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

CRIMINAL APPEAL NO. AAU 24 of 2019
[High Court at Suva Case No. HAC 115 of 2018 (LTK)]

BETWEEN	**:**	**JOHN GEOFEREY NIKOLIC**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**22 October 2021**
Date of Ruling	**:**	**25 October 2021**

RULING

[1] The appellant had been charged with another (his wife) in the High Court at Suva on one count of importing an illicit drug (cocaine) contrary to section 4(1) of the Illicit Drugs Control Act, 2004, one alternative count of possessing an illicit drug (cocaine) contrary to section 5(a) and 32 of the Illicit Drugs Control Act 2004, importing an illicit drug (cocaine and methamphetamine tablets) contrary to section 4(1) of the Illicit Drugs Control Act 2004, one alternative count of possessing an illicit drug (cocaine and methamphetamine tablets) contrary to section 5(a) and section 32 of the Illicit Drugs Control Act 2004 and one count of possessing arms and ammunition without holding an arms licence contrary to section 4 and section 42(2) of the Arms and Ammunition Act 2003.

[2] The information read as follows:

'STATEMENT OF OFFENCE

Importing An Illicit Drug: *contrary to section 4(1) of the Illicit Drugs Control Act, 2004.*

PARTICULARS OF OFFENCE

YVETTE DIANNE NIKOLIC *and* ***JOHN GEOFFREY NIKOLIC*****,** *on the 22nd day of June 2018, at Nadi in the Western Division, without lawful authority imported an illicit drug, namely, cocaine weighing 12.9 kilograms.*

COUNT 2
(Alternative to Count 1)
STATEMENT OF OFFENCE

Possessing An Illicit Drug*: contrary to section 5(a) and 32 of the Illicit Drugs Control Act 2004.*

PARTICULARS OF OFFENCE

YVETTE DIANNE NIKOLIC *and* ***JOHN GEOFFREY NIKOLIC****, on the 22nd of June 2018, at Nadi in the Western Division, without lawful authority had in their possession an illicit drug, namely cocaine weighing 12.9 kilograms.*

COUNT 3
STATEMENT OF OFFENCE

Importing An Illicit Drug*: contrary to section 4(1) of the Illicit Drugs Control Act 2004.*

PARTICULARS OF OFFENCE

YVETTE DIANNE NIKOLIC *and* ***JOHN GEOFFREY NIKOLIC****, on the 22nd day of June 2018, at Nadi in the Western Division , without lawful authority imported an illicit drug, namely cocaine and methamphetamine tablets weighing 34.4 grams.*

COUNT 4
(Alternative to Count 3)
STATEMENT OF OFFENCE

Possessing An Illicit Drug*: contrary to section 5(a) and section 32 of the Illicit Drugs Control Act 2004.*

PARTICULARS OF OFFENCE

YVETT DIANNE NIKOLIC *and* ***JOHN GEOFFREY NIKOLIC****, on the 22nd day of June 2018, at Nadi in the Western Division, without lawful authority had in their possession an illicit drug, namely cocaine and methamphetamine tablets weighing 34.4 grams.*

COUNT 5
STATEMENT OF OFFENCE

Possessing Arms And Ammunition Without Holding An Arms Licence*: contrary to section 4 and section 42(2) of the Arms and Ammunition Act 2003.*

PARTICULARS OF OFFENCE

YVETTE DIANNE NIKOLIC *AND* ***JOHN GEOFFREY NIKOLIC****, on the 22nd of June 2018, at Nadi in the Western Division, had in their possession arms and ammunition, namely 2 pistols and 112 rounds of ammunition without holding an arms licence.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of counts 01, 03 and 05. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of the same counts and sentenced him on 08 March 2019 to 23 years of imprisonment on count 01, 03 years' imprisonment on count 03 and 02 years' imprisonment on count 05; all sentences to run concurrently with a non- parole period of 18 years.

[4] The appellant's lawyers Gordon & Co (Barristers and Solicitors) had lodged a timely appeal against conviction and sentence (29 March 2020). After Gordon & Co withdrew as counsel, his new counsel from the Legal Aid Commission Mr. Thomson Lee informed court on 23 September 2020 that he had been instructed by the appellant to abandon the conviction appeal and pursue only the sentence appeal and the counsel was instructed to tender an abandonment notice signed by the appellant in Form 3 under Rule 39 of the Court of Appeal Act. The appellant had signed his abandonment notice on conviction appeal on 23 September 2020. Mr. Lee confirmed on 18 November 2020 that the abandonment notice had already been filed in the CA registry. Subsequently, Mr. Lee for the Legal Aid Commission had filed an amended notice of appeal containing amended grounds of appeal only against sentence and

written submissions (20 November 2020). The State had tendered its written submissions 29 December 2020.

[5] After 18 November 2020, the matter had been mentioned on 23 December 2020, 29 January 2021, 01 March 2021, 18 March 2021 and 01 April 2021. Leave to appeal hearing into the appellant's appeal could not be taken up during this time (though the pleadings and procedural steps had been completed) as the connected appeal AAU 21 of 2019 filed by the state against the acquittal of the co-accused (the appellant's wife) was not ready for hearing. As agreed by parties, both appeals were to be taken-up together at the leave stage. However, as AAU 21 of 2019 continued to get delayed on account of service of appeal papers, proof of service, notices on the appellant in Australia about court dates and decision on her legal representation in Fiji etc. on 01 April 2021 the appellant's appeal was fixed for leave to appeal hearing on 26 July 2021. Nevertheless, due to COVID related restrictions on usual functioning of courts the matter had been adjourned to 10 September 2021 and 30 September 2020. Once those restrictions were relaxed, this court on 11 October directed that the LA hearing into the appeal would be taken-up on 22 October 2021 and on the following day, the CA registry had informed the DPP and the LAC of the hearing date.

[6] When the matter was taken-up for hearing on 22 October 2021 Mr. Waqainabete appearing for the appellant on behalf of the LAC seemed to move to have the hearing vacated on the basis that the LAC wises to revisit the 'means test' already done or conduct a fresh 'means test' to decide on its representation of the appellant. What had prompted the LAC to take this course of action was said to be a newspaper report that had appeared some months ago. He informed court that the LAC has no concerns as far as the merits of the sentence appeal are concerned and confirmed that the appellant was aware of the fact that the LA hearing would be conducted on 22 October 2021. Mr. Burney appearing for the DPP strongly objected to any postponement of the LA hearing and stated that he came ready to conclude the hearing. Mr. Waqainabete did not state that the LAC was no longer appearing or had withdrawn its representation granted to the appellant; nor was he seeking to withdraw as counsel for the appellant; neither had the appellant withdrawn the appeal from the LAC or instructed the LAC not to appear for him at the hearing. What Mr. Waqainabete was proposing to court

appeared to be a matter on the internal process of the LAC which obviously should have been completed (which had indeed been done according to the counsel) before it decided to appear for the appellant and the legal representation so rendered to the appellant for all this time by the LAC was not sought to be withdrawn even on the date of hearing where for all purposes the LAC was the appellant's legal counsel.

[7] As indicated already, the LA hearing could not be taken-up earlier due to various reasons resulting in a delay of several months. The LAC had not indicated to this court until the date of LA hearing of any application for adjournment or vacation of the hearing it was seeking to make on any ground. Until 22 October 2021, the LAC had represented the appellant continuously since early or mid-2020 and its appearance has never been sought to be withdrawn. It had filed an amended notice of appeal and comprehensive written submissions as far back as in November 2020.

[8] In the circumstances, this court saw no reason why the LA hearing should be vacated as it not only could have led to an unwarranted waste of valuable judicial time but also, even more importantly, would have deprived the appellant of passing the leave to appeal threshold which is a *sine quo non* for a hearing of his appeal before the full court. Moreover, once the LAC enters an appearance for an appellant or a respondent, unless specifically indicated to court, it should be deemed to have conducted all required internal administrative processes to duly offer legal representation and appear in court which cannot be unilaterally withdrawn without permission of court; certainly not on the date of hearing when the court and opposing counsel come ready to proceed with the matter. No counsel including the LAC should indulge in any attempt to disrupt the proceedings of court by applications of this nature. Further, the reason given by Mr. Waqainabete for seeking a vacation of the LA hearing was not convincing and did not appear to be due to any conflict of interest, ethical reasons, counsel's physical incapacity/hospitalisation, other unforeseen circumstances etc. The court is unlikely to permit even a withdrawal of counsel *inter alia* where, though for valid reasons, the application is made at the last minute causing postponement of trial, waste of court time, counsel's fee is whole or in part has not been paid etc. (see **Practice Direction No.1 of 2011** dated 06 April 2011and **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

[9] In terms of section 31 of the Court of Appeal Act, an appellant is entitled to be present only on the hearing of his appeal. On an application for leave to appeal and on any proceedings preliminary or incidental to an appeal (for *e.g*. bail pending appeal, application for enlargement of time, application for legal aid etc.) an appellant is not entitled to be present except with leave of court or where rules of court provide for such right. A judge of the court may allow an appellant to be present on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal in terms of section 35(1)(c) of the Court of Appeal Act and in granting such leave the court would among other matters consider whether the appellant is legally represented or not, whether court is satisfied with the written pleadings already filed, whether any clarifications from the appellant are needed etc.

[10] In this case, the court had not made an order under section 35(1)(c) of the Court of Appeal Act granting leave for the appellant to be present at the LA hearing and the court finds that clear grounds of appeal and supporting written submissions have been filed by the LAC. Therefore, though the appellant had not been brought to court (perhaps, due to possible COVID related issues) by the Corrections Centre where he is being held and he was not connected *via* Skype, I am satisfied that his sentence appeal had been fully canvassed in the amended notice of appeal supplemented by extensive written submissions filed by the LAC. I am also mindful of the fact that even if a judge of the Court refuses to exercise any of the powers under section 35 (1) of the Court of Appeal Act in favour of an appellant, he or she is entitled to renew his appeal before the full court (within 30 days of the ruling) in terms of section 35 (3) of the Court of Appeal Act.

[11] Hence, the decision to refuse the application to vacate the hearing and proceed with the LA hearing.

[12] The learned trial judge had summarised the evidence in the judgment as follows:

> '*[3] The accused was in control of the yacht (the vessel) on which the two packages containing 13 bars of powdery substances and the two packages containing substances in tablet form, arms and ammunition and US$15,000.00 cash were found by the Customs officers on 22 June 2018.*

These items were concealed and hidden in different compartments of the vessel. The vessel had arrived from abroad when the discovery was made.

[4] Following the discovery of the first package containing 10 bars, I accept that the accused under caution uttered words to the effect "I know what you are looking for. There's another 3 bars hidden on the opposite side of the same hatch behind the water tanks". This statement of the accused shows that he was at least aware of the existence of the packages that contained the powdery substances. I accept the statement to be true as a further package containing 3 bars was retrieved by the Customs officers from the location disclosed by the accused. After discovery of the powdery substances the accused attempted to halt the search effort by inflicting self-harm.'

[13] The sentence grounds of appeal are as follows:

Sentence grounds

Ground 1

THAT the Learned Judge may have erred in law by selecting a high starting point of 22 years despite the Learned Trial Judge's pronouncement of the adoption of the New Zealand guidelines for methamphetamine in ***R v Fatu*** *[2006] 2 NSLR 72, which has a starting point of 12 years for importation.*

Ground 2

THAT the Learned Judge may have erred in law and fact when he sentenced the appellant for 13kg of cocaine, yet failing to take into account the relevant consideration that the purity of the 10kg drug was 96.5% - 99.9%, while the purity of the 3kg drug was 2%-2.9%, thus appellant ought to have been sentenced for only the 10kg drug.

Ground 3

THAT the Learned Judge may have erred in law by deducting the appellant's remand period as part of the mitigation and not as time already served under section 24 of the Sentencing and Penalties Act 2009.

Ground 4

THAT the Learned Judge may have erred in law and fact by imposing a sentence that was manifestly harsh and excessive.

[14] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable**

prospect of success' (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[15] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

01st ground of appeal

[16] The appellant's argument is that his case fell into Band 4 of ***Fatu*** guidelines (**R v Fatu** [2006] 2 NZLR 72 to 86) where sentencing tariff for importation of very large commercial quantities of methamphetamine (*i.e.* 500g or more) was set from 12 years to life imprisonment but the sentencing judge having adopted those guidelines had picked 22 years as the starting point without any detailed reasoning or sound analysis. He further submits that the learned High Court judge had failed to explain why such a

high starting point of 22 years was taken as the quantity is already inbuilt when deciding the sentencing tariff and therefore the large quantity should not have been a reason to pick the starting point at 22 years. He complains that this error has resulted in a miscarriage of justice.

[17] Paragraph 23 of the sentencing order sets out the concisely the basis for taking 22 years as the starting point:

> *'[23] Illegal drug dealing is a lucrative business and those who are in this business have no regard to harm that is caused not only to the users but to the community at large. Deterrence, both personal and general is the primary purpose of sentence for drug dealers. In your case, there is no suggestion that you are a user or an addict for me to consider rehabilitative measures for you. Based on harm that these drugs could potentially cause to the community and the sheer quantities and purity involved, I pick a term of 22 years for the importation of cocaine and a term of 3 years for the importation of cocaine and methamphetamine tablets as my starting point.'*

[18] The trial judge had remarked that at the time of sentencing there was no established tariff or a guideline judgment for cases involving cocaine and therefore, it was not possible to identify an appropriate tariff. Having examined several past sentencing decisions the trial judge had also held that the approach to sentencing in cocaine cases in Fiji was not consistent but the approach to sentencing in cases of methamphetamine has been consistent as the courts have been following the New Zealand guidelines set by the New Zealand Court of Appeal in **R v Fatu** [2006] 2 NZLR 72 on the premise that the same maximum penalty of life imprisonment is applicable in both jurisdictions. Although the above guidelines were given for methamphetamine, its application has been adopted for cocaine cases [see **R v Dixon** [2017] NZHC 920 (9 May 2017)]. As both cocaine and methamphetamine are dangerous illicit drugs the trial judge had adopted the New Zealand guidelines for importation of methamphetamine for importation of cocaine with the caution that those guidelines were only a yardstick and to determine a correct punishment, regard must be made not only to the objective seriousness the offence, but also to the seriousness of the appellant's actual act. The trial judge had also stated that one of the factors to be considered to gauge the objective seriousness of the offence is the maximum punishment prescribed for the offence which represents the legislature's assessment of

the seriousness of the offence and as the maximum punishment prescribed for importation of an illicit drug is $01 million fine or life imprisonment or both, the offence of importation of an illicit drug should be treated a seriousness offence.

[19] Having stated that while quantity and purity of the illicit drug were relevant considerations and the sentencing discretion must be guided by all other relevant considerations such as the objective features of the offence and the subjective features of the offender, the trial judge had proceeded to set out the objective seriousness of the offence at paragraphs [18] to [20] of the sentencing order and considered the possession of arms and ammunition also in assessing the objective seriousness of the offence of importation of illicit drugs (see paragraph [25]). Subjective seriousness had been dealt with at paragraph [21 & [22]. Then based on objective seriousness of the offence the trial judge had picked 22 years of imprisonment as the starting point at paragraph [23] and added 03 years for the aggravating features set out at paragraph [26].

[20] The trial judge seems to have by and large followed the two-tier approach to sentencing as articulated in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008):

> *22. In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.*
>
> *23. In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or as in this instance the facts that were outlined to the appellant after his guilty was entered and he was convicted, to which he voluntarily admitted. In doing this the court is taking cognizance of the aggravating features of the offence.*

[21] The appellant seems to rely on **Koroivuki v State** [2013] FJCA 15; AAU0018.2010 (5 March 2013) to highlight that as a matter of good sentencing practice the starting point should be picked from the lower or middle range of the tariff:

> *'[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.'*

[22] However, the above statement must be considered in the context of ***Koroivuki*** where the trial judge had picked his starting point based on a sentencing category reserved for the most serious cases of offending involving considerable degree of sophistication without giving reasons as to why he considered the offending to be the most serious case of offence involving considerable degree of sophistication. The lack of reasoning had led the Court of Appeal to conclude that the trial judge erred in picking his starting point.

[23] In addition the trial judge in of ***Koroivuki*** had used the aggravating factors *i.e.* the large quantity of cannabis and the fact that it was for sale and not for personal consumption twice; firstly, to justify the higher starting point and secondly, as aggravating factors to enhance the sentence. Thus, the statement highlighted by the appellant in ***Koroivuki*** could in effect be seen as a response and an attempt to avoid and warn sentencing judges against double counting in sentencing.

[24] In the appellant's case the trial judge had committed neither of those errors and he had clearly identified matters considered for picking 22 years of the sentencing range of 12 years to life imprisonment and added 03 more years for other aggravating factors. In any event, ***Koroivuki*** spoke of a best practice and it need not be elevated to a binding or inviolable rule of law. Further, the trial judge had adopted ***Fatu*** guidelines with the caution that those guidelines were only a yardstick as there was no guideline judgment in Fiji as at that time.

[25] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting'.

[26] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[27] The Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[28] While starting point of 22 years of imprisonment is not at the lower end of Band 4 of ***Fatu*** guidelines the trial judge had been very specific as to what matter had gone into taking 22 years' starting point within the range of 12 years to life imprisonment. The High Court judge had been equally specific of matters that had contributed to the enhancement of the sentence by 03 years. Therefore, in the case of the appellant there is no concern on double counting as expressed by the Supreme Court.

[29] Moreover, within 03 months of the appellant's sentencing the Court of Appeal handed down a guideline sentencing judgment in relation to cocaine offences in **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019). ***Abourizk*** had *inter alia* considered **R v Fatu** [2006] 2 NZLR 72 and **R v Dixon** [2017] NZHC 920 (9 May 2017)]. Even on revised ***Zhang*** guidelines (**Zhang v R** [2019] NZCA 507; [2019] 3 NZLR 648 (21 October 2019) for supply, importation and manufacture of

methamphetamine the appellant's case falls into Band 5 (*i.e.* over 02 kg) the sentencing tariff is between 10 years and life imprisonment. The quantity of cocaine imported by the appellant was more than 20 times of the weight for lower end of Band 4 of ***Fatu*** guidelines and over 06 times of Band 5 in ***Zhang*** guidelines. Even if the trial judge had picked the lower end of Band 4 of ***Fatu*** guidelines as the starting point all aggravating circumstances and features including the large quantity and the appellant's role would have justified a very substantial enhancement resting the final sentence at 23 years of imprisonment.

[30] The sentencing tariff of 12 years to life imprisonment for any weight of 500g or more as stipulated within Band 4 of ***Fatu*** guidelines did not necessarily mean that any weight of 500g or more should always result in a starting point at 12 years. Depending on the higher weight above 500g and other aggravating circumstances of the offending the starting point could get increased upwards from 12 years and other significant aggravating factors concerning the offender including his role may push the final sentence towards the higher end of life imprisonment. The guideline judgments are just that, "guidelines", and must not be applied in a mechanistic way. The bands themselves typically allow a significant overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified (vide **Zhang v R** (supra)].

[31] According to ***Abourizk*** sentencing guidelines, the appellant's case falls into category 05 of more than 01kg and carries a sentence from 20 years to life imprisonment. Therefore, the appellant had been lucky not to have been sentenced according to ***Abourizk*** sentencing guidelines for the importation of almost 13 kg of cocaine, for otherwise his sentence would have been much higher with a possible substantial fine with a default sentence permitted under section 05 of the Illicit Drugs Control Act 2004 depending on the quantity involved, nature of the act and the degree of involvement of the accused as suggested by the Court of Appeal.

[32] On the other hand, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that

must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015). The appellant's final sentence of 22 years of imprisonment is within ***Fatu*** tariff adopted for guidance by the trial judge.

[33] In all the circumstances aforesaid, I do not think that there is a reasonable prospect of success in his appeal on the first ground of appeal.

[34] On the other hand, if the sentence appeal goes before the full court it might be interested to revisit the sentence in terms of section 23 (3) of the Court of Appeal Act. That is because a change in sentencing practice does not alter the penalty provided by the legislation creating the offence but is an exercise of the sentencing discretion in an individual case. To put it another way, a change in guidelines does not amount to a change of penalty for the purposes of those two provisions. ***Abourizk*** sentencing guidelines may not be affected by the principle of non-retrospectivity in their application to the appellant [see **Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200 and **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019)].

02nd ground of appeal

[35] The appellant's contention is that the judge had erred by considering the purity of cocaine as 96.5%-99.9% when only 10 kg of cocaine had been tested to have that high degree of purity whereas the rest of cocaine (*i.e.* 03 kg) had only 2%-2.9% purity.

[36] This appears to have been the case according to paragraph 5 of the sentencing order:

> *'[5]……. The total weight of cocaine is 12.9kg. For 3 bars, the purity is fairly low, 2 – 2.9%. For 10 bars, the purity is fairly high, 96.5 – 99.9%.'*

[37] However, it would appear that even if one disregards 03 kg pack with low purity 10kg of cocaine, with very high purity of 96.5 – 99.9% in 10kg is sufficient to select 22 years as the starting point and the final sentence of 23 years. It must be remembered that the starting point or the final sentence by no means had depended solely or even significantly on the purity of cocaine. A number of other relevant considerations had gone into them.

[38] Therefore, I do not see a reasonable prospect of success for the sentence appeal on this ground of appeal.

03rd ground of appeal

[39] The appellant submits that the trial judge had not reduced the remand period of 08 months from the final sentence but treated it as one among the rest of mitigating factors. He relies on **Koroitavalena v State** [2014] FJCA 185; AAU0051.2010 (5 December 2014) and **Domona v State** [2017] FJSC 15; CAV001.2017 (20 July 2017) and **Tawatatau v State** [2018] FJSC 2; CAV008.2017 (26 April 2018).

[40] Paragraph 24 of the sentencing order is as follows:

> *[24] The subjective features of the case have very nominal mitigating value. You are 45 years old, married and have two teenage children. You are a foreigner. Your nationality is neither a mitigating nor an aggravating factor. You have made no attempt to explain your conduct or express remorse to qualify for a reduction in sentence. You have no previous history of any criminal conduct but in illicit drug cases, previous good character carries very little mitigating value. I give you a nominal reduction of 4 months for the subjective features, 12 months for your previous good character and* ***8 months for your remand period****. Otherwise, all that was said in mitigation on your behalf deserves very little leniency.'*

[41] In ***Tawatatau*** the trial judge had reduced the sentence he would otherwise have passed on the petitioner to reflect the time he had been in custody awaiting trial but the way the judge did that was to treat it as a mitigating factor which was regarded as an error Nevertheless, the Supreme Court did not interfere with the sentence. Marsoof. J in the Supreme Court said:

'[45] On the question of the sentence, the Petitioner has raised Ground (5) which simply is that the Petitioner's period of remand was not discounted by the learned trial judge in imposing a sentence of 8 years imprisonment with a non-parole period of 6 years. However, it is abundantly clear that the remand period of 1 year 8 months and 8 days was considered among the mitigating factors on account of which the head sentence was reduced by 4 years in arriving at the sentence imposed on the Petitioner by the High Court which has been affirmed by the Court of Appeal. I see no basis for granting enlargement of time for the Petitioner to seek leave to appeal against the decision of the Court of Appeal on the sentence.'

[42] In this case the trial judge had deducted 08 months of remand period as part of the discount for mitigating factors before the final sentence. If the remand period was deducted from the final sentence the ultimate sentence would have been the same.

[43] There is no merit in this ground of appeal.

04th ground of appeal

[44] This is an omnibus kind of appeal point as most of the matters under this ground had already been urged under previous grounds. In addition, the appellant submits that the trial judge had failed to take into account his diagnostic report (though his counsel is said to have raised it as part of mitigation) that he was carrying Huntington's disease but submits that at the time of the conviction (28 February 2019) he was asymptomatic which therefore should have been the case even at the time of his sentence (08 March 2019). It is difficult to see how the appellant's counsel could raise his alleged medical condition as part of mitigation when he was admittedly asymptomatic at the time of conviction and the sentence was meted out just about a week later. In any event, Huntington's disease has not been shown to be causally connected with the appellant's offending but he had got it hereditarily.

[45] There is nothing to indicate from the sentencing order or from the written submissions of the respondent that the appellant's alleged medical condition with supporting evidence had been urged as a mitigating factor before the sentencing judge. In any event personal circumstances have been held to be of little mitigatory value in Fiji (vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) particularly in

illicit drug cases. In New Zealand it has been held that sentencing those convicted of dealing commercially in controlled drugs the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant. Rather, such circumstances are to be weighed in the balance with the needs of deterrence, denunciation, accountability and public protection. These considerations, in conjunction with the maximum sentence scale enacted, require a stern response to offending of this kind [vide **Zhang v R** (supra)].

[46] In case the appellant is to develop Huntington's disease or has already done so, it is for the relevant authorities under whose care and custody he is being held to seek appropriate medical treatments for him like they do for any other serving prisoner.

[47] Therefore, there is no merit in this ground of appeal.

Order

1. Leave to appeal against sentence is refused.

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL