IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBJ 04 of 2018

IN THE MATTER OF A JUDICIAL REVIEW ON THE COMMISSIONER PRACTICE FOR REMISSION OF SENTENCE

BETWEEN

SAMUELA ROGOIVALU

APPLICANT

AND

THE FIJI CORRECTIONS SERVICE

RESPONDENT

Counsel	:	Applicant in person Ms. S. Ali with Ms. P. Sing for the Respondent
Date of Hearing	:	04th April, 2019
Date of Ruling	:	16th April, 2019

RULING

(On the application for striking out)

[1] The applicant made this application for constitutional redress seeking the following reliefs;

1) An interpretation of the recommended life sentence imposed by the High Court; and
2) To hear this matter within a reasonable time.

[2] The applicant was convicted by the High Court for murder and imposed a life sentence. In the sentencing judgment the court orders that the appellant cannot be released before the expiry of a terms of twelve years.

[3] It appears that the applicant's complain is that he was not released by the prison at the expiration of what he calls, the recommended period of imprisonment.

[4] The respondent filed summons to have the application of the applicant for constitutional redress struck out pursuant to Order 18 rule 18 (a) and (d) of the High Court Rules 1988.

[5] The respondent seeks to have the matter struck out on the following grounds:

(i) the application is irregular, defective in nature and does comply with Rule 4(3) of the High Court (Constitutional Redress) Rules 2015;
(ii) it is bad in law;
(iii) it discloses no reasonable cause of action; and
(iv) it is otherwise an abuse of court process.

[6] Order 18 rule 18(1) of the High Court Rules provides:

(1) 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-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[7] Before considering the merits of the application it is important consider the law governing applications for striking out.

[8] 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".

[9] It appears from these decisions 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.

[10] The learned counsel for the respondent submits that the application of the applicant for constitutional redress is time barred and is therefore, liable to be struck out.

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

> (1) An application to the High Court for redress under section 44(1) of the Constitution may be made by a motion supported by affidavit –
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> *(a)* claiming a declaration;
>
> *(b)* praying for an injunction;
>
> *(c)* claiming or praying for such other order as may be appropriate.
>
> (2) An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue arise unless a judge finds there are exceptional circumstances and that it is just to hear the application outside that period.

[12] In this matter the applicant's claim is that he should have been released from the prison at the expiration of the minimum recommended period of twelve years. He was sentenced by the High Court on 05th May, 2005 and the twelve year period expired on 05th May, 2017. The applicant made this application on 11th May, 2018 after one year from the matter in issue arose.

[13] The learned counsel for the respondent cited the following decisions in support of her contention that court has no power to entertain an application for constitutional redress if it is filed after the expiration of the period prescribed by law.

[14] In the case of **Tokoniyaroi v Commissioner of Police** [2018] FJCA 235; ABU30.2017 (30 November 2018) the Court of Appeal held:

> The procedure with regard to the manner of disposal is laid down by High Court (Constitutional redress) Rules 2015. In terms of Rules 3(2) an application to High Court for redress under Section 44 (1) of the Constitution must not be admitted or entertained after 60 days from the date when the matter or issue arose unless a Judge finds there are exceptional circumstances and that it is to hear and try the application outside that period. It is the appellant who should satisfy Court that the circumstances prevented him from bringing this application within the time period of 60 days.

[15] The applicant cited many decisions from commonwealth jurisdictions. In my view these judgment are not relevant for the reason that the law is very clearly set out in High Court (Constitutional redress) Rules 2015.

[16] High Court (Constitutional redress) Rules 2015 confers discretion on the court to entertain and hear an application for constitutional redress even if it is filed out of time if the court finds there are exceptional circumstances.

[17] The applicant came to court on the basis that after serving twelve years in prison he was entitled to be released. The relevant paragraph of the sentence reads as follows:

> Taking everything into consideration I order that you not to be released before the expiry of a term of twelve years to run concurrently with any other sentence you might be serving.

[18] In the sentencing judgment it does not say that he is entitled to be released from prison after twelve years what it says is he cannot be released before the expiry of twelve years. As correctly submitted by the learned counsel for the respondent once the period of twelve years expires it is for the prison authorities to take steps to consider whether the applicant should be released from the prison or the applicant himself could have made an application to the Mercy Commission requesting his release.

[19] In the case of **Silatolu v State** [2018] FJCA 118; ABU23.2016 (13 July 2018) the Court of Appeal Held:

The decision whether or not he should be released from the Prison vests in the Officer in Charge of the Prisoner and in cases of doubt the Commissioner of Prison. If the Commissioner of Prison is unable to ascertain the effect of any law applying in the appellant's context, the Commissioner may refer the matter for determination by the Attorney-General.

Section 48 of the Corrections Service Act 2006 is very clear as to the powers and authority of persons who shall be in-charge of releasing prisoners. It states that:

48(1). Every officer in charge shall be responsible for ensuring that a prisoner is discharged –

(a) at the end of their effective sentence;

(b) in accordance with the order of any court;

(c) into the custody of any person having lawful authority over the prisoner in accordance with a law applying in Fiji; and

(d) in accordance with any decision made by a competent authority authorizing a prisoner's release on parole.

(2). In the event of any doubt arising as to the actual date upon which discharge is due, or the lawful authority of any person into whose custody a prisoner is to be released, the officer in charge shall refer the matter for determination by the Commissioner.

(3). Where the matter has been referred to the Commissioner under subsection (2), and the Commissioner is unable to ascertain the effect of any law applying in that context, the Commissioner may refer the matter for determination by the Attorney-General".

The Court does not have any power under the above provisions of the law to consider the question of the appellant's release on an application for constitutional redress. Any attempt by the court to exercise its powers under the above provisions would be ultra vires.

If the appellant is of the view that his punishment should be remitted in part, he then has to apply to the Mercy Commission for the same under s. 119 (3) (c) of the Constitution of Fiji which states that "on the petition of any convicted person, the Commission may recommend that the President exercise a power of mercy by remitting all or a part of a punishment".

[20] From the decision of the Court of Appeal it is undoubtedly clear that the applicant had no cause of action to institute proceedings for constitutional redress.

[21] The applicant made this application after one year from the date when the matter at issue arose. However, the applicant has not offered an explanation for this undue delay in making the application.

[22] For the reasons aforementioned the court makes the following orders:

1. The application of the applicant for constitutional redress is struck out.
2. There will not be an order for costs of the application.

HIGH COURT OF FIJI
SUVA

Lyone Seneviratne

JUDGE

16th April, 2018