

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBJ 01 OF 2022

BETWEEN: **TAFIZUL RAHIMAN.**

APPLICANT

A N D: **THE STATE**

RESPONDENT

A N D: **THE ATTORNEY GENERALS OFFICE**

(AMICUS CURIE)

A N D: **THE HUMAN RIGHTS OFFICE**

(AMICUS CURIE)

Appearances: Mr. Rahiman (In Person) for the Applicant
 Mr. Kant S. for the Respondent
 Ms. Devi on instructions of R. Vananlagi & Associates for the Fiji Human Rights
 Commission
Date of Hearing: 27 June 2022
Date of Ruling: 20 July 2022

R U L I N G

1. The applicant, Tafizul Rahiman, was convicted of the murder of his late wife Juliet Burre Sanchez. He committed the offence on 03 January 2005 in Nadi. He was sentenced to life imprisonment on 20 May 2008.
2. Rahiman did appeal the conviction and sentence to the Full Court of Appeal. However, the appeal was dismissed on 2 May 2011.
3. He then sought special leave to appeal to the Supreme Court. This too was dismissed on 24 October 2012 (see **Rahiman v State** [2012] FJSC 24; CAV0002.2011 (24 October 2012)).
4. To date, Rahiman has served over fourteen years of his life term.
5. Section 119 of the 203 Constitution provides:

Mercy Commission

- 119.- (1) The Commission on the Prerogative of Mercy established under the State Services Decree 2009 continues in existence as the Mercy Commission.
- (2) The Commission consists of— (a) the Attorney-General who is to be its chairperson; and (b) 4 other members appointed by the President, acting on the advice of the Judicial Services Commission, following consultation by it with the Attorney-General.
- (3) On the petition of any convicted person, the Commission may recommend that the President exercise a power of mercy by— (a) granting a free or conditional pardon to a person convicted of an offence; (b) postponing the carrying out of a punishment, either for a specific or indeterminate period; or (c) remitting all or a part of a punishment.
- (4) The Commission may dismiss a petition that it reasonably considers to be frivolous, vexatious or entirely without merit, but otherwise— (a) must consider a report on the case prepared by— (i) the Judge who presided at the trial; or (ii) the Chief Justice, if a report cannot be obtained from the presiding Judge; (b) must consider any other information derived from the record of the case or elsewhere that is available to the Commission; and (c) may consider the views of the victims of the offence.
6. Rahiman's case is that he has been trying to petition the Mercy Commission pursuant to section 119 (3) of the Constitution.
7. In fact, he says that he has tried on three previous occasions (20 June 2019, 12 December 2020 and 10 March 2021). However, none of those applications ever reached the Mercy Commission. He seems to allege that his every application was thwarted and frustrated by the officials at the Prisons Department. These officials do not bother to ensure that the application is placed before the Mercy Commission.
8. Rahiman further alleges that he also wrote to the High Court in Lautoka on 06 October 2020 but there was no response to this letter. He wrote to the Human Rights Commission on 19 October 2021. Again, no one has bothered to respond to any of his letters.
9. Rahiman says that only the then Acting Chief Justice had shown a courtesy to him vide a letter of 27 August 2019 as follows:

27 August 2019

Tafizul Rahiman
Minimum Correction Centre
P.O Box 14
SUVA

Re: Request for a Report on Case HAC 06/2005

Your letter dated 29 May 2009 refers. I apologise for the late response.

Please note that under Section 119(3), you are to petition the Mercy Commission for its recommendation to his Excellency the President to exercise power of mercy.

Once you have petitioned the Commission, it will then request for a report from the Judge who presides over your trial or his Office if Report cannot be obtained from the presiding Judge.

I suggest you petition the Commission for its recommendation and upon receipt of request from the Commission, we will provide report to the Commission for its consideration.

Sgd.
Acting Chief Justice

10. On 04 January 2022, Tafizul Rahiman filed a Notice of Motion seeking leave to apply for Judicial Review. I reproduce his Motion in full below:

- (1) that the Applicant has sought all legal avenues that is the Appellates Court and did not find any solace thus seeking your ... [Order 53, Rule 1 (2)] kindly.
- (2) that the existence of penal code (cap 17) sentence of life imprisonment, the practicing was ten years under Section 115, this is also confirmed by the Supreme Court in Mohd Shafil Khan.v State no: CAV0019 of 2008 see paragraph 17, 19 and 20, the applicants rights is guaranteed under Section 26 (i) of the 2013 Constitution.
- (3) that the commencement of new law's that is Sentencing and Penalties Decree 2009 Section 18 (1), and Bill No: 29 that the Applicant seems to have been prejudiced and deprived without any minimum term to know when he is eligible for making an application for prerogative of mercy under 119 (3).
- (4) that those who are sentenced under 2009 Decree there liberty in Section 9 (1) starts once they have served their non-parole term including a sentence for life can petition to Mercy Commission under Section 119 (3).
- (5) that the Applicants right to personal liberty in Section 9 (1) is guaranteed under Section 26 (1) to have benefit of law which as in Section 119 (3) any convicted person any other law's inconsistent with this Constitution is invalid to extent of the inconsistency.
- (6) that the Chief Justice on 27 August 2019 (Supreme Court), suggested and noted for the Applicant to make an petition to the Mercy Commission under Section 119 (3) which is in Section 9 (1) (a) by the law and Court to.

Take note that this application is made to seek a clear interpretation of the Sentence (life imprisonment) and seeks the intervention of this honorable Court to answer a very difficult and unusual question posed below;

Is the Applicant eligible for making a petition to the Mercy Commission under Section 119 (3)?

Please take further notice that the Applicant states that he has a reasonable cause to being this action and it is not a frivolous or vexatious application.

Take note that this Court is bound under Section 2 sub-section (3) and (4) (a), (b), (c) of the 2013 Constitution.

Relief Sought

The relief the Applicant seeks are as follows:

- [a]. that the Applicant is praying for an injunction from this honorable courts immediate speedy hearing and interpretation of Section 119 (2), (3) and (4) of the 2013 Constitution.

Relief Sought if Application Granted

The Applicant is praying

- [a]. from this Honorable Court that the Order should be made for the Applicant to petition his case to the Mercy Commission under Section 119 (3).

Grounds On Which Relief Is Sought

The Applicant is praying:

- [a]. from this Honorable Court that the Order to be made to the Correction Service to forward the Applicant's petition to the Mercy Commission for them to consider the merit under Section 119 (4) if any;
- [b]. from this Honorable Court the order to be made to the Attorney Generals Office to forward the Applicants petition to the Mercy Commission for them to consider the merit if any.

11. In his affidavit in support sworn on 23 December 2021, Rahiman deposes as follows:

- (1) that I the Applicant was sentenced under the penal code for life imprisonment without any minimum or recommended term imposed and also the State does not seek for any term to serve [copy of sentence attached].
- (2) that I the Applicant was sentenced on 20th May, 2008 by the Honorable Judge Justice Kishor Govind at the High Court, Lautoka and I did not object to the life imprisonment term to serve because at the existence of penal code the practice was ten years (10), this is also confirmed by the Supreme Court in the case of Mohd Shafil Khan v State CAV 0019 of 2008 in paragraph 17, 19 and 20.
- (3) that upon the commencement of the Sentencing and Penalties Decree 2009 Section 18 (1) and Bill No: 29 of 2019, than I the Applicant seem to have been prejudiced and deprived without any minimum or recommended term impose but otherwise.
- (4) that the Applicant did not have any minimum or recommended term of parole or to know when I am eligible to make my "petition" under Section 119 (3) as any convicted person while I am serving my 14th year without any breach or misconduct of behavior and completed all rehab programs while being incarcerated.
- (5) that the Applicant says the question cannot be mistakenly understood that I am not seeking when I can be eligible to be released on parole, as I know and understand that the Courts play no role in executive decisions to release me on licence see in Suresh Chandra v State, Criminal Appeal No: AAU 0083 of 2012 in paragraph 11.
- (6) that I the Applicant draw the attention of this honorable Court what executive law relates by Section 119 (3) of the 2013 Constitution which states:
"On the petition of any convicted person", the Commission may recommended that the President exercise a power of mercy by:
[a]. Granting a free and conditional pardon to a person convicted of an offence

[b]. Postponing the carrying out of a punishment, either for a specific or indeterminate period; or

[c]. Remitting all or a part of a punishment.

- (7) that the Applicant says my question to this honorable Court is that I am eligible to make “my petition” to the Commission for their recommended as any convicted person while those are sentence under Crimes Decree their liberty will start once they (the offender) will serve the non-parole period.
- (8) that I the Applicant also draw this honorable Courts attention in internal administrative law relating by Section 49 (4) of the Prisons and Corrections Act 2006, to which “the functions of parole board are to make “recommendations” to the Minister relation to this”, also including a sentence for life, but parole board was not established the executive members, to make a “transparent” recommendations.
- (9) that I the Applicant say that if this is the case than it will be an easy reference for the internal administrative and if, this honorable Court can clarify if the Applicant can put his “petition” to the Commission for their recommendation.
- (10) That I the Applicant seek from this Honorable Court that my “petition” should be referred to the Commission and this should be done by the Correction Service” itself, without any discrimination as explicate under Section 26 (3), (a), (b) of 2013 Constitution.
- (11) that I the Applicant further seek from this honorable Court that personal liberty be open to the Applicant, himself to refer his “petition” to the Commission for them to consider the merit if any, as everyone is equal before the law as explicate in Section 26 (1), in respect of Section 119 (3) as any convicted person.
- (12) that I the Applicant draw the attention of this honorable Court that personal liberty be open to the Applicant and that only lawful executives members established at this stage and acting from 2019 is in section 119 (2) of the Constitution is that “the Commission consist of-
 - [a]. the Attorney General who is to be it’s Chairperson; and
 - [b]. 4 other members appointed by the President, acting on the advice of the Judicial Services Commission, following consultation by it with the Attorney General.
- (13) that I the Applicant say this is the practice from the 19th Century that “only executive decision” under 119 (4) is that “the Commission may dismiss a petition that it reasonably considers to be frivolous, vexatious or entirely without merit, but otherwise”, which is lawful.
- (14) that I the Applicant say that any other law or criteria inconsistent with this Constitution is invalid to the extent of the inconsistency as this is explicated in Section 2 of the 2013 Constitution because this Constitution is the Supreme law of this State.
- (15) that I the Applicant further say that what is the meaning that nothing shall affect the prerogative of mercy if the petitioner may think has case is fit for merit at any time he can put his “petition” to the Commission for them to recommend, this has similar law in Section 38 the Court of Appeal Act which is consistency with Constitution.
- (16) that I the Applicant say this has in concise Oxford English dictionary revised 10th edition page 1130 “meaning of prerogative” – is that – “a right or privilege exclusive to a particular individual or class” and “under this law in Section 119 (3) hundreds of lives has benefit with their “petitions from centuries” the Applicant is, seeking the same treatment and benefit of law from this honorable Courts opinion as my right is in Section 26 91) explicate the same.

- (17) that I the Applicant would like to further say that the Supreme Court carefully considered the right and privilege on Supreme law noted and suggested for the Applicant can make a petition to Mercy Commission under Section 119 (3), on 27th August 2019 for which the Applicant seek for a way to make a judicial review.
- (18) the Applicant further reserves his right to file further affidavits upon receiving the Respondent's response in the above.
12. Before me is an application by the Respondent under Order 18 Rule 18(1) (a) of the High Court Rules 1988 and the inherent jurisdiction of this Court seeking an Order to strike out the application on the ground that it discloses no reasonable cause of action.
 13. Mr. Kant argues that the application is not sustainable for the following reasons:
 - (a) there is no decision in this case which is "public" in nature.
 - (b) what the applicant is seeking is an interpretation of section 119(3) of the Constitution
 - (c) section 119(3) is clear that any convicted person may petition the Mercy Commission and if the Commission may recommend to President to exercise a power of mercy
 - (d) it is an abuse of process for the applicant to be seeking a determination from this Court of the availability to him of the option to apply to the Mercy Commission
 14. Rahiman submits that he has a right to petition the Mercy Commission. This right is guaranteed under section 26(1) of the 2013 Constitution. This section is concerned with the right to equality and freedom from discrimination.
 15. He also relies on section 15(2) of the Constitution as giving him that right to petition the Mercy Commission. This section is concerned inter alia with the rights of accused persons and persons charged with an offence and the right of access to Court or tribunal. No issue is raised by counsel for the State as to whether the Mercy Commission is by, the nature of its proceedings and functions, and by definition, is a "court or a tribunal".
 16. In Khan v State [2009] FJSC 6; CAV0019.2008S (12 February 2009), the Supreme Court said obita as follows:
 16. It is important nevertheless that the petitioner, who is a young man, should not be lost in the system, that his situation be reviewed as the law provides, and that he understands the remedies available to him.
 17. Counsel for the State, Mr. Bulamainavalu, has helpfully drawn attention to s.115 of the Constitution. This section provides that the President, acting on the advice of the Commission on the Prerogative of Mercy, may grant to a person convicted of an offence a pardon or conditional pardon, or a respite of the execution of the punishment imposed for the offence, or substitute a less severe form of punishment or remit the whole or part of the punishment imposed. According to Mr. Bulamainavalu, the Commission will consider examining a request from an offender for relief under s.115 once the offender has served 10 years imprisonment.
 18. By s.64 of the Prisons Act (cap 86), the Controller of Prisons is required to report at stipulated times to Minister on the general condition of prisoners (such as the petitioner) sentenced to life imprisonment.

19. Mr. Bulamainavalu has informed the Court that, according to an internal administrative directive by the Prisons Department, the Department should refer a prisoner to the Commission on the Prerogative of Mercy after the Prisoner has served ten years of his term of life imprisonment accordingly.
20. The petitioner was sentenced to life imprisonment on 23 September 2004. His case should therefore be referred to the Commission after 23 September 2014. In the ordinary course of practice in the Prisons Department this should be done by the Department itself. It would of course be open to the petitioner, himself, to refer his case to the Commission, once he has completed serving ten years imprisonment.
21. The petitioner's release from prison, should that occur, will depend substantially on his behavior in prison, how his personality and character develop while he is incarcerated and to what degree he is rehabilitated. These matters will be considered when a better informed decision can be made as whether it would be in the interests of society and in his interests to be released into the community.

17. Section 64(a) of the Prisons Act (Cap 86) provides;

Controller to report to Minister

64. The Controller shall furnish to the Minister a report on the general condition of every prisoner who has during the previous month-
 - (a) in the case of prisoners sentenced to imprisonment for life, completed one years' imprisonment from the date of admission and thereafter at intervals of two years;
 - (b) in the case of all other prisoners sentenced to imprisonment for any period of seven years or more, completed two years' imprisonment from the date of sentence and at intervals of two years thereafter;
 - (c) completed seven or more years of his sentence and has attained, or is believed to have attained, the age of sixty years;
 - (d) in the case of prisoners under twenty years of age, howsoever detained, a report at the expiration of every twelve months of imprisonment until such prisoner has attained the age of twenty years:

Provided that-

- (i) the Minister may, in the case of any such prisoner, direct that a report shall be submitted at more frequent intervals; and
- (ii) the Controller may, if he thinks fit, submit a report at more frequent intervals.

18. It is no doubt open to Rahiman to petition the Mercy Commission. For a convicted prisoner serving a custodial sentence and who has limited access, the Prison Department is the conduit through which a petition to the Commission must pass. The Department's role is simply to pass such a petition on to the Commission.

19. Rahiman's grievance is about the alleged failure of prison officials to refer his petitions to the Mercy Commission. I do note though that his affidavit in support does not mention any specific decision, nor does it name any specific officer. I am of the view that in a situation such as this, an ideal course open to Rahiman is to bring to the attention of any Resident Magistrate who is doing the rounds on the Prison Visitation program about his grievances.
20. In the final, I agree with the submissions of the Office of the Attorney-General. The application is struck out.



Anare Tuilevuka
JUDGE
Lautoka

20 July 2022