

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CRIMINAL APPEAL AAU0117 OF 2007

BETWEEN : MATURINO RAOGO *Appellant*
AND : THE STATE *Respondent*

Before the Honourable Judge Mr Justice John E Byrne

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

Date of Application & Ruling : 10th February 2009

R U L I N G

- [1] This application for leave to appeal from a Judgment of Mataitoga J. in the High Court at Labasa on the 22nd of October 2007 raises an important question of interpretation of the provisions of Section 63 of the Prisons Act.
- [2] On the 27th of January 2009 in Criminal Appeal No. AAU0021 of 2007 **Dwayne Hicks -v- The State** I released the Appellant from prison following my conclusion that he had been eligible for release on the 27th of September 2008.
- [3] Mr Hicks appealed from a decision of Winter J. who had quashed an Order of a Magistrate ordering him to serve a term of 7 years

imprisonment and substituting a minimum term of 5 years imprisonment.

- [4] Mr Hicks maintained that from that 5 years there should be deducted $\frac{1}{3}$ or 18 months for good behaviour.
- [5] The Prison authorities disagreed. They said that in imposing a term of 5 years Mr Justice Winter was in effect giving Mr Hicks a remission of $\frac{1}{3}$ and therefore he had to serve 5 years without any remissions. The Solicitor General agreed with this but Mr Hicks considered the Solicitor General was wrong and that he should have a remission of $\frac{1}{3}$ on the 5 years.
- [6] I accepted that submission without objection from Ms Driu who appeared for the Respondent and held that a prisoner is entitled to receive a remission of $\frac{1}{3}$ of his total sentence of imprisonment provided he has shown satisfactory industry and been of good conduct. I said that the question of good behaviour was a matter obviously for the Prison authorities only and that no Judge had the right to interfere with the assessment of a prisoner's behaviour by the Prison authorities.
- [7] In the present case the Appellant pleaded guilty to one count of ***Wrongful Confinement of a Female*** and two counts of ***Rape*** of the same person. He was sentenced to a total of 18 years imprisonment to be consecutive on the 5 years imprisonment which he was serving at the time of his sentence. Mataitoga J. said in his Judgment the effect of the learned Magistrate's Order was that without any reduction the Appellant would have to serve a

total of 22 years and 11 months because his earlier sentence had 4 years and 11 months left to run.

- [8] Mataitoga J. rightly refused the Appellant's application for leave to appeal against both conviction and sentence on the ground that he made his application over two years after he had been sentenced and to grant such an application would be unreasonable.

I agree.

- [9] The Judge then addressed the term to which the Appellant was sentenced and considered that 18 years was harsh and excessive. Given all the circumstances of the offences, and the need to protect the public and to ensure deterrence for future offenders he considered that a term of 14 years was reasonable. This was to be served concurrently to any sentence the Appellant was serving at the time of his sentence in the Magistrates' Court on the 18th of August 2005.

[10] **The Minimum Term of Imprisonment**

The Judge stated correctly that under Section 33 of the Penal Code Cap 17, the Court passing sentence may order that a minimum term of imprisonment must be served by any Accused who has been convicted of certain offences. Rape is one of those offences. Under Section 151 of the Penal Code the maximum penalty for Rape is life imprisonment.

- [11] The Judge then reviewed the Court Record and found that the Appellant had in the past been convicted of *Indecent Assault of*

Females, Attempted Rape and *Rape* before the two counts of *Rape* and one count of *Unlawful Confinement* in this case. This showed, he said, that the Appellant had great difficulty living normally with women in his community and had no respect for their rights and freedom to enjoy life without being violated or interfered with by individuals such as the Appellant.

[12] He also noted the concern expressed by the Appellant's Village Crime Committee that he was no longer welcomed in his village because of his persistent criminal activity. He also noted that the Appellant had 46 previous convictions and this again showed his lack of respect for other peoples' property and the privacy of their persons. He added that although the Appellant had been given opportunity to mend his ways, he chose not to. He therefore imposed a minimum term of 11 years of the total sentence of 14 years and added "***the effect of this is that you will not be entitled to the usual remission of sentence normally given to prisoners***".

[13] The question posed by this application and with which counsel for the Respondent agrees is whether the Judge was right in saying that the Appellant was not entitled to the usual remission of sentence if a minimum sentence was imposed on him.

[14] I have already said in *Dwayne Hicks* that even where a minimum term of sentence is imposed, a prisoner is entitled to the usual remissions for good conduct because of the way in which I interpreted Section 63 of the Prisons Act.

[15] I therefore grant the Appellant leave to appeal to the Full Court on sentence only. It is desirable that the opinion of the Full Court is obtained on the question posed by this application.

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[John E Byrne]
JUDGE

At Suva

10th February 2009