

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**AT SUVA**

**CRIMINAL APPEAL NO. AAU0021 OF 2007**

**BETWEEN** : DWAYNE HICKS *Appellant*  
**AND** : **THE STATE** *Respondent*

**Before the Honourable Mr Justice John E Byrne**

**Counsel** : Appellant - In Person  
Ms A. Driu for the Respondent

**Date of Hearing & Judgment** : 27<sup>th</sup> January 2009

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***J U D G M E N T***

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- [1] This appeal from a Decision of Winter J. on the 21<sup>st</sup> of August 2007 arises because of the failure of the Prison authorities to give the Appellant the remissions for good behaviour to which he claims to be entitled.
- [2] In the Magistrates Court at Lautoka the Appellant pleaded guilty to 12 charges, eleven of which were for ***Burglary and Larceny*** and one for ***House Breaking, Entering & Larceny***. The offences were committed on various dates in 2004.
- [3] The learned Magistrate imposed a total penalty of 8 years imprisonment but it was pointed out to Winter J. by both counsel

for the Appellant and the State that in doing so the Magistrate made an arithmetical error in the calculation of the total number of years to be served. They agreed that the correct calculation for the total number of years imprisonment was 7 years.

- [4] The learned Magistrate went further when imposing the sentence and because one of the charges involved a home invasion at night (this euphemism is an irritation for Judges like me who called the offence, as it was for many years, "Breaking and Entering a Dwelling House at night" - simply that - and not the needlessly delicate "home invasion at night". In any event, because the learned Magistrate considered this was a breaking and entering or home invasion at night he purported to exercise his powers under Section 33 of the Penal Code and directed that the Appellant serve a minimum of 7 years of his erroneously calculated 8 year term of imprisonment. There were no reasons given for the imposition of a minimum term and accordingly in that regard, as Winter J. found, the learned Magistrate fell into error. This was conceded by counsel for the State.
- [5] In the result Winter J. granted the appeal. He quashed the Order made under Section 33 of the Penal Code and substituted for it an Order that he was to serve a minimum term of 5 years imprisonment.
- [6] The Appellant was not satisfied with this. He informed the Prison authorities that from this 5 years imprisonment he was entitled to a deduction of  $\frac{1}{3}$  for good behaviour.

- [7] The Prison authorities disagreed. They said that in imposing a term of 5 years, Winter J. was in effect giving the Appellant a remission of  $\frac{1}{3}$  and therefore he had to serve 5 years without any remissions. The Prison authorities then referred the matter to the Solicitor-General who replied in a letter dated the 17<sup>th</sup> of September 2008 that the Prison authorities were right. They said that by imposing a minimum term of 5 years, Winter J. had included the necessary deductions from the original sentence of 7 years.
- [8] In my view this is incorrect, simply because Section 63 of the Prisons Act Cap 86 on which the Solicitor-General's office relied makes it clear that every convicted criminal prisoner under sentence of imprisonment for any period exceeding one calendar month shall be eligible for a remission of  $\frac{1}{3}$  of his total sentence of imprisonment provided he has shown satisfactory industry and been of good conduct. These are matters obviously for the Prison authorities and no Judge has the right to interfere with the opinion of the Prison authorities. They are the only ones who can say whether a prisoner has been of good conduct and shown satisfactory industry.
- [9] In the Appellant's case his total sentence of imprisonment as ordered by Winter J. was 5 years from which the normal  $\frac{1}{3}$  for satisfactory behaviour would then have to be deducted.
- [10] The result is that  $\frac{1}{3}$  of 5 years, namely 1 year and 8 months should have been deducted from the Appellant's imprisonment meaning that he had to serve a total of 4 years and 8 months from the date of his original sentence. This expired on the 27<sup>th</sup> of September 2008, on which date the Appellant should have been released.

[11] For these reasons I order that the Appellant be released from Prison forthwith. Whether or not he will take any action against those responsible for his wrongful imprisonment of 4 months is up to him.

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[ John E Byrne ]  
**JUDGE OF APPEAL**

At Suva

27<sup>th</sup> January 2009