

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0052 OF 2022
[High Court Civil Action No: HBM106/20(Ltka)]

BETWEEN : **TAFIZUL RAHIMAN**
Appellant

AND :
1. **THE DIRECTOR OF PUBLIC PROSECUTION'S OFFICE**
2. **THE ATTORNEY-GENERAL'S OFFICE**
3. **THE SOLICITOR GENERAL**
4. **REGISTRAR – SUPREMECOURT**
5. **FIJI HUMAN RIGHTS & ANTI DISCRIMINATION COMMISSION**
6. **CHIEF JUSTICE OF FIJI**
Respondents

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Appellant in Person**
Mr S. Kant for the 1st, 2nd and 3rd Respondents
No appearance for the 4th, 5th and 6th Respondents

Date of Hearing : **15th August, 2023**

Date of Decision : **4th September, 2023**

DECISION

[1] The appellant was convicted of murder and sentenced to life imprisonment. His appeal on both the conviction and sentence was dismissed by the Court of Appeal. His application for leave to appeal to the Supreme Court was also dismissed. (vide: **Rahiman**)

v. State [2012] FJSC 24. Having been sentenced in the year 2008, as at date he has served fifteen years of his term.

[2] It was in 2022 January that, the appellant filed a Notice of Motion seeking leave to apply for judicial review in the High Court.

Order 53 of the High Court Act

[3] Under Order 53 of the High Court Act (the Act), five orders for judicial review are contemplated that is, orders in the nature of mandamus, prohibition certiorari, declaration and injunction.

[4] Before going any further it is clear from the very nature of the present matter taken specifically in the context of the Appellant's "*petition of appeal*" that, the reliefs he might have been entitled to pursue would have been for a declaration and/or a mandamus.

[5] In so far as a declaration is concerned, the appellant's grievance being that he is entitled to be considered for a recommendation by the Mercy Commission for the President to exercise his power of Mercy under Section 119(3) "*the Constitution*," I do not think the respondents' have any quarrel with that. As the learned High Court Judge himself held:

"It is no doubt open to Rahiman to petition the Mercy Commission"
(at paragraph 18 of the impugned judgment)

[6] Indeed, it is the right of any convicted prisoner serving a custodial sentence.

[7] However, the problem faced by the appellant both in the High Court and in this Court is his failure to have brought in necessary parties to the application before the High Court and this Court in appeal.

Necessary Parties in an application for judicial review – specifically in an order seeking mandamus

- [8] To begin with, I could not find any rhyme or reason naming the persons who have been cited as party respondents.
- [9] The appellant's grievance being based on constitutional redress, being nothing more or nothing less than, his right to petition the Mercy Commission under Section 119(3) of the Constitution of Fiji, were the named Respondents obliged by law to assume such a duty? I do not think so.
- [10] If at all the proper parties to be named would have been the prison authorities at the Correction Centre. But there was no demand (or request) made by the appellant on them, who through their commitment to a prisoner under their charge had even submitted the appellant's present petition of appeal to this Court.
- [11] In this case, there was no demand or request made to the said prison (Correction Centre) authorities for the appellant to have been able to say that they had refused to respond to such demand or request (see Wade and Forsyth) (11th ed.) Oxford University Press, page 528.
- [12] The substantial requirement therefore being the requirement of a demand and refusal by the requisite public authority, that being not done, the appellant's application for mandamus had to necessarily fail.
- [13] That is a principle which has stood the test of time ever since the case of **R v Brecknock etal** [1835] 3 Ad & E217 followed and applied in **exp. Halifax Transit Cpn.** [1970] 15 DLR (3d) 720.
- [14] Consequently, on the basis of the foregoing discussion I proceed to make my final determination as follows.

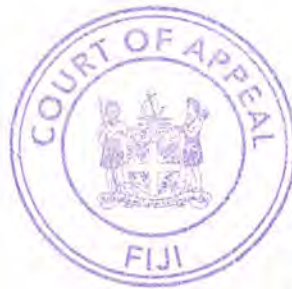
Determination

- [15] In view of and on the basis of the foregoing discussion I did not see a reason or the necessity to address the procedural aspects the respondents had raised as preliminary objections based as they were on Section 12(2)(f) of the Court of Appeal Act taken with Rule 26(3) of “*the Act*” which Rule in any event has been receded to history on account of the Amended Rule 27 issued as per Gazette Notification No.22 dated 21st June, 2018.
- [16] Following upon what I have said above, arguments based on the (full Court) decision in **Goundar v. Minister of Health** (*supra*) and the arguments based thereon also I found to be a redundant judicial exercise if this Court were to address the same.
- [17] In the result, (in sum), the appellant being a convicted prisoner serving a custodial sentence certainly had and still is possessed of his right for constitutional redress to petition the Mercy Commission in terms of Section 119(3) of “*the Constitution,*” through the conduit of the prison authorities as the learned High Court Judge observed in his judgment.
- [18] Admittedly, the Appellant being in a Corrections Centre, should the authorities in his charge fail or refuse to transmit any petition to the Mercy Commission, then only that the appellant would have a cause to complain and seek an order for mandamus on the imperative criterion of “*a demand and refusal*” in seeking judicial review by way of an order for mandamus.
- [19] For the aforesaid reasons, I could not see any ground as urged by the appellant in his purported grounds of appeal to fault the impugned judgment of the learned High Court Judge.
- [20] Accordingly, I proceed to make my orders as follows:

Orders of Court:

- 1) *The present application before this Court is refused and/or dismissed.*

- 2) *Taking into consideration the fact that, the appellant is a convicted prisoner serving a custodial sentence of life imprisonment in a Correction Centre, I make no order for costs.*



Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

In Person appearance for the Appellant

Attorney General's Chambers for the 1st to 3rd Respondents