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RATU ERONI VAKACEGU

v.

THE ATTORNEY-GENERAL OF FIJI

[SUPREME COURT—Kermode J., (15 November 1981)]

B

Civil Jurisdiction

Criminal Law—Prisoner released on compulsory supervision order—later returned to prison—revocation of order—length of sentence to be undergone.

H. C. Patel for the Plaintiff

G. Crimmet for the Defendant

C

By originating summons the plaintiff sought declarations as to the interpretation of s.67(1) of the Prisons Act (The Act). The last declaration sought was that the plaintiff had been unlawfully detained at Naboro Minimum Security Prison. The learned Judge refused this declaration; his interpretation of the Act would not permit the plaintiff being released at the (then) present time:

D

S.67 of the Act reads:

“Effect of cancellation or revocation

E

Where any compulsory supervision order is revoked, the person named therein shall, after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his order is revoked, undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order.”

Observations by the learned Judge on the effect of the Prisons Act follow.

F

The Judge referred to s.63. On appellant's admission to prison to serve his sentence prison authorities were obliged to comply with s.63(3) and credit the prisoner with the full amount of the remission he could earn. S.67, later, made no mention of any forfeiture of this credit or any mention of remission. S.63(1) provided that a prisoner by satisfactory industry and good conduct could become eligible to a remission of $\frac{1}{3}$ of his total sentence, assuming he had not forfeited any remission, that, unless any contrary provision in the Act, remained available to him if he had to return to prison to complete his sentence.

G

Prison authorities had been ignoring the provision for remission where a compulsory supervision order (C.S.O.) was revoked and a person re-admitted to prison; they apparently released such a prisoner only after he had served the full balance of his sentence.

H

The question which arose in the instant case and discussed later, was the meaning of the following words in subsection (1):

"Shall undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order." A

The learned Judge made observations about the meaning and intent of the Prisons Act.

He noted that in interpreting S.67 it was to be borne in mind that the section was intended to spell out the "effect of cancellation or revocation" of a (C.S.O.), and under S.67(2) direct what action was then to be taken. B

By S.65(1), at the direction of the Minister an order may be made that a prisoner be released on a (C.S.O.) for such period as the Minister thinks fit.

By S.65(2), the Controller *shall*, in the case of a prisoner who has been sentenced to imprisonment on not less than two prior occasions and is serving 3 or more years imprisonment and *may* in the case of any other prisoner sentenced to 3 or more years imprisonment, on his release, make an order for a period not exceeding one year. C

The Judge noted that the Controller cannot release a prisoner on such an order before the prisoner is due for release *with remission* without the approval of the Minister. He cannot make such an Order where the prisoner has already been discharged without such an order. D

S.65 does not mention that the effect of an order is to terminate or cancel the balance of sentence imposed on a prisoner which he had to serve at the time he was released. E

S.65 does however procure the prisoner's physical release viz—

"S.65(1) could operate as the release of the prisoner before he had served his sentence.

S.65(2), except with the approval of the Minister, could not operate to shorten the sentence." F

An order could not be made except with the authority of the Minister before the prisoner was due for release *with remission*.

The maximum period of remission provided is one year which was the maximum remission a three year term prisoner could earn. S.65 (Part XIX) clearly recognized Part XIII of the Act which provided for the remission of sentences. G

The Judge observed in relation to s.67(2) that—

"A Magistrate on production of a certificate of revocation—
(i) is to issue a warrant of arrest for the person to be brought before him; H

- A (ii) on being brought before him the Magistrate is obliged to issue a warrant for the *re-admission* of that person to prison."

"Readmission" made it clear that the prisoner who had been released on an order is so readmitted, as a result of cancellation of the order, to continue serving the sentence for which he was admitted to gaol.

- B Revocation of an order under S.66 is permissive, not mandatory. Where the order is made on the release of a prisoner who is due for release with remission, there is no further sentence to be served by him.

- C The Judge observed that the Controller would not seek to exercise his powers of revocation of any order except where the release of the prisoner had been at a time when he had not served his sentence with remission. Regulation 143 required the Controller to discharge a prisoner "on the day he has completed his sentence less remission earned".

The mechanics of the Controller making the order without the authority of the Minister would have been to make the order on the day the prisoner was *due for release with remission*; then to comply with Regulation 143 to discharge him.

- D When a prisoner is released on an order before his sentence with remission was completed, if the Controller revoked the order and so certified s.67(2) operated to ensure that the prisoner who had been released on the order was readmitted to prison—i.e. to serve the balance of his sentence; and s.67(1) then stated the position after the person had been returned to prison.

- E The words in S.67(1)—

"..... undergo a further term of imprisonment equal to that portion of his *sentence which remained unexpired at the time of his release* under such order."

- F particularly those emphasised had given rise to a divergence of legal opinion. If upon release a prisoner had already served his sentence with remission he was entitled to be discharged, there being no unexpired sentence. But when released before his sentence has been served, he returned to prison to undergo a further term equal to his unexpired sentence i.e. after he had undergone any other punishment to which he may have been sentenced. As mentioned earlier prison authorities ignored the s.63 remission, i.e. where a compulsory supervision order is revoked and a person had been remitted to prison. Release would follow only after he had served the full balance of his sentence. They viewed S.67(1) as providing for the mandatory serving of the total sentence imposed. The result was the prisoner served the full term without remission—justifying this apparently, by the words of s.67(1).

- G The Judge gave an example of applying this and another interpretation mentioned—

- H "A prisoner sentenced to 3 years is credited with 1 year remission on admission. He served 18 months and had 6 months to serve (assuming no forfeiture of remission). He is then released on an order which is revoked later. The

prison authorities would have this prisoner serve a further 18 months—i.e. the unexpired portion of his sentence of 3 years of which he had served only 18 months.” A

In the illustration mention the words “unexpired at the time the order is made” conveyed that the full balance of sentence which the prisoner still had to serve when released on the order i.e. 18 months.

The Judge said—

“The intention of the legislature is that the prisoner must be returned to prison to serve the balance of his sentence if his order is revoked.” B

The prison authorities had overlooked s.63. They had incorrectly assumed that the mandatory words of s.67(1) override s.63. There was nothing in s.67 which justified non-recognition by the prison authorities of the prisoner’s statutory right to earn one third revision of his sentence for good behaviour. If it had been intended that that might be forfeited when an order was revoked the notice would have so provided. C

If the result of forfeiture had to be considered a punishment the proper place so to provide was s.66(2)(b) where a punishment of 3 months imprisonment can be imposed for contravention of the terms of an order.

S.67 created no offence, and did not impose additional punishment. That which was referred to therein is no fresh imposition but the unserved part of the prisoner’s sentence which he had been serving at the time of his release on the order. On its revocation, he had to serve a further term of imprisonment equal to but not additional to the balance of his sentence. S.67 did not state that he should serve the whole balance without remission nor indicate in any way that s.63 was to be ignored. D E

If the unexpired portion of the sentence which remained when a prisoner was released took into account the full credit for remission s.63 had no further application in a case where a prisoner is remitted to prison. The prisoner would have received remission he had not earned.

In the example given the prisoner would have had to serve only 6 months notwithstanding he had not earned any remission and there remained 18 months of his official sentence still to serve. At the time the prisoner was released he still had to serve the balance of the term imposed on him by a Court. He had at that time not earned any remission but had been given full credit of remission which he could lose if he did not behave himself in prison. The credit could not and did not operate to reduce the sentence the prisoner had to serve until he earned it. It was a statutory device to give effect to the remission which a prisoner could earn under s.63(1). When the prisoner served $\frac{2}{3}$ of his sentence without forfeiture the credit then operated to reduce his total sentence by $\frac{1}{3}$ and the prisoner was entitled to be discharged. F G

Until that credit operated the unexpired portion of his sentence was the portion of his total sentence not actually served by him.

In the Court’s view that credit had not been destroyed or reduced in anyway by the provisions of s.67 nor did that section take away from a prisoner returned to prison to serve the rest of his sentence the right to earn full remission of his sentence by good behaviour. H

Held: The Court made declarations thus—

A “I declare that the words “undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order” in subsection (1) of section 67 of the Prisons Act means that the person named in such order on revocation of such order shall on re-admission to prison serve the balance of the sentence imposed on him by a Court which he still had to serve at the time he was released on such order.

B I further declare that the said subsection (1) of section 67 does not in any way affect the statutory right a prisoner has under subsection (1) of section 63 to earn remission on his total sentence of imprisonment and that in calculating the date for the discharge of a prisoner returned to prison on revocation of a compulsory supervision order credit must be given to such prisoner for remission earned by him. When he has served his sentence and is due for release with remission he must then be discharged.” The time for release of the prisoner was a matter for the Controller.

C

KERMODE, Mr Justice:

Judgment

D The plaintiff by Originating Summons originally sought five declarations.

Mr Patel for the plaintiff has now abandoned the plaintiff's claim for the 4th declaration alleging the Minister has not approved revocation of the plaintiff's compulsory supervision order in view of the facts stated in Mr Rigamoto's affidavit filed in opposition.

E The first three declarations sought are all concerned with the interpretation of section 67(1) of the Prisons Act. The last declaration sought is one to the effect that the plaintiff is unlawfully detained at Her Majesty's Prison at Naboro Minimum Security Prison. I decline to make that declaration as my interpretation of section 67(1) of the Act would not permit the plaintiff being released at the present time.

Section 67 of the Prisons Act provides as follows:

F *“Effect of cancellation or revocation*

67.—(1) Where any compulsory supervision order is revoked, the person named therein shall, after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his order is revoked, undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order.

G

(2) When any compulsory supervision order is revoked, a magistrate shall, on production of a certificate of such revocation, issue a warrant for the apprehension of the person to whom such order was issued, and any magistrate before whom such person is brought shall issue a warrant for readmission of such person to prison.

H

The question which arises in this instant case is the meaning of the following words in subsection (1):

“Shall undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order.”

Mr Grimmett for the Crown has submitted a written submission. It appears that within the Crown Law Office there is a divergence of opinion as to what section 67(1) means and how it is to be applied by the prison officials.

A

In interpreting section 67 it must be borne in mind that the section is intended to spell out the "Effect of cancellation or revocation" of a compulsory supervision order and under subsection (2) directs what action is to be taken when an order is revoked.

Under subsection (1) of section 65 an order may be made at any time on the directions of the Minister who can direct that a prisoner be released on a compulsory supervision order for such period as he thinks fit. Under subsection (2) the Controller shall, in the case of a prisoner who has been sentenced to imprisonment on not less than two prior occasions and is serving 3 or more years imprisonment, and may in the case of any other prisoner sentenced to 3 or more years imprisonment, on his release make an order for period not exceeding one year. It is provided, however, that the Controller cannot release a prisoner on such an order before the prisoner is due for release *with remission* (emphasis is mine) without the approval of the Minister. He cannot make such an order where the prisoner has already been discharged from prison without such an order.

B

C

If the effect of an order is appreciated, the effect of revocation of such order is easier to understand.

D

There is in section 65 no mention that the effect of an order is to terminate or cancel the balance of the sentence imposed on the prisoner which he had to serve at the time he was released. It does however procure his physical release from prison. Under subsection (1) it can operate as the release of the prisoner before he has served his sentence. Under subsection (2), however, except with the approval of the Minister it cannot operate to shorten the sentence. An order cannot be made, except with the authority of the Minister, before the prisoner is due for release *with remission*. The maximum period of supervision provided is one year which is the maximum remission a three year term prisoner can earn.

E

Section 65, which is in Part XIV of the Act clearly recognises Part XIII of the Act providing for remission of sentences.

Section 67 is also in Part XIV of the Act. Subsection (2) of the section provides that a Magistrate, on production of a certificate of revocation, is to issue a warrant of arrest for the person to whom the order was issued for that person to be brought before him. On being brought before him the Magistrate is obligated to issue a warrant for the *re-admission* of such person to prison.

F

The use of the word "re-admission", which I have underlined for emphasis, makes it abundantly clear that the prisoner released on an order goes back to or is re-admitted to the prison as a result of cancellation of the order for his release to continue serving the sentence for which he was admitted to jail.

G

Where I consider some confusion may have arisen in the first place is failure to appreciate that revocation of an order under section 66 is permissive and not mandatory. There is a reason for this.

Where the order is made on the release of a prisoner, who is due for release with remission, there is no further sentence to be served by him. Subsection (2) of section 66 provides for a penalty of up to 3 months for contravention of the terms of an order.

H

A The Controller would not seek to exercise his powers of revoking any order in any case except where a prisoner is released on an order at a time when he had not served his sentence with remission. Regulation 143 requires the Controller to discharge a prisoner "on the day he has completed his sentence less remission earned". While the Controller can before that prisoner is discharged make an order, he cannot by revoking the order also revoke his discharge. The order nevertheless continues in force until it expires and a discharged prisoner must still comply with the order or suffer further punishment under section 66(2).

B The mechanics of the Controller making an order without the authority of the Minister would be to make the order on the day the prisoner is *due for release with remission* and then to comply with Regulation 143 and discharge him.

C Where a prisoner is released on an order before his sentence with remission is completed, if the Controller revokes the order and so certifies, subsection (2) of section 67 operates to ensure that the prisoner released on the order is re-admitted to prison to serve the balance of his sentence.

Subsection (1), which would in my view have been better understood had it been subsection (2), where it logically belongs, states the position after the person is returned to prison.

D The interpretation of the first part of subsection (1) presents no problem. The person concerned shall first undergo any punishment inflicted on him for an offence as a consequence of which his order is revoked and then has to "*undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order*".

The words which I underlined have given rise to a divergence of legal opinion as to what they mean.

E The important words for consideration are "sentence which remained unexpired at the time of his release under such order". At the time of his release the prisoner who has already served his sentence with remission is entitled to be discharged. There is no unexpired sentence which he has to serve. When he is released before his sentence has been served, however, he goes back to prison to undergo a further term equal to his unexpired sentence after he has first undergone any other punishment he may have been sentenced to.

F When the person is re-admitted to prison the prison authorities are still bound by the provisions of the Act and the regulations made thereunder. There is nothing in section 67 which relieves them of that obligation.

G At the time of his admission to prison to serve his sentence the prison authorities were obliged to comply with subsection (3) of section 63 and credit the prisoner with the full amount of the remission which he could earn. Section 67 makes no mention of any forfeiture of this credit or any mention of remission.

H Subsection (1) of section 63 provides that a prisoner by satisfactory industry and good conduct can become eligible to a remission of one third of his total sentence of imprisonment. It is a statutory right which he has and unless the statute provides for forfeiture of that right it is a right all prisoners retain.

Subsection (3) of section 63 provides that to give effect to subsection (1), the person on admission is to be credited with the full amount of remission he could earn

and it also provides in some detail for forfeiture of "such portions of such remission as a punishment for idleness, lack of industry or any offence against prison discipline". A

Section 63 is in Part XIII of the Act dealing with remission of sentences. Apart from the specific provision therein for forfeiture of portions of remission for prison offences there is no other provision in the Act relating to forfeiture of remission. If remission could be forfeited in any other way section 63 would be a logical place to find the provision. B

When any prisoner is released before he is normally due for release he will have been credited with the full one third of his total sentence of imprisonment as remission on his admission. Assuming he has not forfeited any remission that credit, unless there is provision to the contrary in the Act, is available and remains available to him if he has to return to prison to complete his sentence.

The prison authorities whether on the advice of the Crown Law Office or on their own initiative have been ignoring the provision for remission where a compulsory supervision order is revoked and a person is re-admitted to prison. They apparently release such prisoner only after he has served the full balance of his sentence. They view section 67(1) as providing for the mandatory serving of the total sentence of imprisonment imposed on a prisoner. The result is that the prisoner serves the full term without any remission. Their justification for this is apparently the words of subsection (1) which provide that a revocation of an order the person named herein "shall undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order." C D

Another suggested interpretation is that the unexpired portion of the sentence at the time of his release is the total sentence imposed less remission credited and less time served. E

Examples as to the practical effect of applying these two interpretations are as follows:

A prisoner sentenced to serve 3 years imprisonment is credited with 1 year remission on his admission. He serves 18 months and has 6 months to serve (assuming no forfeiture of remission). He is then release on an order which is later revoked.

The Prison authorities would have this prisoner serve a further 18 months—the unexpired portion of his sentence of 3 years of which he had served only 18 months. The second interpretation would result in the prisoner having to serve only 6 months. The 6 months is arrived at as follows. The prisoner has 2 years to serve after admission if he earns full remission. He served 18 months and has 6 months to serve when he is released on a compulsory supervision order. The second interpretation however wrongly assumes that "remission credited" is "remission earned". F G

I consider that the words "unexpired at the time the order is made" is the balance of the full sentence which the prisoner still had to serve when he was released on the order. In the examples given above, that would be 18 months. The intention of the legislature is that the prisoner must be returned to prison to serve the balance of his sentence if his order is revoked.

Where I consider the prison authorities have erred, however, is in ignoring section 63. They have incorrectly assumed that the mandatory words of section 67(1) overrides section 63. H

A There is nothing in section 67 which justifies non-recognition by the prison authorities of the prisoners statutory right to earn one-third revision of his sentence for good behaviour.

If it had been intended that that right be forfeited when an order is revoked the section would have so provided. If the results of a forfeiture is to be considered as a punishment, the proper place to so provide is in section 66(2)(b) where a punishment of 3 months imprisonment can be imposed for contravention of the terms of an order.

B

Section 67 creates no offence and does not impose any additional punishment. The imprisonment therein referred to is no fresh imposition of imprisonment but is the unserved part of the prisoner's sentence which he was serving at the time of his release on the order. On revocation of the order he must serve a further term of imprisonment equal to but not additional to the balance of his sentence. Section 67 does not state that the person must serve the whole balance without remission or indicate in any way that section 63 is to be ignored.

C

Admittedly the section could have been clearer. One of Mr Grimmett's arguments indicate that he fully appreciated that section 63 should not be ignored but acceptance of the second suggested interpretation would result in the prison authorities not being authorised to forfeit remission by way of punishment for a prisoner who is readmitted to prison. There would be no incentive for that prisoner to behave himself and prison discipline could suffer.

D

If the unexpired portion of the sentence which remained when a prisoner was released took into account the full credit for remission, section 63 could have no further application in a case where a prisoner is re-admitted to prison. The prisoner would have received remission which he had not in fact earned. In the example given earlier the prisoner would only serve 6 months notwithstanding that he had not earned any remission and there was 18 months of his official sentence still to serve.

E

At the time the prisoner was released he still had to serve the balance of the term imposed on him by a Court. He had at that time not earned any remission but he had been given full credit of remission which he would lose if he did not behave himself in prison. The credit did not and could not operate to reduce the sentence that prisoner had to serve until he earned it. It was a statutory device to give effect to the remission which a prisoner could earn under subsection (1) of section 63. When the prisoner served two thirds of his sentence without any forfeitures the credit then operated to reduce his total sentence by one-third and the prisoner was entitled to be discharged. Until that credit operated the unexpired portion of his sentence was the portion of his total sentence not actually served by him. That credit was not in my view destroyed or reduced in any way by the provisions of section 67. Nor does the section take away from a prisoner returned to prison to serve the rest of his sentence his right to earn full remission of his sentence by good behaviour.

F

G

None of the declarations framed by the plaintiff have been properly framed to cover the situation as I see it. It does not appear that the plaintiff had legal advice when he prepared his summons. He has however endeavoured to frame declarations which call for the interpretation and application of section 67(1).

H

Accordingly, I grant him the following two declarations.

I declare that the words "undergo a further term of imprisonment equal to that portion of his sentence which remained unexpired at the time of his release under such order" in subsection (1) of section 67 of the Prisons Act means that the person named in such order on revocation of such order shall on re-admission to prison serve the balance of the sentence imposed on him by a Court which he still had to serve at the time he was released on such order. A

I further declare that the said subsection (1) of section 67 does not in any way affect the statutory right a prisoner has under subsection (1) of section 63 to earn remission on his total sentence of imprisonment and that in calculating the date for the discharge of a prisoner returned to prison on revocation of a compulsory supervision order credit must be given to such prisoner for remission earned by him. When he has served his sentence and is due for release with remission he must then be discharged. B

The plaintiff succeeds in his application. I do not attempt to determine in the earliest date he is due for release. That is for the Controller to decide. On Mr Grimmett's calculations the earliest date, if there are no forfeitures of remission, could be the 27th January, 1982. C

The plaintiff is entitled to costs and I accordingly order that the defendant pay costs to be taxed if not agreed.

Declarations granted. D