

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV0002 OF 2022

Court of Appeal No. AAU 113 of 2014

BETWEEN : **MOHAMMED ISMAIL**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Honourable Acting Chief Justice Salesi Temo,**
Acting President of the Supreme Court

: **The Honourable Justice Terence Arnold**
Judge of the Supreme Court

: **The Honourable Justice William Young**
Judge of the Supreme Court

Counsel : **In Person for the Petitioner**

: **Ms. L. Latu for the Respondent**

Date of Hearing : **5 October 2023**

Date of Judgment : **26 October 2023**

JUDGMENT

Temo, AP

[1] I have read the draft judgment of His Lordship Mr. Justice Terence Arnold. I agree entirely with his Lordship's judgment and proposed orders.

Introduction

[2] The Petitioner, Mohammed Ismail, was tried and convicted in the High Court on three counts – rape (s 207(1) and (2)(a) of the Crimes Act 2009), attempted rape (s 208 of the Act), and indecently insulting a person (s 213(1)(b)). The offences were committed against his wife, from whom he was separated. She was six months pregnant at the time. On 26 August 2014, Mr Ismail was sentenced to a total term of imprisonment of 12 years, with a non-parole period of nine years.

[3] Mr Ismail sought leave to appeal to the Court of Appeal against his conviction on three grounds. In a ruling dated 20 September 2016, a single Judge of the Court granted him leave to appeal on one ground only, relating to alibi.

[4] In a judgment dated 29 April 2021, the Court of Appeal dismissed Mr Ismail's conviction appeal.¹ He then filed two petitions for leave to appeal to this Court, one against his conviction and another against his sentence. He sought an enlargement of time in respect of both petitions. Mr Ismail is a serving inmate, acting for himself.

Developments at the hearing

[5] At the outset of the hearing before this Court, the Acting President, Temo ACJ, enquired about Mr Ismail's release date from prison. Mr Ismail said that he had been told that he

¹ *Mohammed Ismail v State* [2021] FJCA 109.

was due for release on 26 August 2025. This date was confirmed by State counsel, Ms Latu. The Acting President then pointed out that, consistently with recent Supreme Court authority, Mr Ismail should have been released on 26 August 2023.

- [6] To explain, although s 49 of the Corrections Service Act 2006 provides for the establishment of a Parole Board, one has never been set up. Consequently, the main mechanism for early release of prison inmates is through sentence remission. Under s 27 of the Corrections Services Act, an inmate must be given a release date for the purposes of initial classification. The release date must be calculated on the basis of a remission of one-third of any sentence of imprisonment exceeding one month. Under s 28(1), the entitlement to the period of remission is dependent on the good behaviour of the inmate and may be forfeited (but later restored).
- [7] There is an obvious question as to how the entitlement to the period of remission interacts with a non-parole period imposed as part of an inmate’s sentence. The practice of the Corrections Service for some years has been to apply the entitlement to remission only to the sentence remaining to be served after the non-parole period has been completed. To take Mr Ismail’s case as an example, he was sentenced to 12 years’ imprisonment with a non-parole period of nine years on 26 August 2014. The Corrections Service calculated the remission period only on the basis of the three years after his non-parole period was completed, so that his sentence was remitted by one year. On this approach, Mr Ismail would have to serve a total of 11 years’ imprisonment, which gives a release date of 26 August 2025.
- [8] However, in *Kreimanis v State*,² the Supreme Court stated that this approach was incorrect, given the language of s 27(2) of the Corrections Service Act. That subsection provides that for the purposes of 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***” (emphasis added). The background to this subsection is explained in Calanchini J’s judgment in *Kreimanis*.³

² *Kreimanis v State* [2023] FJSC xxx.

³ At [12]-[14].

[9] To illustrate the correct approach, if Mr Ismail had been sentenced to 12 years' imprisonment without a non-parole period, he would have been entitled (assuming good behaviour) to remission of one third of 12 years, i.e. four years. He would therefore have been entitled to be released after serving eight years' imprisonment, i.e. on 26 August 2022.

[10] However, because he was sentenced to a non-parole period of nine years, Mr Ismail had to serve that period before he could be released; but once that non-parole period was completed, he was entitled to be released immediately because he had already served the eight years required to earn remission. So he should have been released on 26 August 2023. On the correct approach, Mr Ismail is required to serve two years less than he would have to serve on the approach applied by the Corrections Service.

[11] At the Acting President's request, Ms Latu contacted a legal officer in the Corrections Service. She advised that the officer said that:

- Mr Ismail had not forfeited the right to remission through bad behaviour;
- the Corrections Service had continued to apply its (incorrect) methodology in calculating entitlements to remission; and
- he was not aware of the *Kreimanis* decision.

[12] The members of the Court were surprised to hear this. It is incumbent on the Corrections Service to follow the law, and the law applicable to the calculation of remission is clearly set out in this Court's decision in *Kreimanis*. That decision was delivered on 29 June 2023 and was publicised in the local media at the time. If it has not done so already, the Corrections Service should undertake a thorough review to ensure that there are no other inmates who are remaining in prison longer than they should as a result of its incorrect calculation of remission entitlements.

[13] Given the circumstances, the Court released Mr Ismail on bail pending determination of the appeal.

Result

[14] Mr Ismail has indicated that he does not wish to pursue his petitions for leave to appeal if he is to be released. Accordingly, I would:

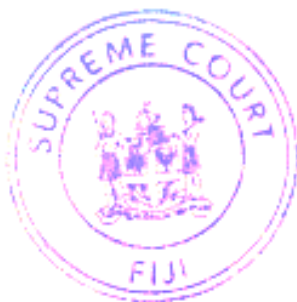
- Treat Mr Ismail's petitions to this Court as withdrawn;
- Release Mr Ismail from bail;
- Confirm that Mr Ismail completed his sentence on 25 August 2023 and must be released immediately.

Young, J

[15] I am in entire agreement with Arnold J's judgment and agree with the proposed order.

[16] Orders:

1. *The Petitions are formally dismissed.*
2. *The Petitioner is released from bail.*
3. *The Petitioner is to be released from custody immediately, having completed his sentence.*



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Acting President of the Supreme Court

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