

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBM No. 11 of 2015.

BETWEEN : **GUSTON FREDERICK KEAN** of Lautoka in the Republic of Fiji.
APPLICANT

AND : **DIRECTOR OF PUBLIC PROSECUTIONS**
1ST RESPONDENT

AND : **ATTORNEY GENERAL OF FIJI**
2ND RESPONDENT

RULING

INTRODUCTION

1. Before me is an application to strike out a Notice of Motion for Constitutional Redress filed by Guston Frederick Kean in person on 27 May 2015 on the ground that it discloses no reasonable cause of action, is scandalous, frivolous and vexatious, and is otherwise an abuse of process. The facts are not in dispute. No affidavit is filed.
2. Kean's Notice of Motion for Constitutional Redress seeks an Order :
...THAT the nine (9) years minimum term of imprisonment imposed by the High Court of Fiji in Criminal Action Number HAC 158 of 2007 be subjected to remission of one third of the total sentence of imprisonment and for such further Order that this Honourable Court may deem fit, equitable, expedient and necessary in the circumstances of the case.

BACKGROUND

3. On 15 April 2008, the Suva High Court in criminal case 158/2007 convicted Kean on a charge (under section 293(1)(a) of the old Penal Code) of Robbery with Violence. He was sentenced the day after, on 16 April 2008, to eleven years imprisonment with a nine year minimum term, concurrent to his existing prison term.
4. On 27 May 2015, some seven years and one month after Kean was sentenced, he filed a Notice of Motion For Constitutional Redress at Lautoka High Court. Kean is aggrieved that:
.....the Prisons and Correction Services have deprived me of the Remission of One Third of the Total Sentence of imprisonment imposed by Mataitoga J. of the High Court of Fiji.

5. Given that Kean was given a nine year minimum term, it would appear that he is of the belief that, had he been given that one-third remission by the Commissioner of Prison, then he would have been due for release around the time he filed his application for redress in 2015.
6. The main thrust of Kean's argument is that the Commissioner of Prisons has refused (or is refusing) to credit him a one third remission of his total sentence which he is entitled to under section 63(1) of the Prisons Act (Cap 86).

COMMENTS

7. Kean is applying for Constitutional Redress pursuant to section 44(1)(2) and section 26(1) of the 1997 Constitution and of course, the Prisons Act (Cap 86).
8. The 1997 constitution was abrogated by the President of the Republic of Fiji on 10 April 2009. The President signed the Existing Laws Decree 2009 on the same day. The effect of this Decree was that all laws existing before 10 April 2010, except for the Constitution Amendment Act 1997, shall continue in force.
9. In September 2013, Fiji's new Constitution came into force when the President assented to the document and displayed it in a public ceremony which was widely covered by the media. That process was carried out pursuant to the Fiji Constitutional Process (Adoption of Constitution) Decree 2013.
10. Notably also, the Prisons Act (Cap 86) which Kean relies on, was repealed by the Prisons and Corrections Act of 2006. This new Act actually came into force on 27 June 2008, that is, two and a half months after Kean was sentenced and first committed to prison on that (latest) conviction¹.

KEAN'S AFFIDAVIT IN SUPPORT OF CONSTITUTIONAL REDRESS

11. Kean's Constitutional Redress application is supported by an affidavit he swore on 09 December 2014. The relevant part of this I reproduce below:
 5.the Prisons and Correction Services have deprived me of the Remission of One Third of the Total Sentence of imprisonment imposed by Mataitoga J. of the High

¹ He was then serving other terms for similar convictions of Robbery With Violence.

Court of Fiji. I crave leave to refer to a true copy of prisons sentencing performer sheet a true copy whereof is annexed hereto and marked "B".

6. I am aggrieved of the deprivation of my fundamental right of a remission of one third of the total sentence as per statutory law in force embodied in article 63(1) of the Prison Act Cap 86. I crave leave to refer to true copy whereof is annexed hereto and marked "C".
7.the sentence imposed in accordance with the statutory in force is directly subjected to a guaranteed qualified right of remission of one third of the total sentence provided by article 63(1) of the Prison Act Cap 86.
8.I should and only be sentenced in accordance with the statutory law in force when the offence was committed regarding remission. I crave leave to refer to a true copy of the fundamental qualified right to the proper sentence as provided in article 28(1)(1) of the 1997 Fiji Constitution whereof is annexed hereto and marked "D".
9. by depriving Guston Fredrick Kean the remission of one third of the total sentence by the Prison Department is inconsistent and repugnant with the principles embodied in article 28(1)(j) of the 2007 Fiji Constitution and Article 63(1) embodied in the Prison Act Cap 86.
10. I therefore humbly pray for the following orders:-
 - (1) That my total sentence of 11 years with the nine (9) years minimum term be subjected to the remission of one third of the total sentence.
 - (2) Such further or other orders that this honourable court may deem fit just equitable expedient and necessary in the circumstances of the case.

ISSUES

12. There are many issues in this case. Some of the questions raised in the submissions are as follows:
 - (i) Kean relies on the 1997 Constitution which was abrogated in 2009. Can the 1997 Constitution continue to be tenable as a source of a right even after abrogation?
 - (ii) if (assuming) the answer to (i) above is "yes", then would Kean not be well out of time in filing this application? This particular question leads to two other questions: does his cause for Constitutional Redress accrue on the date when he was first committed to prison, or, does it accrue on the date when he would have been released from prison on/after remission? If the latter is the case, as Kean appears to think, then does that not mean that he should be relying on the 2013 Constitution?
 - (iii) if the answer to (i) above is "no", is this application curable by amendment? Even if it is curable by amendment, in which case he would have to now plead the 2013 Constitution, would he still face the problem of being out of time?

- (iv) if (assuming) the old Prisons Act (Cap 86) applies, is the one-third remission deducted from the minimum term of nine years or is it deducted from the original sentence of eleven years? (see Supreme Court of Fiji decision in **Munesh Chand v The State** Criminal Appeal No.CAV 003/2012; Supreme Court of Fiji in **Maturino Roago v State** Crim. Appeal No. CAV0003 of 2007 (unreported)
- (v) in any event, is it not the case that the remission is granted at the discretion of the Prison Authorities and if so, and assuming that the Prison Authorities had exercised that discretion in error, how is that a Constitutional Redress issue? Is that not a case more appropriate for a judicial review application under Order 53 of the High Court Rules 1988?

SUBMISSIONS BY THE LEGAL AID COMMISSION

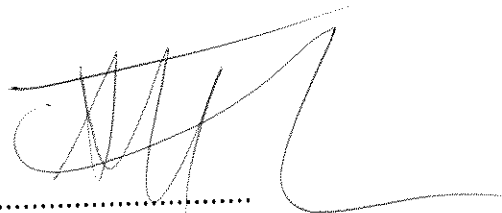
13. The Legal Aid Commission concedes that the application for Constitutional Redress was filed on 27 May 2015. While that is well outside the 60 day limitation period prescribed by the High Court (Constitutional Redress) Rules 2015, counsel submits that Rule 3(2) makes provision for the judge to extend the time in any case where there is *“an exceptional circumstance that it is just to hear the application”*. Counsel then revisits to section 63(1) of the Prisons Act and notes the fact that this Act was repealed by the Prisons And Corrections Act 2006 in particular section 28 of the latter Act. She then discusses the changes that the new Act has brought about in terms of how the remission process is managed, administered, and applied in every case. She then states at paragraph 4.5 of her submissions that:

“The Applicant was then informed by the Commissioner of Prisons that he was no longer entitled to the remission as the Prisons Act (Cap 86) was no longer in force. This prompted the applicant to apply for constitutional redress as such the Applicant has the onus to satisfy the Honourable Court in what way his constitutional rights have been contravened by section 28 of the Prisons And Corrections Act. And if so, whether the Applicant is entitled to the remission of 1/3 of the total sentence. These are legal questions that needed to be addressed and therefore is an exceptional circumstance that this Honourable Court needs to hear and determine.

14. She also cited the supreme Court’s observation in **Kean v State** [2015] FJSC 27; CA V007.2015 (23 October 2015).

CONCLUSIONS

15. I have read the Supreme Court's decision in Kean v State (supra). I have also read the Supreme Court's decision in Munesh Chand v The State (Criminal Appeal No. CAV 003/2012 and also Yunnus v State [2013] FJSC 3; VAC0008.2011 (24 April 2013). In my view, these cases provide the answer to the issues which Kean is aggrieved about. As for the application now before me, I will say only this. All the issues raised above, the answers to which are in the above cases, can only merit further consideration by this court if I had the jurisdiction in the first place to even hear and consider Kean's substantive application for Constitutional Redress. Kean relies on the 1997 Constitution which was abrogated in 2009. Upon the abrogation of the 1997 Constitution, that document can no longer be the source of any right, nor can it be the source of any jurisdiction for this court. I think the error is so fundamental that it is incurable by amendment. And even if I had jurisdiction (which I say I do not), the fact of the matter is that the Supreme Court has already considered the same issues in Kean v State (supra). It is an abuse of process to relitigate the issue in a Court sitting as a Constitutional Redress Court.
16. Order in Terms of the Office of Attorney-General's application to strike out.


.....
Anare Tuilevuka

JUDGE

14 October 2016

