

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2022/0025

BETWEEN

BRIAN BAILEY

CLAIMANT

AND

THE SUPERINTENDENT OF PRISON

RESPONDENT

APPEARANCES

Brian Bailey appeared in person.

The Attorney General Ms Sheree Jemmotte-Rodney and Ms Cedricia Shiell appeared for the Crown.

2022 NOVEMBER 23

RULING

On serving time docked from remission where appeal has been filed

- 1 **Morley J:** Brian Bailey, aged 22, (dob 16.07.00), is serving a sentence of imprisonment, and, filing a writ of habeas corpus on 11.11.22, wants to be released having served two-thirds, among various reliefs, claiming he is entitled to a full-one third remission. However, the Superintendent of Prison (SP) has docked him 126 days for bad behaviour in jail. Bailey claims his earliest date of release ought to have been 11.11.22, though the SP says it 18.11.22, but owing to the bad behaviour the new release date is 24.03.23.
- 2 Following a first appearance in the case on 15.11.22, there was an affidavit filed by the SP, leading to further hearing on 21.11.22, with argument on the meaning of the **Prison Act &**

Rules, for ruling in writing today, 23.11.22, (just before which there has been a further argument offered in writing by Bailey, also dealt with here).

- 3 Bailey offers a clever argument of statutory interpretation, saying in court on 15.11.22 he has been assisted in the background by an inmate named Warren Cassell, who is a lawyer jailed since June 2022.
- 4 On 16.07.20, on pleas concerning indictments 23/19 and 07/20, Bailey received 4.5 years for variously handling stolen goods, burglary, and forgery¹. He first went into custody on remand on 04.11.19, was bailed on 18.11.19, and then remanded again on 03.02.20. The SP reports from September 2019 he has been the subject of 90 discipline actions, which led to the 126 remission days lost.
- 5 On 11.07.22 he appealed against his conviction, notwithstanding he had pleaded, being granted leave on 27.09.22. His appeal appears encouraged by other inmates appealing, named Baptiste and Henry, who successfully appealed their pleas of guilty heard on 11.02.22, with written decision on 21.10.22², conspicuously also assisted by Warren Cassell, which he has done before on 17.04.18 in an unreported case called Riley, such that appealing pleas has been growing on Montserrat.
- 6 By appealing two years after sentence, on 11.07.22, Bailey has presented himself to my court as an 'unconvicted prisoner', as if on remand, allowed for example under **rule 12 Prison Rules** to wear his own clothes, and as such he claims under further reading of the **Prison Rules** he cannot be docked remission.
- 7 This argument is of some importance, as if right, every prisoner may appeal, whether or not with merit, whether having pleaded guilty or not, as a simple device to stymie prison discipline by making it impermissible to dock remission if pending appeal. At any stage, as the two-thirds point approaches, all a prisoner may need do to avoid forfeiture which had earlier been decided, of whatever length, is lodge appeal.
- 8 The argument relies on two sections of the **Prison Rules**, arising from the **Prison Act** cap 10.04. Of note are **rules 2 and 35(3)**, in addition to **rule 7**:

¹ See <https://www.eccourts.org/regina-v-elijah-rolle-et-al/>.

² See <https://www.eccourts.org/martin-jno-baptiste-et-al-v-the-king/>

Rule 2

...

“**unconvicted prisoner**” means a prisoner awaiting trial, a prisoner on remand, a prisoner committed for contempt of court, a prisoner convicted but not sentenced, a prisoner appealing against conviction, or a prisoner under lawful temporary detention without charge...and “**convicted prisoner**” shall be construed accordingly.

[Underlining added]

Rule 7

7. (1) Every prisoner serving a sentence of thirty days or more shall under normal circumstances be given unconditional release when he has served two thirds of his sentence.
(2) A prisoner referred to in paragraph (1) shall be discharged when the adjudged term of his sentence plus any period of remission lost under paragraphs 33 and 34 has been served.

[Underlining added]

Rule 35

...

(3) In the case of an offence against discipline committed by an unconvicted prisoner, a punishment of prospective or contingent forfeiture of remission may be made:
Provided that such punishment shall have effect only if a sentence of imprisonment is imposed upon conviction of the prisoner, in which case it shall have effect even if the sentence is stated to be reduced by the period during which the prisoner was a convicted prisoner.

- 9 Bailey’s argument is, if pending appeal, forfeiture of remission can only ever be prospective, it being contingent on a sentence of imprisonment being passed, which notionally cannot be passed until his conviction is upheld, meaning he is not under sentence for so long as his appeal is unfinished, observing further the appeal may in any event render sentence futile if acquitted on appeal against conviction.
- 10 Bailey has presented his argument on 21.11.22 with admirable clarity, it appears much rehearsed as an oral script, using all the right legal language, which is a tribute to his efforts and the assistance he has received.
- 11 The point to be resolved is one of pure interpretation of statute. Do the rules really mean as argued?
- 12 Significantly, in the meantime, the prison is treating Bailey as serving a sentence where he will be released on 24.03.23, assuming no further ill-discipline, rather than as being on remand until his appeal is heard, which owing to systemic delays in the region may not be heard until well after that date. The approach he is not on remand pending appeal is echoed

by Bailey's suit, as he wants to be released at what he calculates to be the two-thirds point. On its face, both sides agree he is serving a sentence, though which in theory later may be quashed.

- 13 To my mind, the starting point for consideration is it is clear he is serving a sentence. This is why he is in jail. He will be released when the sentence is complete, or if it is quashed, whichever is sooner.
- 14 Though he holds technically the position of an 'unconvicted prisoner', per **rule 2**, it is significant at **rule 35(3)** 'prospective' forfeiture of remission can arise. The rule therefore contemplates there can be discipline hearings concerning an unconvicted prisoner leading to loss of remission. He faces forfeiture of 126 days. The prospective loss is 'contingent' on his receiving a prison sentence. In this case, he has indeed received a prison sentence, which is why he is in jail. There can in theory be persons on remand who are badly behaved, awaiting trial and unsentenced, whereupon the forfeiture of remission would be prospective, contingent on receiving a prison sentence later if convicted. However, here, Bailey is not an 'unsentenced prisoner', instead, he has made himself an 'unconvicted prisoner' by filing appeal, but in fact is under sentence from 16.07.20. It follows the loss of the 126 days is not prospective contingent on a prison sentence, but actual, there being a prison sentence in operation. The 126 days is therefore not a prospect, but bites.
- 15 The legal fact there has been a sentence is established by the certificate of sentence filed by the SP as exhibit BK1 attached to his affidavit of 21.11.22. Under sentence, and therefore lawfully in custody, he falls to be governed by the **Prison Act & Rules**, and where arising, disciplined, with remission forfeiture, as discussed above. It follows that if under the writ of habeas corpus there is a burden the detention must be shown lawful by the Crown, as suggested in further written submission by Bailey on 23.11.22, it is so shown by the sentence certificate.
- 16 This analysis he is under sentence is reinforced when it can be seen under **rule 7** remission may arise for 'every prisoner serving a sentence', where no distinction is made between convicted and unconvicted, implying any prisoner, including an unconvicted prisoner, though appealing, can nevertheless be serving a sentence.

- 17 To interpret the rules otherwise would invite wholly unruly inmate behaviour which could not be punished by reference to docking remission, but only less meaningfully by stoppage of pay, or cellular confinement, or other privileges, or more harshly by bringing separate charges in fresh court proceedings for additional sentencing.
- 18 It follows in my judgment, reviewing the **Prison Rules**, and his sentence, it has been established presently Bailey's earliest date of release is 24.03.23, according to the SP, and I will not order his release under his writ of habeas corpus, which I now dismiss, with no order as to costs.
- 19 Noting punishment under the rules is decided by the SP or Prison Visiting Committee, insofar as Bailey wishes to challenge the fairness of the discipline proceedings, or the amount of time docked as being excessive, under the rules it appears his appeal lies to the Governor, per **rule 36(3)**:
- Rule 36**
(3) The Governor may quash any finding of guilt by the Superintendent or the Committee and may remit any punishment or mitigate it either by reducing it or by substituting another which is, in his opinion, less severe.
- 20 Separate from an appeal to the Governor, there may be available judicial review of the discipline proceedings, if unfairly conducted, though these would require a separate suit, which may or may not be successful, and, given timelines for litigation, it is likely by the time the suit is heard Bailey will already have been released.
- 21 If it is ever adjudicated Bailey should not have been docked 126 days, or ever sentenced after pleading guilty, or ever convicted on pleading, his remedy may be in damages, which would likely be financial recompense. But for now, he remains in jail.

The Hon. Mr. Justice Iain Morley KC

High Court Judge

23 November 2022