IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL REVIEW NO. HAR 002 OF 2022

BETWEEN	:	**STATE**
AND	:	**APETE VAKANANUMI KAISAU**
Counsel	:	Mr S Kumar for the State Mr E Sau for the Applicant
Date of Hearing	:	**28 October 2022**
Date of Ruling	:	**5 December 2022**

RULING

[1] On 5 November 2003, Apete Kaisau (the applicant) was confined to a mental hospital by a Presidential Order, after the High Court made a special finding that the applicant was not guilty of murder by reason of insanity. The applicant was clinically diagnosed to be suffering from schizophrenia, resulting in delusions and hallucinations.

[2] The Presidential Order was made pursuant to section 150 of the Criminal Procedure Code (now repealed). Section 150 reads:

> Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible for his action at the time when the act was done or omission made, then if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did or made the same, the court shall make a special finding to the effect that the accused was not guilty by reason of insanity.

When such special finding is made the court shall report the case for the order of the President and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.

The President may order such person to be confined in a mental hospital, prison or other suitable place of safe custody.

[3] The Order expressly stated that the applicant was to be confined to St Giles Hospital until the President make further order in the matter.

[4] At the time the Order was made, the Mental Treatment Act 1978 was in force. That Act gave special powers to the Minister for Health to discharge a person into the community who is confined to the hospital by virtue of a committal order made under section 150 of the Criminal Procedure Code. The relevant provision of the Mental Treatment Act reads:

> 14.-(1) Notwithstanding the provisions of any other law in force in Fiji, the Minister may in his discretion discharge any person in respect of whom there is in force an order made under the provisions of sections **148** or **150** of the Criminal Procedure Code wheresoever detained, upon such conditions as the Minister may think fit. *(Amended by 47 of 1971, s. 2.)*
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> (2) The Minister may in his discretion revoke any discharge granted under this section and thereupon it shall be lawful for any police officer to take such person into custody and return him to the place from whence he was discharged and the said person shall then be detained in the said mental hospital, prison or other place as if the order of discharge had not been made. *(Section substituted by 24 of 1964, s. 7.)*

[5] Subsequently, both the Criminal Procedure Code and the Mental Treatment Act were repealed and replaced with the Criminal Procedure Act 2009 and the Mental Health Act 2010.

[6] The Criminal Procedure Act 2009 came into force on 1 February 2010. The corresponding provision in the Criminal Procedure Act, section 105 states:

> The court shall make a special finding that an accused person is not guilty of an offence by reason of insanity if—
>
> - (a) any act or omission is charged against any person as an offence; and
> - (b) it is given in evidence on the trial of the person for that offence that he or she was insane so as not to be responsible for the actions at the time when the act was done or the omission was made, and
> - (c) it appears to the court that the accused person did the act or made the omission charged but was insane at the time when it was done or made.
>
> When a special finding is made under subsection (1) the court shall order that the accused is—
>
> - (a) to be confined in a mental hospital, prison, a declared mental health facility or other suitable place for safe custody; and
> - (b) to be dealt with in accordance with any law dealing with mental health.

[7] The Mental Health Act came into force on 1 July 2011. Section 123 sets out the transitional provisions. Section 123 reads:

> **Transitional provisions**
>
> **(1)** Any person admitted to the psychiatric hospital on a Presidential Order under the Mental Treatment Act (Cap 113) shall seek a review to the court.
>
> **(2)** Schedule 3 has effect.

[8] Schedule 3 of the Mental Health Act reads:

> ***Existing Presidential orders***
> Those patients who have been admitted to the Mental Health Hospital under a Presidential Order can have the Order discharged by applying to the High Court.

[9] In this case, the applicant seeks to have the Presidential Order discharged and he be released into the community. The jurisdiction of the High Court to discharge a Presidential Order made under the Criminal Procedure Code is derived from Schedule 3 of the Mental Health Act. The nature of the proceeding is a review of the Order.

[10] In the case of the applicant, this is a third review of the Presidential Order by the court. The first two reviews were carried out by Temo J in 2014 and 2015, respectively. After hearing the applications, Temo J concluded that the court had not been provided with detailed information about the treatments that the applicant had received for his mental illness at the hospital (Cr Misc Case No. HAM071/2014S & 101/2015S, paragraphs 22-26). In a consolidated ruling delivered on 2 October 2015, Temo J declined to discharge the Presidential Order and release the applicant into the community. However, the court left it open for the applicant to seek a further review after 12 months from the date of that ruling.

[11] Upon receipt of this application, an order was made for the St Giles Hospital to provide the court with a report on the current psychiatric state of the applicant. The hospital has submitted a detailed report on the applicant dated 29 September 2022. The report was formally tendered in court as evidence by the Medical Superintendent, Dr Pandit. The applicant had been assessed by a number of psychiatrists, including Dr Pandit and Dr Gaikwad who is the Principal Medical Officer at the hospital. The 29 September 2022 report is not favourable towards the applicant.

[12] After his application for a discharge was declined by the court in 2015, there had been numerous incidents of relapses of his illness due to him not taking his

medications. He had been threatening the medical staff and there had been incidents when the applicant had been violent towards the staff. According to the doctors assessing the applicant, the decision not to take medications is likely to be due to his personality traits and not associated to his mental illness. His perception of the medical staff is that 'they deserve punishment for not treating him with respect'.

[13] On 30 November 2022, Dr Pandit and Dr Gaikwad submitted a joint report on the applicant setting out a community management plan for the applicant if the court considers discharging him from the hospital. The report notes that at times the applicant refuses to take oral medications administered by medical staff, but upon perusal, he does take medications. The report also notes that the applicant remains unpredictable as to whether he is a danger to others if he is released for a long period of time and if he does not take his oral medications to manage his symptoms.

[14] However, both doctors after conducting a psycho-education session with the applicant's sister Ms Asenaca and after discussion with the Community Mental Health Team of Occupational Therapy Unit have proposed a tailored community management plan for the applicant in the event he is released into the community.

[15] Ms Asenaca has agreed to provide support and care to the applicant if he is released into the community. Ms Asenaca's evidence is that when the Mental Treatment Act was in force, the applicant was released on the weekends to spend time with his immediate family. The applicant spent time with her and her children at their home during weekends and that there was not a single moment she or her children felt threatened by the applicant. He followed her instructions and conducted himself well during his stay with her. One of Ms Asenaca's son is now a police officer and resides at Rakiraki. If the applicant is discharged from the hospital, Ms Asenaca plans to re-locate with the applicant to Rakiraki. She is willing to abide by any community treatment plan sanctioned by the medical doctors for the mental wellbeing of the applicant.

[16] In determining the merits of this application, I am mindful of the purpose of the Mental Health Act. The purpose of the legislation can be ascertained from the principles and objectives of the Act.

[17] The principles of the Mental Health Act are set out in section 4 as follows:

(1) In interpreting and implementing the provisions of this Act, due regard must be given as far as practical and subject to available resources—

- (a)to the principles approved by the World Health Organization ("WHO") in relation to mental health;
- (b)to other international agreements and standards concerning the care and treatment of the mentally disordered, including the International Covenant on Human Rights, the United Nations Convention on the Rights of the Child and the Convention on the Rights of People with Disability.

(2) As far as practicable, and subject to available resources, those responsible for implementing this Act must aim to—

- (a)promote and treat mental health and prevent mental disorders in Fiji;
- (b)provide access to basic mental health care for all who need it;
- (c)provide for the making of mental health assessments and diagnoses in accordance with internationally accepted principles;
- (d)provide the least restrictive type of mental health care that is practicable in the circumstances of a given case;
- (e)promote and provide access to mental health care in the community;
- (f)promote the right of self-determination by those with a mental disorder;
- (g)ensure the availability of complaint procedures and a periodic review mechanism;
- (h)promote the appointment of qualified decision-makers on mental health issues;

- (i)ensure the well-being, safety and adequate working conditions, welfare, support, capabilities and efficiency of all persons providing any mental health services; and
- (j) ensure respect for the rule of law and for human rights in regard to mental health issues.

(3) This Act should be applied in such a manner that restrictions on the liberty of persons with a mental disorder and interference with their rights, dignity and self-respect are kept to a minimum, so far as is consistent with—

- (a)their proper care, support, treatment and protection;
- (b)the safety, health and welfare of other persons; and
- (c) in relation to persons in custody and prisoners, the good order and security of the mental health facility, prison, or other place where they are detained.

[18] The objectives of the Act are set out in section 5 as follows:

- (a)to provide for the care, treatment, management, rehabilitation and protection of people with mental illness and other mental disorders;
- (b)to regulate mental health care, treatment and rehabilitation services in a manner that makes mental health care, treatment and rehabilitation services available to the population equitably, efficiently and in the best interest of mental health care users within the limits of the available resources;
- (c)to coordinate access to mental health care, treatment and rehabilitation services by various categories of mental health care users;
- (d)to integrate the provision of mental health care services into the general and wider human services environment in the cultural context of Fiji;
- (e)to promote the rehabilitation of persons with mental disorders and their integration into the community at the earliest appropriate time;
- (f)to facilitate the development of community mental health services including the establishment of respite and halfway homes, residential facilities and group homes;

- (g)to clarify the rights and obligations of mental health care users and the obligations of mental health care providers; and
- (h)to regulate the manner in which the property of persons with mental disorders may be dealt with.

[19] It is clear that the purpose of the Mental Health Act is not to confine mentally ill people for indefinite period. The purpose of the Act is to care, manage and treat mentally ill people with dignity so that they can be integrated into the community. Section 6 of the Act binds the courts to ensure that persons suffering from mental illness receive the best available care, support, treatment and protection. The courts are bound to apply and give effect to the purposes and objectives of the Act.

[20] The US Courts have held that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law (Specht v Patterson, 386 US 605, 608 (1967); In re Gault, 387 US 1, 12-13 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist.

[21] In a landmark decision in the case of *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the US Supreme Court held that a finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. The court said at p 575:

> May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. May the State fence in the harmless

mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. In short, a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friend. (per Stewart J)

[22] I have been given due consideration to all the evidence before me. The applicant is one of the longest involuntarily confined patient of St Giles Hospital. He has been in medical confinement for twenty years. Overall, apart from occasionally threatening the medical staff at the hospital, he did not pose any danger to the public or to himself. He had never attempted to physically harm himself. His threatening behaviour at the hospital was only towards the medical staff and not towards the other patients or visitors at the hospital or his family members. The evidence is that the threatening behaviour towards the medical staff is likely to be associated to his personality traits and not to his mental illness. The evidence is that the applicant does not pose a threat to the community as far as he takes his medications to manage his illness.

[23] I am satisfied that he is not likely to pose a real or imminent risk to himself or to the public if he is integrated into the community.

[24] For these reasons, I allow the application for a review and discharge the Presidential Order made on 5 November 2003 to confine the applicant to a mental hospital.

[25] I sanction and approve the Community Management Plan proposed by Dr Pandit and Dr Gaikwad for the applicant as follows:

1. Ms Asenaca is appointed the applicant's guardian and carer (the primary carer).

2. The applicant is allowed weekend releases (Saturdays and Sundays) from the hospital for initial two weeks effective from 10th December 2022.

3. When the second weekend release ends on 25th December 2022 and if reports are favourable from the primary carer, Ms Asenaca, the leave period to be extended to one week.

4. Thereafter, the applicant will stay weekly at the St Giles Hospital and in the community alternatively for 8 weeks (2 months).

5. After 8 weeks, the release period performance is to be evaluated by the hospital considering the reports from his primary carer, Ward reports and Occupational Therapy Unit.

6. If the reports are favourable towards the applicant, he is to be released from the hospital on Community Treatment Order and on case management for next three months with regular visits from the Community Mental Health team.

7. Once it is confirmed that the applicant has been attending clinics and taking his medications as required under supervision, he will continue on community treatment order and regular follow up at St Giles Hospital.

8. It is the primary carer's responsibility to supervise the applicant's medications and bring him for clinics as and when called. It is also her responsibility to bring him to the hospital if he defaults medication or shows warning signs.

9. Nearest police station should be informed and should assist in case the primary carer needs police assistance to bring the applicant to the hospital.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused