

**THE COMMISSIONER OF PRISONS & THE
PREROGATIVE OF MERCY COMMISSION**

A

v.

SIVOROSI RAIKALI

[HIGH COURT, 1998 (Byrne J) 1 September]

B

Civil Jurisdiction

Constitution- Presidential Pardon- whether may be coupled with Compulsory Supervision Order. Constitution (1990) Section 99; Prisons Act (Cap 86) Section 65.

C

Sentence- Presidential Pardon- whether may be coupled with Compulsory Supervision Order. Constitution (1990) Section 99; Prisons Act (Cap 86) Section 65.

D

The Defendant who had served 11 years of a life term of imprisonment was pardoned and released but he was also made the subject of a Compulsory Supervision Order. The High Court HELD: the Presidential Power to grant a pardon subject to lawful conditions does not include the power to release subject to a Compulsory Supervision Order since only the Minister of Home Affairs has the power to make such Orders.

Cases cited:

E

R. v. Foster [1985] 1 Q.B. 115

Rex v. Cosgrove [1948] Tas. S.R. 99

In re Royal Commission on Thomas Case [1980] N.Z.L.R. 602

Action for declaratory relief in the High Court.

N. Barnes and Ms N. Basawaiya for the Plaintiffs

Defendant in person

F

Byrne J:

G

At the conclusion of argument on the 28th of August I ordered the immediate release from prison of the Defendant and stated that in view of the importance of the matters raised by the Originating Summons dated 24th July 1998 before the Court I would publish my reasons later. I now do so in this judgment.

The Originating Summons seeks four Declarations although the third which seeks a Declaration that the provisions of Sections 65 to 69 of the Prisons Act Cap. 86 apply to life imprisonment was not pursued. The remaining Declarations sought by the Plaintiffs are:

- (1) That a Presidential Pardon granted under Section 99 of the 1990 Constitution can be combined with a Compulsory

Supervision Order issued under Section 65 of the Prisons Act Cap. 86.

- (2) A Declaration as to the legal status of the warrant of readmission issued by the Chief Magistrate for the Defendant to "undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release" dated 30/9/97. A
- (3) A Declaration as to the length of the unexpired portion of the Defendant's sentence. B

The facts of the case are not disputed and are as follows:

On 11th December 1984 the Defendant was convicted of murder in Labasa and sentenced to life imprisonment. On 18th December 1995 after having served eleven years the Defendant upon application to the Prerogative of Mercy Commission was granted a Presidential Pardon and released from prison on 22nd December 1995. C

The Presidential Pardon was granted subject to a Compulsory Supervision Order (CSO) for a period of twelve months which would have expired on the 22nd of December 1996. D

On the 19th of September 1996 the Defendant was sentenced to eighteen months imprisonment for assault occasioning actual bodily harm.

On 21st October 1996 the CSO was revoked by the Minister for Home Affairs. E

On 18th September 1997 the Defendant completed his eighteen months term of imprisonment and was released from prison.

On the 26th of September 1997 the Chief Magistrate issued a Warrant of Apprehension for the Defendant due to the production of a Certificate of Revocation of the Defendant's CSO. F

On the 30th of September 1997 the Defendant appeared before the Chief Magistrate who issued a Warrant of re-admission to serve the unexpired portion of his sentence. The Defendant is now serving his sentence in Suva Prison.

The matter was referred to the Attorney-General's Office for advice on the length of term that the Defendant now has to serve to complete the unexpired portion of his sentence following doubts by the Commissioner of Prisons whether in view of the Presidential Pardon the Defendant was liable to serve any further time in prison. G

The President granted the Defendant a pardon as is the normal practice on the recommendation of the Prerogative of Mercy Commission but, also on the recommendation of that Commission, made the pardon subject to the Defendant

being placed under a Compulsory Supervision Order for a period of twelve months. The pardon was granted on the following conditions:

- A
- (1) That the Defendant be released from prison forthwith.
 - (2) That he be placed under a Compulsory Supervision Order for a period of twelve months.

B The question before the Court on which I have received very helpful submissions from Mr. Barnes and Miss Basawaiya is whether Section 99 of the 1990 Constitution gives the President power to grant a pardon subject to the condition of a Compulsory Supervision Order.

Section 99 (1) (a) states the President may grant to any person convicted of any offence under the law of Fiji a pardon, either free or subject to lawful conditions.

C It does not state what amounts to a lawful condition but I consider that the phrase means subject to conditions which the President has the right in law to impose.

D Compulsory Supervision Orders are dealt with by Section 65 of the Prisons Act Cap. 86 which specifically gives the power to impose a Compulsory Supervision Order to the Minister for Home Affairs in his capacity as the Minister responsible for prisons, or in certain circumstances to the Comptroller.

E In my view therefore the President has no power to attach a Compulsory Supervision Order to a pardon, the power of making such an order being reserved only for the Minister for Home Affairs.

F The essence of a Compulsory Supervision Order is that the prisoner has not completely served his term of imprisonment and is liable to be returned to prison should he breach the terms of his Supervision Order. His return to prison is in respect of his original sentence of imprisonment and not in respect of any new offence.

G The essence of a pardon is that it is an annulment of a sentence of imprisonment but not the conviction itself and as such the sentence no longer exists. In Regina v. Foster [1985] 1 Q.B. 115 the Court of Appeal held that the effect of a free pardon was to remove from the subject of the pardon the penalties and punishments ensuing from a conviction but that it did not eliminate the conviction itself. In reaching this decision the Court cited with approval the Tasmanian case of Rex v. Cosgrove [1948] Tas. S.R. 99 a judgment of Supreme Court of Tasmania and the judgment of the Full Court of the High Court of New Zealand In re Royal Commission on Thomas Case [1980] N.Z.L.R. 602.

In these circumstances in my judgment a Compulsory Supervision Order cannot be combined with a pardon. To do so would mean that conditions are being attached to a sentence which no longer exists.

I was informed by counsel that the practice here was to re-admit the prisoner once the year (or whatever length of time stipulated by the CSO) expired, consider his progress and then if applicable release on a full pardon. The time period for this process was indeterminate.

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The new Constitution of 1997 may have rectified this anomaly in that it provides that the President may grant a pardon or a conditional pardon. I assume that a conditional pardon will not take effect until all its conditions have been met i.e. that upon completing twelve months in the community without re-offending, a pardon will then be granted.

B

As an example of the dangers and injustice of requiring a prisoner in the position of the Defendant to return to prison to serve the remainder of a life sentence in the circumstances obtaining here it is only necessary to note that one of the most common conditions of the Compulsory Supervision Order is that the person subject to the order will not associate with known criminals. In practice this could mean that the subject could be returned to prison simply because he was seen having a social drink with a known criminal. That surely would be wrong in law and a breach of all known notions of justice.

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It was for these reasons that I ordered the immediate release of the Defendant.

D

Accordingly I answer the Declarations sought by the Originating Summons as follows:

- (1) No.
- (2) The legal status of the Warrant of Re-admission issued by the Chief Magistrate was a nullity.
- (3) There was no unexpired portion of the Defendant's sentence.

E

(Declaration granted.)

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