15 August 2023

TO:

1. Lautoka High Court Civil File No. HBC 275 of 2019;
2. The Plaintiff appearing in person;
3. The Attorney-General's Chambers, appearing for the Defendants.