

**IN THE MAGISTRATES' COURT OF FIJI
AT LAUTOKA
EXTENDED CRIMINAL JURISDICTION**

*High Court Criminal Case No. HAC 173 of 2018
Magistrates' Court Criminal Case No. 634 of 2018*

STATE

v.

- 1. JOELI TAWATATAU**
- 2. ILIVASI NAVUNICAGI**
- 3. ILIESA VAKABUA**
- 4. VILIAME ROCATIKEDA**

For the Complainant: *Mr. A. Singh, of counsel, for the Director of Public Prosecutions*

For the 1st and 3rd Defendants: *Ms. L. Manueli, of counsel, of the Legal Aid Commission*

For the 2nd and 4th Defendants: *In Person*

Date of Hearing: 5th December 2019, 2nd March 2020

Date of Decision: 22nd October 2020

**DECISION OF THE RESIDENT MAGISTRATE IN EXTENDED JURISDICTION
ON THE PLEA IN BAR OF *AUTREFOIS CONVICT***

I. BACKGROUND

1. The Defendants, Joeli Tawatatau, Ilivasi Navunicagi, Iliesa Vakabua and Viliame Rocatikeda are serving prisoners. Ilivasi Navunicagi is serving a life imprisonment term for murder¹ and the rest are serving multiple year terms for other indictable offences².
2. On 3rd December 2016, while housed at the Natabua Corrections Centre, they allegedly stabbed a fellow inmate, Mr. Simone Tui. Mr. Tawatatau, Mr. Navunicagi, Mr. Vakabua and Mr. Rocatikeda were thereafter jointly charged for the prison offence of “*assault or act of violence*” contrary to regulation 13 of the **Correction Service Regulations 2011**³ as a result.
3. They were subsequently tried before a prison tribunal pursuant to regulations 14 and 15 of the **Correction Service Regulations 2011**. I pause here to note that pursuant to regulation 16 of the **Corrections Service Regulations 2011**, had the matter been tried before the Commissioner, they would have been liable to forfeiture of remission of sentence not exceeding 3 months – a total of 90 days⁴.
4. As matters unfolded, they were tried before the Supervisor of Corrections for the Western Division who as Supervisor was limited by the terms of regulation 16 (2) to a maximum punishment of forfeiture of remission not exceeding 1 month amongst other punishments available to him⁵. On 13 February 2017, they were punished with a forfeiture of remission of sentence of 1 month each.⁶

¹ He must serve a minimum term of 20 years before he is eligible to apply for a pardon from the President of the Republic of Fiji.

² See: **Rocatikeda v. State** [2020] FJCA 47; AAU135.2016 (29 April 2020); **State v. Noa – Sentence** [2015] FJHC 939; HAC089.2010L (1 December 2015) and **Tawatatau v. State** [2020] FJCA 58; AAU040.2017 (20 May 2020).

³ The prison charge incorrectly references provisions from the now repealed **Prisons Act, Cap. 86** and the old **Prisons Regulations**, also now repealed. However, since the prison proceedings are not before me for consideration except insofar as they pertain to the plea in bar, I have no jurisdiction to consider whether an error was in fact made in respect of the prison charge and what, if any, remedy is available to these defendants should an error be found in the first place. I put this discrete issue to the side.

⁴ See Regulation 16 (1) of the **Corrections Service Regulation 2011**.

⁵ See Regulation 16 (2) of the **Corrections Service Regulation 2011**.

⁶ See Regulation 16 of the **Corrections Service Regulations 2011**. Each of them complained that the prison tribunal did not adhere strictly to the due process requirements of Regulation 14 but again, I have no jurisdiction to consider the lack of due process complaint raised. I put this second discrete issue to the side.

5. When a prisoner enters prison for the first time they must be classified in accordance with the Commissioner's Orders⁷ and for the purposes of the initial classification, each prisoner's date of release must be determined calculated on the basis of a one third remission of any sentence of imprisonment exceeding one month.⁸
6. The remission of sentence that is applied at the initial classification shall *thereafter* be dependent on the good behaviour of the prisoner⁹ and may be forfeited and then restored, in accordance with the Commissioner's Orders.¹⁰ Ordinarily, forfeiture of remission should be used as a last resort and in any event, should not exceed 7 days for a single breach, with a total not exceeding 10 days per month.¹¹
7. It is clear that, perhaps taking into account the gravity of the act charged for, the Supervisor decided to impose the maximum punishment available to him to impose against each of these Defendants.¹² Unfortunately, State assistance in ascertaining the full particulars of what transpired during the prison proceedings was not forthcoming despite the fact that several adjournments were granted to it to provide that information.
8. I am left to work off what I have been provided via affidavit evidence from the defendants and from what State counsel conceded to be the position from the bar table during oral argument before me and from what I have been able to establish based on the material before me and from public information sources available to me – all of which I have cited. That information is sufficient, in my considered view, to make a proper determination of the issues before me here and now.
9. On 18 September 2018, the State filed criminal charges against each of these defendants pursuant to section 56 of the **Criminal Procedure Act 2009** alleging a breach of section 255 of the **Crimes Act 2009**. It is not disputed by the State, a position made clear by Mr. Singh, *of counsel*, during oral argument before me, that

⁷ See Order No. 7, rule 3 of the **Commissioner's Local Orders 2011**.

⁸ See section 27 (2) of the **Corrections Service Act 2009**.

⁹ Cf **Timo v. State** [2019] FJSC 22; CAV 0022.2018 (30 August 2019) at [42].

¹⁰ See section 28 (1) of the **Corrections Service Act 2009** and *see also* Order No. 11, rule 3 of the **Commissioner's Local Orders 2011** and Order No. 7, rule 2 of the **Commissioner's Orders 2011**.

¹¹ See Order 7, rule 2.3 of the **Commissioner's Orders 2011**.

¹² Again, I must emphasise that it is not within the jurisdiction of this court at this time to review the prison tribunal proceedings. The prison tribunal proceedings are referenced and examined in the sole context of determining the validity of the plea in bar raised in respect of these criminal trial proceedings.

the new charge is predicated upon the same act or acts that informed the prison charge. I will come to why the State assert that the plea in bar is not available shortly.

10. The crime of “*Act Intended to Cause Grievous Harm*” contrary to section 255 of the **Crimes Act 2009** is an indictable offence punishable with a maximum of life imprisonment. As such, these criminal trial proceedings were transferred almost immediately to the High Court pursuant to the requirement at section 4 (1) (a) of the **Criminal Procedure Act 2009** and while the matter was before the High Court in original trial jurisdiction, the Director of Public Prosecutions filed his Information against each defendant, as is required by law¹³, on 15 December 2018.
11. On 19 March 2019, on application by the Office of the Director of Public Prosecutions, the High Court remitted these criminal trial proceedings to the Lautoka Magistrates’ Court to deal with.
12. Pursuant to section 4 (2) of the **Criminal Procedure Act 2009**, “a judge of the High Court may, by order under his or her hand, and the seal of the High Court, in any particular case or class of cases, invest a Magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the jurisdiction of the Magistrates’ jurisdiction.”
13. Since the coming into force of the **Criminal Procedure Act 2009** on February 10, 2010, the practice has invariably been for Resident Magistrates’ operating in original summary jurisdiction to transfer an indictable offence to the High Court pursuant to section 4 (1) and section 191 of the **Criminal Procedure Act 2009** and for the High Court to thereafter remit indictable offences to the Magistrates’ Court or to a specific Resident Magistrate under the grant of extended jurisdiction conferred upon that Court or that Magistrate pursuant to section 4 (2) in circumstances where it seems appropriate to the High Court judge to do so.¹⁴
14. I have observed that the word “remit” in this context has sometimes been conflated with the phrase “sent down”. The phrase “sent down” is misleading. “Sent back” has also been used and this is more accurate. Transferred also works. The phrase “remit” means “to refer a matter to someone with authority to deal with it” or to “order a legal

¹³ See the definition for “indictable offence” at section 2 of the **Criminal Procedure Act 2009** and see also section 198 of the **Criminal Procedure Act 2009**.

¹⁴ No definitive threshold has been set for the exercise of this discretion.

case to be dealt with in a different court of law”: *see* the Cambridge English Dictionary.¹⁵

15. The grant of extended jurisdiction grants the Magistrate or the Magistrates’ Court *specific subject matter jurisdiction* to try a matter they would otherwise not have had authority to try. So in granting extended jurisdiction to a specific Resident Magistrate or to a Magistrates’ Court in a particular district within the Republic and then sending the file to that Resident Magistrate or to the Magistrates’ Court, the High Court in effect transfers the High Court file to someone with newly given authority to deal with it.
16. The next consideration is what the extent and what the limits to that jurisdiction are; and as a necessary corollary to these questions, what procedural rules govern the exercise of extended jurisdiction. Except for a limitation to the sentencing power set out at section 4 (3) of the **Criminal Procedure Act 2009**, Parliament has enacted no law to establish the extent and limits of a court operating under extended jurisdiction and Parliament has enacted no law to govern its procedure. Rules of practice have developed and we have an evolving body of common law to help answer these questions. I will deal with the issue of jurisdiction to deal with the plea in bar raised here separately later on.
17. Coming back to the procedural background to this matter, the State’s Information was read out to each defendant in open court before me, and they each entered a plea of *autrefois convict*. They say that they have been previously convicted of the same offence arising out of the same facts and having been convicted for it, should not be made to undergo a new trial.
18. In the alternative they argue that if their plea of *autrefois convict* is not accepted this matter should be stayed in light of the constitutional protection against double punishment. In short, they argue that they are not liable to further punishment. In respect of the second argument raised, they rely on two key provisions, *i.e.* section 59 of the **Interpretation Act 2009** and section 3 (2) of the **Crimes Act 2009**, and they also all rely on the decision of the Court of Appeal in **Tawatatau v State** [2007] FJCA 26; AAU0002.2007 (23 March 2007).

¹⁵ Cambridge English Dictionary at <https://dictionary.cambridge.org/dictionary/english/remit> (accessed on 8 October 2020).

19. The State, as I understood their position to be, does not dispute that the plea in bar would succeed if the prison offence had indeed been a criminal offence. However, the argument advanced on behalf of the State is that the prison offence was not a criminal offence, it was a disciplinary offence determined by a disciplinary tribunal and not a court of competent jurisdiction and as such, this court is not barred in any way from conducting a criminal trial proceeding in respect of the same act or acts that grounded the initial disciplinary case.
20. The State went onto to argue that this Court is bound by the holdings in two decisions of the High Court namely; **Cerevakawalu v. State (No. 1)** [2001] 2 FLR 262 (6 August 2001) and **Usumaki v. State** [2019] FJHC 1183; HAA14.2019 (19 December 2019), and argued that both the plea in bar and the protection against double punishment were not available to these defendants because the holdings in these decisions were that they are not available in cases involving prison offences. I will consider each of these positions in turn later on.

II. THE LEGAL QUESTIONS TO BE DETERMINED

21. After examining the submissions made, it is clear to me that the questions to be determined today are really these:

(A) *Are these defendants at risk of being tried for an offence in respect of an act or omission for which they have previously been either acquitted or convicted in direct contravention of section 14 (1)(b) of the **Constitution of the Republic of Fiji**?*

(B) *If the answer to (A) is “no”, are these defendants protected from double punishment by the application of section 11 (1) of the **Constitution of the Republic of Fiji**; section 59 of the **Interpretation Act 1967** and/or section 3 (2) of the **Crimes Act 2009**?*

III. THE QUESTION OF JURISDICTION

22. The Office of the Director of Public Prosecutions and the Legal Aid Commission, through counsel, each submitted orally that I have jurisdiction to consider and determine these legal questions. However, it is an important point and I deem it prudent to determine the question of jurisdiction carefully.
23. In the ten years and eight odd months since the coming into force of the **Criminal Procedure Act 2009**, the law on what the grant of extended jurisdiction means has come to be well-settled in some areas, but not in others¹⁶. The one point that seems to be well-settled is that the grant of extended jurisdiction in effects means that the Resident Magistrate or the Magistrates' Court granted extended jurisdiction sits as the High Court alone *i.e. without assessors* and, in effect creates a court with subject matter jurisdiction to conduct a bench trial for an indictable offence.
24. In the absence of legislation governing the scope of the court's jurisdiction and procedure, the common law in my considered view clearly points to equivalency of jurisdiction and powers between a court in extended jurisdiction and the High Court in original jurisdiction; the grant of extended jurisdiction effectively granting to the Resident Magistrate all the powers ordinarily available to the High Court judge originally charged with trying that matter except insofar as section 4 (3) of the **Criminal Procedure Act 2009** expressly limits sentencing powers to that of an ordinary Magistrate sentencing in summary jurisdiction.¹⁷

¹⁶ For example, in instances where an application implicates the inherent jurisdiction of the High Court: **State v. Rajesh Kumar and Atish Vinod** [2020] FJMC 106; Criminal Case 142 of 2015 (13 July 2020); or where an application involves a provision under Part XIV of the **Criminal Procedure Act 2009**: **State v. Tawatatau** [2017] FJMC 11; Criminal Case 886.2011 (12 January 2017). However, it is well-settled that appeals from the Magistrates' Court in extended jurisdiction, like the High Court, will go directly to the Court of Appeal pursuant to section 21 of the **Court of Appeal Act 1949**: see **Sharma v. State** [2015] FJCA 174; AAU0012.2015 (23 December 2015); **Kirikiti v. State** [2014] FJCA 223; AAU00055.2011 (7 April 2014) and **State v. Prasad** [2019] FJCA 18; AAU123.2014 (7 March 2019).

The question of the applicability of section 151 of the **Criminal Procedure Act 2009** to instances where costs are imposed by a Magistrate dealing with an indictable matter under the grant of extended jurisdiction also falls to be considered and determined. There is no right to an interlocutory appeal in criminal trial cases *except* and *unless* specifically provided by statute. There is no right of interlocutory appeal from costs orders in the High Court: see **State v. Khan** [2019] FJCA 257; AAU069.2013 (28 November 2019). The question, if it is to be answered in the future, may lie the interpretation of the word "Magistrate" at section 151 of the **Criminal Procedure Act 2009**. Section 101 of the **Constitution**, section 2 of the **Criminal Procedure Act 2009** and section 2 and section 3 of the **Magistrates' Court Act 1944** may become relevant for that purpose.

¹⁷ See **State v. Kumar and Vinod** [2020] FJMC 106; Criminal Case 142 of 2015 (13 July 2020). See also **Caniogo v. State** [2011] FJHC 711; HAA019.2011 (30 September 2011); **Sharma v. State** [2015] FJCA 174; AAU0012.2015 (23 December 2015) at [3]; **Boila v. State**, Criminal Miscellaneous Case No. HAM 136 of 2019 (unreported, 31 July 2019) at [5], [20] and [21]; **Usa v. State** [2019] FJCA 179; AAU81.2016 (25 September 2019) at [1] and [2]; and **Saukelea v. State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) at [10].

25. On the question of jurisdiction and procedural rules that apply, in **State v. Kumar and Vinod** [2020] FJMC 106; Criminal Case No. 142 of 2015 (13 July 2020), I had occasion to observe:

“35. Let me be clear:

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should...With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. We have no more right to decline the exercise of the jurisdiction which is given, than to usurp that which is not given...All we can do is exercise our best judgment, and conscientiously to perform our duty.”

Per Chief Justice Marshall of the U.S Supreme Court in *Cohen v Virginia*, 6 Wheat 264 – 405, 5 L ed. 257 – 291.

36. *** if a Magistrate has been granted extended jurisdiction to try an indictable offence than he or she sits as the High Court alone *and* must exercise the jurisdiction of that court whenever the interests of justice and the merits of the case so requires.

Procedural Rules that Apply

37. Another important point that falls to be considered is which procedural rules apply.

38. The accepted position is that the Magistrate sits as a High Court alone and in that sense, he or she, in effect, conducts a bench trial in respect of that indictable matter.

39. In those circumstances, there being no assessors to worry about – it makes sound policy sense to have the defendants in these circumstances tried in accordance with the rules and procedures that govern ordinary trials in the Magistrates’ Court – adopting provisions

from the High Court criminal rules that best meets the interests of justice and the merits of the case where ever a lacuna exists.

40. This course of action has certainty, efficacy, and access to all the protections ordinarily available to the defendant had the matter remained in the High Court to commend it.”

26. I continue to adopt that reasoning here. However, it would be remiss of me if I do not make mention of section 290 (1) of the **Criminal Procedure Act 2009** in respect of an observation I had made *obiter* there. Section 290 (1) of the **Criminal Procedure Act 2009** confers upon the State or an accused person, the right to apply to either a Magistrates’ Court or the High Court for any order necessary to protect the interests of either party or to ensure that a fair trial of all the issues is facilitated, and such applications may relate, *inter alia*, to a challenge to the proceedings on the grounds of the breach of any fundamental human right of the accused person, or any other applicable human rights issue.

27. Pursuant to section 290 (2) and (3) of the **Criminal Procedure Act 2009**:

“(2) A court may hear and adjudicate upon an application made under this section at any time the court determines....

(3) Upon hearing any application under this section the court may make any necessary order to protect the rights of any party to the proceedings...”

28. In **State v. Kumar**, *supra*, I observed that our common law seemed to suggest that if a Magistrate sat in summary jurisdiction than – subject to a sea change in our laws, that Magistrate had no power to hear and determine an application to permanently stay criminal trial proceedings.

29. It seems clear to me *now* that section 290 (1) of the **Criminal Procedure Act 2009** confers statutory authority, hereto deemed lacking, upon the Magistrate in summary jurisdiction to hear rights based applications for abuse of process or delay or executive abuse. As I said, this is a currently evolving area of law and procedure. While the current common law position in respect of a Resident Magistrates’ power in summary jurisdiction to hear fair trial and other rights based applications for

permanent stay may need to be revisited in the future, it is fortunately not something I need concern myself right now, the charge here being an indictable offence remitted to a Magistrate under extended jurisdiction.

30. In the result and for the reasons set out above, I find that this Court has jurisdiction to hear and determine the availability of this plea in bar. In addition, I find that a Resident Magistrate sitting in extended jurisdiction sits as the High Court *alone* i.e. without assessors, and as such possesses statutory jurisdiction to deal with the matter pursuant to section 219 of the **Criminal Procedure Act 2009**.¹⁸

IV. THE PLEA IN BAR – *AUTREFOIS CONVICT*

31. The plea of *autrefois convict* is a principle of great antiquity “now universally accepted in charters of human rights as a basic right”: see **R v. Ali et al** [2011] EWCA Crim 1260 at [28].
32. The modern authority for the principle is **Connelly v. DPP** [1964] 2 All E.R 401.¹⁹ In that decision, Lord Morris of Borth-y-Gest extrapolated and set out several key principles governing the plea in bar of both *autrefois convict* and *acquit* as follows at 1305:

“In giving my reasons for my view that the direction given by the learned judge was entirely correct, I propose to examine some of the authorities and to state what I think are the governing principles. In my view both the principles and the authorities establish – (i) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted; (ii) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted; (iii) that the same rule applies if the crime in respect of which he is being charged is in effect the same or substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (iv) that

¹⁸ As opposed to via the common law. See also: Sawyer, G, 'Autrefois Acquit and Decision Not on the Merits', *Res Judicatae*, vol. 2, no. 3, 1939, p. 203 available online at: <http://classic.austlii.edu.au/au/journals/ResJud/1941/50.pdf> (last accessed on 8 October 2020). See also **R v. Riddle** [1980] 1 S.C.R 380.

¹⁹ See also **R v. Ali et al**, supra at [29].

one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty; (v) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus if there is an assault and a prosecution and conviction, there is no bar to a charge of murder if the assaulted person later dies; (vi) that on a plea of *autrefois* convict or *autrefois* acquit a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates, and facts as are necessary to enable him to show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he could have been convicted; (vii) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings; (viii) that apart from circumstances under which there may be a plea of *autrefois* acquit a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of *res judicata* applies²⁰; (ix) that apart from cases where indictments are preferred and where pleas in bar may therefore be entered the fundamental principle applies that a man is not to be prosecuted twice for the same crime. These principles, which in my view should be accepted and followed, have been evolved over a long period.”

33. Lord Devlin, in his speech at 1339-40, added this caution in respect of Lord Morris of Borth-y-Gest’s enumerated principles:

“For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he

²⁰ **R v. Connelly** supra at 421E – 423A

is then charged. The word offence embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law ... I would add one further comment. My noble and learned friend [a reference to Lord Morris of Borth-y-Gest] in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with my noble and learned friend that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based see *Rex v. Kendrick and Smith*. I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not. If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I should be tempted to stretch the doctrine as far as it would go. But, as that is not my view, I am inclined to favour keeping it within limits that are precise."

34. The plea of *autrefois convict* is analogous to abuse of process but, unlike an abuse of process complaint, is pleaded as of right leading to immediate termination of the criminal trial proceedings if made out, as opposed to *via* an application for stay determined *via* the exercise of judicial discretion: see **R v. Stone** [2005] NSWCCA 344 (24 October 2005) at [25] and **R v G** [2001] 2 Cr App R 615.
35. It must be pled specifically; and in instances where a plea of not guilty is entered, that plea must first be withdrawn and the plea in bar entered in its place: **The King v. Kent-Newbold** [1939] HCA 37; (1939) 62 CLR 398.
36. In **Richards v. The Queen** [1992] UKPC 28, the Privy Council after examining a long list of authorities going back to the 19th century held that "the underlying rationale of *autrefois convict*, as explained by Blackburn J. in *Weymss v. Hopskins*, is to prevent duplication of punishment." The principal holding is that the plea in bar of *autrefois convict* only operates in circumstances where there has been a finding of guilt and some order or sentence that has finally disposed of the matter. As such, a finding of guilt alone would not be sufficient to enliven the plea in bar of *autrefois*

convict.²¹ In contrast, in the case of the plea of *autrefois acquit*, the situation is different. A finding of not guilty, an acquittal and I would venture to say, a stay order could operate as a bar to future proceedings because these orders are final orders that have finally disposed of the matter.

V. DOUBLE JEOPARDY

37. However, the ratio in **Richards v. The Queen** supra ought not to be used to suggest that the plea in bar of *autrefois convict or acquit* and the prohibition against double punishment are, strictly speaking, one and the same thing. They are not. They are separate and distinct sides to the same coin. A good example of how important it is to distinguish between the two concepts lies in the decision of **Rarasea v. The State** [2000] FJHC 146; HAA0027.2000 (12 May 2000). The appellant appealed against sentence on the basis that he was punished twice for the same offence. The High Court of Fiji per Madraiwiwi J. dealt with the application on its merits and linked the complaint back to section 25 (1) of the **Constitution of the Republic of Fiji of 1997** (now abrogated) as opposed to section 28 (1) of that **Constitution: cf. Cerevakawalu v. State (No. 1)** [2001] 2 FLR 262 (6 August 2001) and **Usumaki v. State** [2019] FJHC 1183; HAA14.2019 (19 December 2019).

38. In **Tawatatau v. State** [2007] FJCA 26; AAU0002.2007 (23 March 2007), the Court of Appeal faced with a complaint that a prisoner had been punished twice for the same offence held at [38],

“We consider the question of conviction is not the critical aspect of this appeal and so the question of whether the prison tribunal is a court does not need to be resolved. Neither does the answer lie in a determination whether or not there has been a breach of section 28 of the Constitution. What sections 20, 59 and 82 all provide is the avoidance of double punishment for the same offence.”

39. The Court of Appeal then went on to determine the question of double punishment on its own and ultimately held that whenever a prisoner was punished for a violation of a prison offence and was subsequently charged in the Magistrates’ Court for a criminal offence predicated on the same facts or *vice versa* than he or she was at risk of double punishment. Faced with a situation where the prisoner had already been punished by

²¹ See also **R v. Ali et al** [2011] EWCA Crim 1260 at [70] *obiter*.

the prison tribunal prior to his conviction and sentence in the Magistrates' Court, the Court of Appeal allowed the appeal and quashed the conviction and sentence imposed by the Magistrates' Court.

40. In **Gonemaituba v. State** [2007] FJCA 28; AAU0007.2007 & AAU0066.2006 (25 June 2007), the Court of Appeal (differently constituted) when faced with a similar complaint as that raised by the appellant in **Tawatatau v. State**, supra but for proceedings that had occurred prior to the Court's decision in **Tawatatau v. State** held as follows:

“[11] As we have stated, the decision in **Tawatatau** was after the events to which this appeal relates had taken place. The penalty under the regulations has now been passed and this Court has no power to alter it. However, on the same principle as was stated in **Tawatatau's** case, we can remedy the position by reducing the magistrate's sentence of six months by the period of remission forfeited leaving four months imprisonment consecutive to any sentence the appellant is currently serving.”

41. In **Gonemaituba v. State** supra, the appellant had been subsequently tried and punished by the prison tribunal *after* a Magistrate had convicted and sentenced him for an offence predicated on the same facts. It is clear from the remarks of the Court of Appeal that had the situation been the other way around, the Court would have quashed the Magistrate Court conviction and sentence in the same way and for the same reasons it had in **Tawatatau**, supra. However, because it did not have standing to consider the prison tribunal's decision after the fact, the Court of Appeal attempted to cure the palpable injustice caused by the double punishment by further reducing the prisoner's sentence as imposed by the Magistrates' Court by four months, taking into account the loss of remission he was punished for in respect of his second prison tribunal proceedings.

42. The High Court per Shameem J. took a different approach when confronted with similar circumstances in **Nacani v. State** [2007] FLR 200 (20 April 2007). The learned Judge of the High Court found as follows:

“In this case the Appellant was punished again by the Prisons Tribunal and therefore there was a breach of the *autrefois convict* principle. The decision

was endorsed by the Officer-in-Charge of the Korovou Prison, and the right of review is to the Commissioner of Prisons. I have no confidence that the Appellant is able to seek a review on his own.

For that reason I order that a copy of this judgment be sent down to the Commissioner of Prisons, drawing his attention to the contents of it, and inviting him to review the decision of the Prison Tribunal in relation to the Appellant on the 26th of September 2006. I also order that a copy of the decision of the Fiji Court of Appeal in **Joeli Tawatatau v. The State** be sent for his attention for future cases of escaping. The appeal is otherwise dismissed.”

43. I wish to make one final observation on this point. In **Joeli Tawatatau v. The State**, supra at [14], the Court of Appeal spoke of the protection against double jeopardy as something distinct from “cases strictly of *autrefois convict*.”

44. In the United States of America, the protection against double jeopardy enshrined in the Constitution of the United States of America was described by the Supreme Court in **Brown v. Ohio** [1977] USSC 108; 432 U.S. 161; 97 S.Ct. 2221; 53 L.Ed.2d.187; No. 75 – 6933 (16 June 1977) to operate in this way:

“The principle “protects against a second prosecution for the same offence after acquittal. It protects against a second prosecution for the same offence after conviction. And it protects against multiple punishments for the same offence.... Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorisation by imposing multiple punishments for the same offence ...Where successive prosecutions are at stake, the guarantee serves “a constitutional policy of finality for the defendant’s benefit.” United State v. Jorn, [1971] USSC 16; 400 U.S. 470, 479 [1971] USSC 16; 91 S. Ct. 547, 554 [1971] USSC 16; 27 L.Ed.2d 543 (1971) (plurality opinion). That policy protects the accused from attempts to re-litigate the facts underlying a prior acquittal...and from attempts to secure additional punishment after a prior conviction and sentence...”

45. The principle against double jeopardy derives its roots in the Latin maxim “*non bis idem*”. In the **Prosecutor v. Dusko Tadi – Decision on the Defence Motion on the Principle of Non Bis in Idem en 19-94-1** [1995] ICTY 8 (14 November 1995), the Trial Chamber of the International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 observed:

“The principle of non-bis-in-idem appears in some form as part of the internal legal code of many nations. Whether characterised as non-bis-in-idem, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts...”

46. In short, the principle against double jeopardy protects the criminal defendant from being twice charged for offences he or she has been previously charged and punished. It also protects the criminal defendant from double punishment. It can be pleaded as a plea in bar or it can ground an application for stay on the basis of abuse of process or a specific plea of res judicata.

VI. THE FIJIAN POSITION

47. In **Cerevakawalu v. State (No. 1)** supra, the High Court of Fiji considered **R v. Hogan** (1960) 3 WLR 426, a decision of the English Court of Criminal Appeal. This latter case was authority for the principle that prison offences are an offence against discipline and that proceedings relating to internal discipline were not matters a court of law need concern itself with.

48. The High Court in **Cerevakawalu v. State (No.1)** supra, held that *autrefois convict* did not apply in instances where a prisoner already tried and punished for a prison offence suddenly found himself charged with an offence under our criminal laws because, “(t)he prison rules are there to ensure the maintenance of an orderly prison. They do not create criminal offences, they create disciplinary offences. These are matters relevant for sentence. They do not affect conviction.”

49. The decision in **Cerevakawalu v. State (No. 1)** supra was subsequently overturned in **Cerevakawalu v. State (No. 2)** [2001] FJCA 25; AAU0024U.2001S (22 November 2001) although it bears noting that the Court quashed the appellant’s conviction and

sentence on the basis that the appellant's charge was defective. Interestingly, the Court of Appeal felt it necessary to add *obiter* that "although the factual background was the same for both the internal prison disciplinary procedures and the charges laid under the Criminal Code, the offences themselves are quite different. For that reason had it been necessary to consider this particular ground on its own the appeal would have failed."

50. In **Tawatatau v. State**, supra, the Court of Appeal, some six years after **Cerevakawalu v. State (No. 1)**, had occasion to examine that decision in the light of the double punishment question raised before it. The Court held at [36], "We find it surprising that the decision of the possibility of a breach of section 28 of the **Constitution**²² was considered in the absence of *** evidence²³ and the lack of evidence makes the finding that there was no double jeopardy startling. We do not find this case authority for the respondent's contention in this case²⁴."
51. The Court of Appeal then went on to consider the double jeopardy question purely through the lens of double punishment and held that in circumstances where a prisoner was first punished for a prison offence, he or she was ultimately in jeopardy of being punished twice if he or she were subsequently charged for the same offence under a criminal statute. The same would hold true *vice-versa*, the Court held.
52. The **Tawatatau v. State** supra approach aligns itself with the approach taken by the High Court in **Rarasea v. State**, supra, insofar as the Court of Appeal and the High Court in both cases chose to examine the double jeopardy question before it purely through the lens of the prohibition against double punishment.
53. **Rarasea v. State**, supra was a decision predicated on section 25 of the **Constitution Act of 1997** (now abrogated); now mirrored at section 11 (1) of our current **Constitution** which provides, "Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment."

²² Now abrogated. Its mirror provision is found at section 14 (1) of the **Constitution of the Republic of Fiji**.

²³ Referring here to the learned High Court judge's observations that it was "not clear whether the appellants were disciplined for the same conduct, or whether it was conduct arising from the hostage situation." Although not remarked upon in **Tawatatau v. State** supra, it is clear **Cerevakawalu v. State (No. 2)** supra, that the reality of the matter was that the disciplinary offence was different from the common offence charged.

²⁴ The respondent being the State.

54. Interpreting that last prohibition, the High Court of Fiji in Rarasea v. State, supra held:

“It is now settled law that a constitution is an instrument sui generis requiring special rules of interpretation: Minister of Home Affairs v. Fisher [1989] AC 319. These rules require a broad and purposive approach as was recognised by Mudholker J in Sakal Papers (P) Ltd v. Union of India and Ors [1961] INSC 281; AIR 1982 SC 305 at 311

“It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our constitution as fundamental and, therefore, while considering the nature and content of those rights the courts must not be too astute to interpret the language of the constitution in so literal a sense as to whittle them down. On the other hand the court must interpret the constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.”

Therefore any consideration of section 25 (now repealed and mirrored at section 11 of the current Constitution) must be approached with the understanding that any treatment or punishment that impinges upon the inherent dignity of the individual will contravene the provision.”

55. The High Court per Madraiwiwi J. held ultimately that the punishments meted out by the Commissioner of Prisons, namely the reduction of remission and rations breached the principle against double jeopardy. He held that any reduction of rations amounted to inhumane and degrading treatment and as such, was an unconstitutional measure, the right to food being a basic human right. In addition, he ordered the immediate restoration of the remission lost; the appellant having already been sentenced in court for the escaping that he had then subsequently been charged and punished for in prison.

56. Having set out this common law background, I now turn my mind to the statute that the State relies on.

57. Section 37 (2) of the **Correction Services Act 2006**, the State submits, permits both double charging and a narrow form of double punishment and as such, the State asserts, these defendants have no ground for complaint.

58. Section 37 (2) of the **Corrections Services Act 2006** provides as follows:

“(2) When a prisoner is charged with and punished for a prison offence, nothing shall prevent criminal proceedings being taken against the prisoner arising from the same circumstances, but a court shall take into account any penalty imposed under this Act, when sentencing a prisoner for the criminal offence.”

(Underline added)

59. The key word is “circumstances”. A rational reading of section 37 (2) of the **Corrections Act 2006** examined through the lens of section 14 (1) of the **Constitution** as well as section 11 of the **Constitution** as interpreted by **Rarasea v. State**, *supra* leads one to conclude that all the provision does is reflect the common law understanding articulated by Lord Devlin in **Connelly v. Director of Public Prosecutions**, *supra* that the principle of *autrefois convict* does not extend to a subsequent offence based on the same or substantially the same circumstances as a prior offence charged and convicted for. To determine the question of *autrefois convict*, one must look to the legal characteristics of the actual offences charged initially and subsequently.²⁵ In short, the first offence and the second offence must be predicated upon the same act or omission. If they are, then *autrefois convict* will apply.²⁶ If they are not, then *autrefois convict* will not.

60. Clearly then, this provision does not seek to derogate rights already available to defendants under our **Constitution**. Instead, Section 37 (2) of the **Correction Service Act 2006** may well add one additional dimension, perhaps in recognition of the sanctity of the prohibition against double punishment. A court charged with sentencing a person convicted of an offence predicated upon the same or similar circumstances that grounded the prison offence must take into account the sentence

²⁵ See **Savu v. The State** [2004] FJHC 210; HAM0033D.2004S (7 June 2004).

²⁶ See **Blockburger v. United** [1932] USSC 4; 284 U.S.299, 304 [1932] USSC 4; 52 S.Ct 180, 182 [1932] USSC 4; 76 L.Ed. 306 (1932) and **Brown v. Ohio** [1977] USSC 108; 432 U.S. 161; 97 S.Ct. 2221; 53 L.Ed.2d.187; No. 75 – 6933 (16 June 1977).

imposed by the prison tribunal. How this is taken into account is left to the discretion of the second sentencing court and in my considered view, courts considering section 37 (2) of the **Correction Service Act 2006** would do well to keep in mind section 59 of the **Interpretation Act** and section 3 (2) of the **Crimes Act 2009** and the ratio in **Tawatatau v. State**, supra.

61. At the end of the day, the Constitution is sovereign and pursuant to section 7 (3) and (4) of the **Constitution**, a narrow interpretation of section 37 (2) of the **Correction Services Act 2006** is warranted in order to keep that statutory provision within constitutional limits and to permit a reading that respects the rights and freedoms provided for in our Bill of Rights, in particular, the protection against double jeopardy expressly provided for at section 14 (1) and section 11 of the **Constitution**. To read section 37 (2) of the **Correction Service Act 2006** any other way, and in particular, to read it the way counsel for the Director urged me to read it would be to render that provision unconstitutional.
62. The ratio in **Usumaki v. State** [2019] FJHC 1183; HAA14.2019 (19 December 2019) must be read through the lens of the cases and provisions highlighted above. Ultimately, while it follows the same logic as **Cerevakawalu v. State (No. 1)** supra, it does not grapple with the same issues of *autrefois convict* and double punishment specifically pleaded in this instant case before me and so can be distinguished on that basis.
63. The decision in **Usumaki v. State**, supra was an appeal from the decision of a Magistrates' Court sitting in summary jurisdiction. Magistrates' Courts are creatures of statute and on a literal reading of section 37 (2) of the **Corrections Services Act 2006**, the High Court held that the learned Magistrate was correct in reducing one month from the ultimate term imposed to balance out the loss of 1 months remission ordered previously by the Prison Tribunal for the same offence.
64. Clearly when faced with the situation where the appellant had already been dealt with by the prison tribunal, the original sentencing court felt that the only way to balance the scales was to adjust the subsequent sentence by factoring in the initial loss of remission, restoring it to the appellant through an equivalent reduction in his prison term for the second subsequent offence. The manner in which the learned Magistrate

took the initial prison term into account is on all fours with the approach taken by the Court of Appeal in **Gonemaituba v. State**, supra.

65. Unlike the defendants in this case, the appellant in **Usumaki v. State**, supra had not specifically entered a plea of *autrefois convict* in the court below. As such, the issue before the learned Magistrate was double punishment.
66. So that brings us to the plea of *autrefois convict* specifically pleaded here. The defendants argue that the prison offence of “*assault or act of violence*” that they were charged and punished for before the prison tribunal was for all intents and purposes a criminal offence and that having been charged and punished for that crime, they cannot be subsequently punished here and now for an “*act with intent to cause grievous harm*” predicated upon the exact same act that they were tried and punished for previously.
67. The question is, does their claim have any merit. The State do not dispute that its Information is predicated upon the exact same act that grounded the prison offence that the defendants had been tried and punished for previously but the State asserts that *autrefois convict* is not available because prison offences are purely disciplinary offences and as such are nothing this court need concern itself with here and now.

VII. THE POSITION IN THE UNITED KINGDOM

68. The position the State takes is derived directly from the remarks of Lord Chief Justice Parker in the English Court of Criminal Appeal case of **R v. Hogan**, supra. **R v. Hogan** stood as good authority in the United Kingdom for many years but in 2017, the court of criminal appeal signalled a massive shift in English law in the intervening fifty years since **R v. Hogan** was decided.
69. In **Regina v. Robinson** [2017] WLR (D) 698, the England and Wales Court of Criminal Appeal observed:

“We pay tribute to the researches of counsel on the question of whether *R v. Hogan* [1960] 2 QB 513 can stand in the light of modern legal developments in and European law. We do not need to formally decide this point but have little doubt in the light of the authorities in such as **Engel v. Netherlands** 1 EHRR 647; **Ezeh and Connors v. UK** (2004) 39 EHRR 1; **Zolotukhin v.**

Russia (2012) 54 EHRR 987; **A and B v Norway applications No. 241330/11 and 2978/12** [2016] ECHR 987; **R v. McLean** [2014] NIQB 124 and **R (Napier) v. Secretary of State for the Home Department** [2004] WLR 3056. In our view the questions admits of one answer. Where a prison adjudication proceeding involves punishment by loss of liberty such proceedings amount to “criminal proceedings” by a body of competent jurisdiction and the rule against double jeopardy applies i.e. the decision in **R v. Hogan** (supra) no longer stands.”

70. In **Engel v Netherlands** 1 EHRR 647, the European Court of Human Rights formulated what has come to be known as the *Engel criteria* for determining whether a person accused of a disciplinary offence can be said to be “charged with a criminal offence”.²⁷

71. As C.J. F Kidd explains in his article titled “**Disciplinary Proceedings and the Right to Fair Trial under the European Convention on Human Rights**”,

“These *Engel* criteria or factors have been continuously applied in the subsequent case law. So much so that, although the Court confined its remarks to the context of military disciplinary proceedings, they must now be regarded as constituting the classic statement of the relevant criteria. They point to three stages in any investigation:

1. *The domestic classification.* The classification of the proceedings in issue in the domestic law of the respondent State is the starting point but is no more than that. As seen, if they are classed as criminal the Convention guarantees apply without question. If they are classed as disciplinary, including the situation where the State has chosen to “prosecute the author of a ‘mixed offence’ on the disciplinary rather than on the criminal plane”²⁸, recourse to stages 2 and 3 below might yet show that the proceedings involve the

²⁷ Kidd, C. J. F. “Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights.” *The International and Comparative Law Quarterly*, vol. 36, no. 4, 1987, pp. 856–872. *JSTOR*, www.jstor.org/stable/760357. Accessed 27 May 2020.

²⁸ *Ozturk v. Germany* (1984) 6 E.H.R.R. 409 at p. 678.

determination of a criminal charge for the purposes of the Convention.

2. *The inherent nature of the disciplinary offence.* Where the offence with which the applicant was charged in disciplinary proceedings has an inherently criminal character – where its “very nature”²⁹ is criminal – that is strong evidence that the autonomous Convention meaning has been satisfied. This is where the comparative or common denominator approach is particularly relevant....Another pointer to such a nature is where the disciplinary offence could have been prosecuted as a criminal offence in the law of the respondent State i.e. that it is a “mixed offence” referred to above.
3. *The nature and severity of the penalty risked.* In particular, where imprisonment or other serious deprivation of liberty is a possible penalty in disciplinary proceeding, that indicates, in a “society subscribing to the rule of law”, that the charge is criminal.³⁰ Conversely where the penalty risked is of a nature that not normally found in criminal law, but rather is special to disciplinary proceedings, an opposite conclusion is indicated. That is so even where the penalty is of considerable severity such as dismissal of the applicant from his employment.

...

In considering the severity of the penalty it will be noted that it is the maximum penalty which could have been inflicted upon the applicant in the disciplinary proceedings that is crucial. For example, one of the successful applicants in *Engel* had in fact been sentenced to 12 days “aggravated arrest” (not involving loss of liberty). Yet, because he *could* have been sentenced to several months in a disciplinary unit that was the penalty at risk. The light penalty actually imposed could not, in the words of the Court, “diminish the importance of what was initially at stake.”

²⁹ Ibid

³⁰ *Idem*, p 678 – 679.

72. Ultimately, Criteria 1 is a function of the supranational nature of the European Court of Human Rights and a recognition of the margin of appreciation doctrine that applies as a threshold test for that Court.

73. In **Ozturk v. Germany** (1984) 6 E.H.R.R. 409 at [52] the Court made very clear that:

“[52] In any event, the indications furnished by the domestic law of the respondent State have only a relative value. The second criterion stated above – the very nature of the offence, considered also in relation to the corresponding penalty – represents a factor of appreciation of greater weight.”

VIII. LOCALISING THE ENGEL CRITERIA

74. Criteria 1 is not something that a national court need concern itself with. The answer to the question whether a prison offence is criminal or disciplinary in nature is something that every court Fiji must determine for itself.

75. In my considered view, the threshold test for the classification of offences in Fiji ought to involve a two-step process as follows:

(1) What is the inherent nature of the disciplinary offence? In answering this question, the Court can either look to the manner in which the proceedings were conducted³¹; and it can also look to whether the offences charged were inherently criminal in nature or whether they were mixed offences i.e. offences capable of being both disciplinary and criminal in nature.³²

(2) Did the disciplinary offence give rise to a “truly penal consequence”? In answering this question the Court can look to whether the punishment was a term of imprisonment or a fine³³; or whether the consequence formed a part of an arsenal of sanctions to which the accused may be liable in

³¹ See **R v. Wigglesworth** [1987] 2 SCR 541

³² See **Engel**, supra, **Ozturk**, supra and **Ezeh and Connors v. The United Kingdom**: ECHR 9 October 2003; 40086/98, 39665/98, Times 30-Oct-2003, [2003] ECHR 485.

³³ See **R v. Wigglesworth**, supra.

*respect of a particular offence and the sanction imposed was one imposed in furtherance of the purpose and principles of sentencing*³⁴; and it could also look to whether the punishment resulted in loss of liberty or an addition to the days that a prisoner could legitimately have expected to serve.³⁵

76. In **Ezeh and Connors v. The United Kingdom**: ECHR 9 October 2003; 40086/98, 39665/98, Times 30-Oct-2003, [2003] ECHR 485, the European Court of Human Rights at [86] held:

“[86] In addition, it is the court’s established jurisprudence that the second criteria laid down in *Engel* are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as “criminal” from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 21, § 54, and *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 23, § 55). This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, p. 20, § 47; *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 756, § 56; *Garyfallou AEBE v. Greece*, judgment of 24 September 1997, *Reports* 1997-V, p. 1830, § 33; and *Lauko v. Slovakia*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2504-05, § 57).”

IX. THE INHERENT NATURE OF THE PRISON OFFENCE CHARGED

77. In **R v. Wigglesworth** [1987] 2 S.C.R. 541, the appellant had been a police officer with the Royal Canadian Mounted Police. He had been charged and convicted for a “*major service offence*” under the *Royal Canadian Mounted Police Act, R.S.C. 1970*

³⁴ See **R v. Rogers** 2006 SCC 15, [2006] 1 S.C.R. 554 at [52] and **Canada (Attorney-General) v. Whaling** 2014 SCC 20, [2014] 1 SCR 392

³⁵ See **R v. Shubley** [1990] 1 SCR 3 (minority decision) and **Ezeh and Connors**, *supra*.

c. *R -9*. He was subsequently charged for assault under Canada's criminal laws and he argued that this violated his section 11 right not to be tried and punished twice for the same offence.

78. On appeal to the Court of Appeal for Saskatchewan, the court of appeal held that the “*major service offence*” proceedings were purely disciplinary in nature. Cameron J.A of that court stated:

“A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constituted a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the person must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example, a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.”

79. Constable Wigglesworth was liable under the *Royal Canadian Police Act* to a term of imprisonment of 1 year. Cameron J.A expressed no opinion as to the constitutionality of the power given to the Royal Canadian Mounted Police to imprison members of its force found guilty of major service offences.

80. The Supreme Court of Canada held that the protection at section 11 of its Constitution against double jeopardy applied only to persons prosecuted by the State for public offences involving punitive sanctions i.e. criminal, quasi-criminal and regulatory offences.³⁶ The Supreme Court then went on to opine in its majority decision that:

³⁶ See **R v. Wigglesworth** at [16]

“21. While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase “criminal or penal matters” which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because of its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.

...

22. In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity...”

24. This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than the maintenance of internal discipline within the limited sphere of activity³⁷... However, as this was not argued before us in this appeal I shall assumed that it is possible that

³⁷ In respect of this last, the Supreme Court of Canada distinguished between fines subsequently used to benefit the Force as opposed to going to the Consolidated Fund. In the case of the former, this was clear indication that the purpose of punishment was to maintain internal discipline. In the case of the latter, that would be clear indication that the fine was imposed for the purpose of redressing a wrong done to society.

the “by nature” test can be failed but the “true penal consequence” test passed. Assuming such a situation is possible, it seems to be me that in cases where the two tests conflict the “by nature” test must give way to the “true penal consequence” test. If an individual is to be subject to penal consequences such as imprisonment- the most severe deprivation of liberty known to our law – then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.”

81. In the final, the Supreme Court of Canada held that while a “**major service offence**” failed the “by nature” test, it did have a true penal consequence. As such, “the “by nature” test must give way to the “true penal consequence” test”³⁸ and the protection against double jeopardy enshrined at section 11 of the Canadian Human Rights Charter applied to the “**major service offence**” Constable Wigglesworth was originally charged with. His appeal ultimately failed on the basis that a charge for “**major service offence**” shared none of the legal characteristics of a charge for “**assault**” and as such, though based on the same circumstances, were not the same offence. The appellants’ appeal in Misioka v. State [2007] FJCA 17; AAU0052, AAU0053.2006S (23 March 2007) failed on the same basis.³⁹

82. In R v. Shubley [1990] 1 S.C.R 3, the Supreme Court of Canada had occasion to consider whether Shubley’s act of assaulting a fellow prisoner was inherently criminal and whether close confinement or loss of earned remission constituted a true penal consequence. The Supreme Court of Canada by majority decision in answer to the first question opined that his act in assaulting a fellow prisoner was not inherently criminal because:

“The appellant was not being called to account to society for a crime violating the public interest in the preliminary proceedings. Rather, he was being called to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules. If he had been called upon twice to answer to the State for his crime, s. 11 (h) would apply. But section 11 (h) does not operate so as to preclude his being answerable to prison officials for a breach of discipline as well as to the State for his crime.”

³⁸ See R v. Wigglesworth at [26].

³⁹ See also Misioka v. State [2008] FJSC 54; CAV0012.2007 (25 February 2008).

83. However, in **Ezeh and Connors v United Kingdom**, *supra*, the European Court of Human Rights took a completely different view after having carefully considered the Government's submissions through the lens of its previous decision in **Campbell and Fell v. United Kingdom** ECHR 28 June 1984:

“It was noted that misconduct by a prisoner might take different forms; while certain acts were clearly no more than questions of internal discipline, others could not be seen in the same light. Relevant indicators were that “some matters may be more serious than others”, that the illegality of the relevant act might turn on the fact that it was committed in prison and that conduct which constituted an offence under the Rules might also amount to an offence under the criminal law so that, theoretically at least, there was nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings.

102. Moreover, criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence (see *Öztürk, Bendenoun and Lauko*, judgments cited above, pp. 20-21, § 53, p. 20, § 47, and p. 2505, § 58, respectively).

103. In the present case, the Court notes, in the first place, that the offences in question were directed towards a group possessing a special status, namely prisoners, as opposed to all citizens. However, the Court does not accept the Government's submission that this fact renders the nature of the offences *prima facie* disciplinary. It is but one of the “relevant indicators” in assessing the nature of the offence (see *Campbell and Fell*, cited above, p. 36, § 71).

104. Secondly, it was not disputed before the Grand Chamber that the charge against the first applicant corresponded to an offence in the ordinary criminal law (sections 4 and 5 of the 1986 Act). It is also clear that the charge of assault against the second applicant is an offence under the criminal law as well as under the Prison Rules. It is true that the latter charge involved a relatively minor incident of deliberately colliding with a prison officer, which may not necessarily have led to prosecution outside the prison context. It is also true that

the extreme gravity of the offence may be indicative of its criminal nature, as indicated in *Campbell and Fell* (see paragraph 101 above). However, that does not conversely mean that the minor nature of an offence can, of itself, take it outside the ambit of Article 6, as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the second of the *Engel* criteria, necessarily requires a certain degree of seriousness (see *Öztürk*, cited above, pp. 20-21, § 53). The reliance on the severity of the penalty in *Campbell and Fell* (pp. 37-38, § 72) was a matter relevant to the third of the *Engel* criteria as opposed to a factor defining the nature of the offence.

Relying on Convention case-law, the Government contested the weight to be attached to this concurrent criminal and disciplinary liability. However, in the case most directly in point, *Campbell and Fell* (p. 36, § 71), the Court referred to even a “theoretical” possibility of the impugned acts being the subject of concurrent criminal and disciplinary proceedings as a relevant factor in the assessment of the nature of the offence and it did so independently of the gravity of the offences in question. Accordingly, and even noting the prison context of the charges, the theoretical possibility of concurrent criminal and disciplinary liability is, at the very least, a relevant point which tends to the classification of the nature of both offences as “mixed” offences.

105. Thirdly, the Government submit that disciplinary rules and sanctions in prison are designed primarily to ensure the successful operation of a system of early release so that the “punitive” element of the offence is secondary to the primary purpose of “prevention” of disorder. The Court considers that awards of additional days were, from any viewpoint, imposed after a finding of culpability (see *Benham*, cited above, p. 756, § 56) to punish the applicants for the offences they had committed and to prevent further offending by them and other prisoners. It does not find persuasive the Government's argument distinguishing between the punishment and deterrent aims of the offences in question, these objectives not being mutually exclusive (see *Öztürk*, cited above, pp. 20-21, § 53) and being recognised as characteristic features of criminal penalties (see paragraph 102 above).

106. Accordingly, the Court considers that these factors, even if they were not of themselves sufficient to lead to the conclusion that the offences with which the applicants were charged are to be regarded as “criminal” for Convention purposes, clearly give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter.

107. The Court finds, as did the Chamber, that it is therefore necessary to turn to the third criterion: the nature and degree of severity of the penalty that the applicants risked incurring (see *Engel and Others*, pp. 34-35, § 82, and *Campbell and Fell*, pp. 37-38, § 72, both cited above).”

84. I agree with the decision of the European Court of Human Rights. In my considered view, the prison offence of “*assault or act of violence*” cannot be characterised as purely disciplinary. By its very nature it can be both a disciplinary and a criminal offence.

85. While prisoners have a duty to comport themselves in accordance with prison rules, it is equally clear that the State have a public interest in prosecuting and punishing citizens and residents of Fiji, whether imprisoned or free, who assault or commit other acts of violence against another person in Fiji.

86. That being so, the specific prison offence of “*assault or act of violence*” is a mixed offence that could well fall under the category of either disciplinary or penal offence or both.

X. TRUE PENAL CONSEQUENCE

87. It is therefore necessary to consider whether the maximum penalty of forfeiture of remission of up to 3 months that each of these inmates were liable to consists a true penal consequence.

88. In **Chand v. State** [2005] FJHC 581; HAA0099.2005L (26 August 2005), the High Court of Fiji per Connor J. took the view that:

“Remission with respect to a prison sentence is not a right but is something that reflects good behaviour and the like. Any misbehaviour which in this instance was escaping from lawful custody will always have the potential to impact on the loss of remission. As I said, the remission is effectively a reward for good behaviour. Bad behaviour means you lose the right to that reward. It is not in itself an additional punishment; it is the removal of the benefit.”

89. The case of **Chand v. State**, supra was decided two years before **Tawatatau v. State**. No doubt had it been decided later, the ultimate outcome in **Chand** on the question of double jeopardy would have been different.
90. The Court of Appeal per Goundar, Inoke and Madigan JJA in **Raogo v. State** [2010] FJCA 13; AAU0117.2007 (9 April 2010) at [10] accepted that remissions under the **Prisons Act** (now repealed) are the entitlement of prisoners upon qualification.
91. In **Timo v. State** [2019] FJSC 22; CAV0022.2018 (30 August 2019), the Supreme Court of Fiji acknowledged at [39] that remission involved the cancellation of a part of prison sentence and at [54] indicated that parole and remission are entitlements that had to be earned. This is certainly true insofar as parole is concerned but by statute that is not the position in respect of remission. Remission is automatically conferred on a prisoner upon entry into prison and *can be lost* and re-earned, but it is not something that needs to be earned from day one.
92. Section 27 of the **Correction Service Act 2006** provides:
- “27 (1) All convicted prisoners shall be classified in accordance with the procedures prescribed in Commissioners Orders.
- (2) For the purposes of the initial classification a date of release shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month.
- (3) Notwithstanding subsection (2), where the sentence of the prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.
- ”

(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.

(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act.”

93. A date of release calculated on the basis of a one-third remission of the sentence for any term of imprisonment not exceeding one month is a statutory requirement for the initial classification of a convicted prisoner.⁴⁰ Thereafter, the remission of sentence applied at the initial classification shall be dependent on good behaviour and may be forfeited and restored in accordance with Commissioners Orders.⁴¹

94. Ultimately, any prisoner sentenced to imprisonment for more than one month is entitled to a third remission of his or her sentence upon initial classification. This one third remission must be calculated *without regard* to any non-parole periods imposed, although for the avoidance of doubt and despite that calculation, the prisoner *must* serve the full term of the non-parole period before he or she can be released. These provisions give legislative effect to the holding of the Supreme Court in **Timo v. State** supra, that remission must be calculated having regard to the head sentence and will thereafter be held in abeyance until the conclusion of the non-parole period.

95. The use of the word “forfeited” at section 28 (1) of the **Corrections Service Act 2006** is particularly telling. To forfeit something is to “lose or be deprived of (property or a right or privilege) as a penalty for wrongdoing.”⁴²

96. In **Shubley v. State** supra, the majority held that loss of remission and solitary confinement did not constitute a true penal consequence. Shubley, an inmate, had allegedly assaulted another inmate. The superintendent of the detention centre conducted an informal hearing to ascertain the facts pertaining to the appellant’s alleged misconduct and ordered him placed in solitary confinement for five days with a restricted diet. He was subsequently charged with assault causing bodily harm.

⁴⁰ See s. 27 of the **Corrections Service Act 2006**.

⁴¹ See s. 28 of the **Corrections Service Act 2006**.

⁴² Concise Oxford English Dictionary: 12th Edition.

97. The majority per McLachlin J. held that remission did not shorten a sentence for imprisonment; something that could only happen on appeal. Instead, remission, McLachlin observed:

“permits an inmate who has “applied himself industriously” to the prison program, to serve part of his sentence outside the prison. The privilege of remission (it is not a right) is conferred as a matter of prison administration to provide incentives to inmates to rehabilitate themselves and cooperate in the orderly running of the prison. The removal of that privilege for conduct that violates these standards is equally a matter of internal prison discipline. Forfeiture of remission does not constitute the imposition of a sentence of imprisonment by the superintendent, but merely represents the loss of a privilege dependant on good behaviour....

I conclude that the sanctions conferred on the superintendent for prison misconduct do not constitute “true penal consequences” within the *R v. Wigglesworth* test.”

98. Cory J., of the Canadian Supreme Court, delivered this strong dissent:

“Prisons within prisons have been known to man as long as prisons have existed. As soon as castles had dungeons there were special locations within those dungeons for torture and for solitary confinement. The grievous effects of solitary confinement have been almost instinctively appreciated since imprisonment was devised as a means of punishment. Prisons within prisons exist today, exemplified by solitary confinement.

The complete isolation of an inmate from other is quite different from confinement to a penal institution where some form of contact with people both inside and outside is the norm. Close or solitary confinement is a severe form of punishment. The vast majority of the human race is gregarious in nature. To be deprived of human companionship for a period of up to 30 days can and must have very serious consequences. Literature of yesteryear and today is replete with the deterrent effects of such punishment.

...

I would conclude, therefore, that solitary confinement must be treated as a distinct form of punishment and that its imposition within a prison constitutes a true penal consequence.

...

In my view, the loss of earned remission or of the ability to earn remission which is also contemplated as a possible penalty under s. 31 (2) is likewise a penal consequence attaching to a serious breach of discipline. While the opportunity to earn remission might well be a privilege, once it has been earned it should in the ordinary course of events be viewed as an acquired right. Although it may technically correct to say that earned remission does not reduce the length of a sentence, its true penal effect is to do precisely that. To every inmate the significant portion of the sentence is the time served within the prison. Imprisonment means the denial of freedom of movement and the segregation or isolation of an inmate from society. That being so, then the real termination of a prison sentence, certainly from the perspective of the inmate, is the moment when he or she is permitted to reintegrate into society. It is that freedom of movement and the ability to interact with others which is so very important to every individual. From the point of view of the inmate, any shortening of the period of confinement through earned remission has the same effect as a reduction of sentence.”

99. The European Court of Human Rights took a position that mirrored the minority position in **R v. Shubley**, supra. In **Ezeh and Connor v. The United Kingdom**, supra, the Grand Chamber held as follows:

“The nature and severity of the penalty which was “liable to be imposed” on the applicants (see *Engel and Others*, cited above, pp. 34-35, § 82) are determined by reference to the maximum potential penalty for which the relevant law provides (see *Campbell and Fell*, cited above, pp. 37-38, § 72; *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, p. 18, § 34; *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, p. 17,

§ 34; *Benham*, cited above, p. 756, § 56; and *Garyfallou AEBE*, cited above, p. 1810, §§ 33-34).

The actual penalty imposed is relevant to the determination (see *Campbell and Fell*, cited above, p. 38, § 73, and *Bendenoun*, cited above, p. 20, § 47) but it cannot diminish the importance of what was initially at stake (see *Engel and Others*, cited above, p. 36, § 85, together with *Demicoli, Garyfallou AEBE* and *Weber*, loc. cit.).

121. Turning therefore to the nature of the penalties in question in the present case, the Court notes that the parties did not dispute the Chamber's observations concerning the effect in domestic law of the award of additional days under the 1991 Act. The Chamber found in this connection that remission of part of a prisoner's sentence was initially considered in domestic law to be a privilege which could be granted and taken away at the discretion of the authorities, and to which the prisoner had no legal entitlement. However, prior to the 1991 Act, the domestic courts had already come to reject the notion that remission was a privilege and that prisoners who had lost remission had not lost anything to which they were entitled. The courts considered that, if remission was not a legal "right", prisoners had at least a legitimate expectation of release on the expiry of the relevant period (see paragraph 42 above). In *Campbell and Fell* (pp. 37-38, § 72), the Court accepted that the practice of granting remission, as it existed at that time, was such that it created in the prisoner a legitimate expectation that he or she would recover his or her liberty before the end of the term of imprisonment and that forfeiture of remission had the effect of causing the detention to continue beyond the period corresponding to that expectation. The Court found support for that view in the judgment of Lord Justice Waller in *R. v. Hull Prison Board of Visitors, ex parte St Germain and Others* (cited above).

The Court does not see any reason to depart from this analysis made by the Chamber of domestic law prior to the 1991 Act.

122. The Court therefore considers, as did the Chamber, that the effect of the 1991 Act was to introduce more transparency into what was already inherent

in the system of grants of remission. While it abandoned the term “loss of remission” in favour of “awards of additional days”, the 1991 Act embodied in law what had already been the reality in practice. Accordingly, any right to release did not arise until the expiry of any additional days awarded under section 42 of the 1991 Act. The legal basis for detention during those additional days continued therefore to be the original conviction and sentence.

123. As noted by Lord Chief Justice Woolf in *R. v. the Secretary of State for the Home Department, ex parte Carroll, Al-Hasan and Greenfield* (see paragraph 52 above), the award of additional days did not increase a prisoner's sentence as a matter of domestic law. The applicants' custody during the additional days awarded was thus clearly lawful under domestic law. Nevertheless, the Court does not consider that this goes to the heart of the question of the precise nature of the penalty of additional days. As recently demonstrated by the Court in *Stafford v. the United Kingdom* ([GC], no. 46295/99, §§ 64 and 79, ECHR 2002-IV), the Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation. The reality of awards of additional days was that prisoners were detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings which were legally unconnected to the original conviction and sentence.

124. Accordingly, the Court finds that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability (see paragraph 105 above).”

100. I agree entirely with the dissent in **R v. Shubley**, supra and with the decision of the Grand Chamber in **Ezeh and Connor v. The United Kingdom**, supra. I find that the 30 day actual forfeiture of remission ordered in this case and the total 90 day forfeiture of remission each of them were ultimately liable to constituted a true penal consequence. Within the framework governing our Corrections Service, it constituted added days to the term the prisoner and specific to the case at bar, the terms these defendants had expected to serve up to that point.

101. In the result and for the reasons set out above, I hold that the prison offence of “*assault or act of violence*” and the offence of “*act with intent to cause grievous harm*” were both criminal offences predicated on the same acts and that as such, the principle of *autrefois convict* applies.

102. That being so, the pleas in bar must and do succeed. These criminal proceedings are terminated forthwith.

103. Before I end with articulating each party’s right to appeal, I pause here to note that the second question need not be answered in light of my finding of the first point. However, because counsel and the defendant’s spent considerable time on this point, I will say this.

104. At the end of the day, charges filed for the same offence predicated upon the same act charged for in prison may ultimately be an exercise in futility: *see* section 3 (2) of the **Crimes Act 2009** and section 59 of the **Interpretation Act** and **Tawatatau v. State**, *supra*.

105. In the future, it may be best for the Corrections Serve and the Office of the Director of Public Prosecutions to work together to develop a memorandum of understanding in respect of which type of prison offences may best be dealt with in prison and which type of prison offences may best be dealt with under the **Crimes Act 2009** in order to avoid situations like this from arising in the future.⁴³ Or alternatively, it may be time to amend the **Commissioner’s Orders** or the **Correction Service Regulations** to include express provision to the effect that:

“1. In situations where a serious criminal offence appears to have occurred the police should be contacted immediately.

2. Where the charge is escape or assault or act of violence, the adjudicator will confirm with the Office of the Director of Public Prosecutions whether the prisoner is or has been prosecuted for the same offence. If so, it would be double jeopardy to continue with the adjudication of that charge.”⁴⁴

⁴³ Memorandums of Understanding of this nature have been signed between prosecuting authorities and Prison Tribunals in the United Kingdom as can be seen from the domestic decisions from the United Kingdom cited through this decision.

⁴⁴ *See* **R v. Robinson** *supra*.

106. Any party not satisfied with the decision of this Court is at liberty to appeal to the Court of Appeal within 30 days.

.....
Seini K Puamau
RESIDENT MAGISTRATE

Dated at Lautoka this 22nd day of October 2020.