IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 126 OF 2015

STATE

v

1. **JOSEPH ABOURIZK**
2. **JOSESE MURIWAQA**

Counsel:	Mr L.J. Burney with Ms R. Uce and R. Mohammed for Prosecution Mr M. Naivalu for Mr Abourizk Mr J. Rabuku for Mr Muriwaqa
Date of Judgment	: 16 June 2023
Date of Sentence	: 31 July 2023

SENTENCE

1. On 16 June 2023, at the High Court at Lautoka, Mr Abourizk and Mr Muriwaqa (the Offenders) were convicted after a re-trial of a single count of Unlawful Possession of Illicit Drugs, contrary to section 5(a) of the Illicit Drugs Control Act 2004 (IDCA).

2. The Court found that the offenders were in possession of 49.9 kilograms of cocaine, the most significant quantity of illicit drugs ever seized by police in Fiji, whilst being transported within Fiji.

3. On 13 July 2015, the offenders were travelling together in a private vehicle registration No. HM-046. Mr Muriwaqa is a Fijian citizen and was driving the vehicle. Mr Abourizk was the passenger seated in the front passenger seat. He is a visitor from Australia. The police approached them at Vuda Point and found in the boot of the HM-046 a suitcase containing 20 parcels wrapped in plastic and masking tape and 14 similarly wrapped parcels inside a travel bag. The 34 packages contained an aggregate weight of 49.9 kilograms of cocaine. At the trial, both denied any knowledge that the bag and the suitcase contained cocaine. The offenders had driven 49.9 kilograms of cocaine over a distance of at least 10 km, culminating at Vuda Point.

4. Police witnesses confirmed that they had never detected any drug manufacturing plant in Fiji. It is highly likely that this large quantity of cocaine has been unlawfully imported into Fiji and was in transit to another overseas destination.

5. The illicit drug offending has become a serious problem in Fiji. Large quantities of hard drugs have been seized in the recent past. Fiji has become an attractive transit point due to its convenient location in the South Pacific linking the supply route of the Americas with Australia and New Zealand where illicit drug trade has become a lucrative underground business. Illicit drug trade has international ramifications and to face the challenges posed by organised and sophisticated drug cartels, Fiji must have an effective deterrent system in place to combat this menace. The courts must come down harsh on drug offenders to send a clear message to society and to the international community that Fiji will never tolerate such offences. In the context of cocaine sentencing, particularly relevant purposes include deterrence and the protection of the community.

6. The offence of possession of illicit drugs contrary to section 5(a) of the IDCA is a serious offence. It carries a maximum penalty of life imprisonment. Unlike in most other commonwealth jurisdictions like England, New Zealand and Australia, the IDCA of Fiji does not distinguish between different classes of drugs. Nor does it differentiate between various types of offending. All the offending verbs or offending actions are treated equally. 'Supplies', 'possesses', 'manufactures' and 'cultivates" are treated equally, and none of the offending actions is given any higher or lower standing, as far

as section 5(a) of the IDCA is concerned. [Sulua v State [2012] FJCA 33 (31 May 2012)].

7. The lack of description in the sentencing provision and its indiscriminate application to all types of offences and all types of drugs have been problematic to some sentencing courts in Fiji. [See: Emori Dibi v State Criminal Appeal No. HAA 96 of 2017 In re Koroi et al HAR002-006.2012 (20 April), State v Nabenu [2018] FJHC 539; HAA10.2018 (25 June 2018)].

8. The State suggests that, given the circumstances of this case, signified by the large commercial quantities of drugs found in transit, the offenders should be sentenced on the same basis as suppliers and traffickers.

9. I agree with the State that there is utility in the lack of prescription in the sentencing provision in that it allows the courts considerable scope to do justice in individual cases and that the deliberate decision of Parliament to treat all types of drug offending as potentially equally serious allows the courts sufficient latitude to sentence those convicted of possession of commercial quantities of drugs on the same basis as suppliers and traffickers.

10. However, the sentencers must be mindful that they do not offend the cardinal principle of law that a person must not be punished except for offences for which he has been convicted [King v Bright [1916] 2 KB 441, Vakalalabure v State [2006] FJSC8; CAV0003U.20045 (15 June 2006)].

11. Marshall JA in Sulua (supra) observed that the trial judge erred in taking into account as an aggravating factor that the drugs were intended for supply when the accused was charged and convicted for possession only. Temo JA (as he then was) having agreed that the sentencer had fallen into an error in sentencing the accused on the basis the drugs were possessed for supply, concluded nevertheless that the error was not fatal because the maximum penalty prescribed for possession and supply is the same that is life imprisonment.

12. In Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013), the Court of Appeal observed that:

> If there is evidence led by the prosecution regarding the purpose for which the offender had the drug in his possession, then that purpose becomes relevant in assessing the culpability of the offender. If the drug is of a small quantity and was intended for personal use, the court can take that into account in reducing the offender's culpability when passing sentence. If the drug was possessed with the intention to keep for another, that intention is relevant in assessing the offender's culpability and role in the joint enterprise. If the drug is intended for distribution or sale, a higher culpability is imputed on the offender. The list is not exhaustive. Further, the court can impute various degrees of culpability based on commercial aspects involved. If the drug is kept in possession for sale, the degree of culpability will be much higher than if the drug was possessed for supply for no remuneration but as a favour for another. The criminality that is involved in each case will depend on the evidence led by the prosecution or facts admitted by the offender."

13. In the present case it was open on the evidence to impute the commercial use that the offenders had intended to put the drugs to, as an aggravating factor to enhance the sentence.

14. The sentencing discretion of the courts must be exercised in accordance with the proportionality principle entrenched in the Constitution and the guidance provided in Section 4 of the Sentencing and Penalties Act (SPA) so as to maintain reasonableness, accountability and consistency. According to Section 4(2)(b) of the SPA, the courts must have regard to the current sentencing practice and the terms of any applicable guideline judgment. Once a sentencing guideline has been settled by a superior court under sections 6, 7, 8 and 9 of the SPA, it is deemed to represent the current sentencing practice in Fiji.

Current Sentencing Practice for Hard Drugs

15. In the past, the absence of an applicable guideline judgment for hard drugs gave rise to an undesirable lack of consistency in the approach of sentencing courts. With a view to promoting a more consistent approach to sentencing for hard drugs, the Court of Appeal in Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019) pronounced a guideline judgment (Abourizk Guidelines) pursuant to the Sentencing and Penalties Act. The majority of the Court of Appeal stated at [145]:

> "[145] Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for the tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, Methamphetamine etc.).
>
> These guidelines may apply across all acts identified under sections 5(a) and 5(b) of the Illicit Drugs Control Act 2004 subject to relevant provisions of law, mitigating and aggravating circumstances and sentencing discretion in individual cases. (Emphasis added)
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> Category 01: - Up to 05g - 02 ½ years to 04 ½ years' imprisonment.
>
> Category 02: - More than 05g up to 250g - 03 ½ years to 10 years' imprisonment.
>
> Category 03:- More than 250g up to 500g - 09 years to 16 years' imprisonment.
>
> Category 04:- More than 500g up to 01kg - 15 years to 22 years' imprisonment.
>
> Category 05 - More than 01kg - 20 years to life imprisonment."

Retrospective Application of Guideline Judgment

16. At the sentencing hearing, the Counsel for Offenders argued that the Abourizk Guidelines are no longer valid and not applicable to the present case because the majority decision of the Court of Appeal that affirmed the conviction was set aside by the Supreme Court.

17. I do not agree with this argument. Although the Supreme Court quashed the conviction entered by the High Court, it has not reviewed or set aside the guideline judgment entered by the Court of Appeal. In the Court of Appeal, the Director of Public Prosecutions had given notice of the State's intention to seek a guideline judgment for sentences for hard drugs. The Court of Appeal has followed the procedure outlined in the SPA before setting out the guidelines. The Legal Aid Commission made adequate representations. Therefore, subordinate courts are bound to follow the guidelines given by the Court of Appeal.

18. However, in view of the Supreme Court decisions in Kumar v State [2018] FJSC 30; CAV0017.2018 (2 November 2018) and Prasad v State [2019] FJSC 3; CAV0024.2018 (25 April 2019), I see another potential challenge to the Abourizk Guidelines in view of the observations (*obiter dictum*) made by the Supreme Court in respect of retrospective application of guideline judgments. The offence in this case was

committed on 13 July 2015 and the Court of Appeal passed the guideline judgment on 7 June 2019. After the said Supreme Court decisions, the question of whether sentencing guidelines apply retrospectively has been somewhat controversial in this jurisdiction, although the Supreme Court in Kumar and Prasad has not decided on the retrospectivity point.

Do the Abourizk guidelines apply retrospectively to the offenders in the present case?

19, In Kumar v State [2018] FJSC 30; CAV0017.2018 (2 November 2018), the Supreme Court observed, at [28]:

> The impact of an increase in Kumar's case. The Director of Public Prosecutions gave notice of the State's intention to seek a guideline judgment for sentences for the rape of children and juveniles in its written submissions dated 24 September 2018, supplemented by further written submissions dated 9 October 2018. No written submissions in response were filed on behalf of Kumar. That was not altogether surprising. **If the Court decided that the current sentencing practice for the rape of children and juveniles should be reviewed, any new sentencing practice would not apply to Kumar. It would only apply to offenders whose offences took place after the promulgation of our judgment.** Dato' Alagendra conceded that when the Court put that proposition to her. There was, therefore, no need for Kumar's legal team to respond to the State's submissions at all." (Emphasis added)

20. The Supreme Court returned to this issue in Prasad v State [2019] FJSC 3; CAV0024.2018 (25 April 2019), at [40]:

> Thirdly, there is another reason why the applicant in Aitcheson might have felt hard done by. There was a particular reason why the Legal Aid Commission which was providing representation for the applicant in Aitcheson would not have contemplated the possibility that his sentence would have been increased.
>
> Aitcheson was a rape case involving young children. There was in the same session of the Supreme Court another appeal in a rape case involving a young child (Kumar v The State [2018] FJSC 30) in which the Director of Public Prosecutions had specifically asked the court, pursuant to section 6(1) of the sentencing and Penalties Decree 2009, to review sentences for the rape of children and juveniles and to give a guideline judgment on the topic. No such request under section 6 was made in Aitcheson. Accordingly, the Legal Aid Commission could confidently expect that if the tariff for sentencing in rape cases involving children and juveniles was to be increased as a result of any guideline judgment which the court chose to give in Kumar, it would not apply to the applicant in Aitcheson - not least because counsel for the State in Kumar (who also represented the State in Aitcheson) expressly conceded that if the court gave a guideline judgment increasing the tariff for sentencing in rape cases involving children and juveniles, the new tariff should only apply to offenders whose offences took place after the promulgation of the court's judgment. **Otherwise, the new tariff would be**

applied retrospectively, and some people might say that that would not only be unfair to accused persons, but might also be a breach of the principle of non-retrospectivity which lies behind Art 14(2) (n) of the Constitution."[Emphasis added]

21. What would have been the position if the State did not concede that the new tariff should only apply to offenders whose offences took place after the promulgation of the court's judgment? If the new tariff were to be applied retrospectively, would that breach the principle of non-retrospectivity entrenched in the Constitution or produce unreasonable results? With all due respect, I beg to differ to answer this question in the negative. I differ out of no disrespect to the Supreme Court, but to avoid absurdity and to overcome the difficulty in going back to the pre-Abourizk era marred by huge disparities in the sentencing of hard drug offenders in Fiji, in the absence of a guideline judgment.

22. I verily believe that if the application of Section 14(2)(n) of the Constitution and Section 4(2) of the Sentencing and Penalties Act were properly and adequately explained and also the House of Lords decision in R. (Uttley) v Secretary of State for the Home Department [2005] 1 Cr.App.R.(S.) and Court of Appeal (England) decision R v H (J) [2012] 1 WLR 1416 (cited in Fiji in State v Sagole - Sentence [2018] FJHC 843; HAC76.2018 (11 September 2018)] were brought to the notice of the Supreme Court, it would not have made the observations it had made in those two matters.

23. Article 14 (2)(n) of the Constitution provides:

> "Every person charged with an offence has the right-
>
> > to the benefit of the least severe of the prescribed punishments if the prescribed punishments for the offence has been changed between the time the offence was committed and the time of sentencing;"

24. The prescribed punishment for the offence of Possession of Illicit Drugs contrary to Section 5(1) of the IDCA has not been changed between the time the offence was committed and the time of sentencing. It has always been life imprisonment ever since the IDCA was passed by Parliament in 2004. Sentencing tariffs and guideline judgments are judicial constructs to maintain the uniformity and transparency of the sentencing process. They can never have the effect of changing the punishments prescribed by Parliament. The sentencing courts are at liberty to deviate from the

established tariffs if the circumstances in individual cases warranted such a deviation. The sentencing tariffs do not take away the sentencing discretion of the courts.

25. Anybody entering Fiji by sea or air ought to know that the possession of illicit drugs is an offence punishable by life imprisonment in Fiji. The announcement given to the passengers upon arrival at the airport will be to that effect. Ignorance of the law is not an excuse. Therefore, no one is entitled to complain of injustice or unreasonableness if his sentence did not exceed the prescribed punishment by the Act of Parliament.

26. A sentencing court in Fiji is required by the terms of section 4(2) of the Sentencing and Penalties Act to have regard to current sentencing practice and not the sentencing practice that was prevalent at the time of the offence. I agree with the argument of the State that holding otherwise would result in a form of sentencing practice leading to arbitrary disparity in sentencing (and a sense of injustice) if the just and proportionate sentence was determined by reference to whether the offending occurred before or after 7 June 2019, particularly as there was no settled sentencing practice prior to the Abourizk Guideline Judgment.

27. In State v Nikolic [2019] FJHC 167; HAC 115.2018[L TK] (8 March 2019), the learned sentencing judge observed that the approach to sentencing in cocaine cases in Fiji was not consistent and for that reason, it was not possible to identify an appropriate tariff for the offence. In its guideline judgment, from paragraphs 124 onwards, the Court of Appeal has cited a number of cocaine cases decided in Fiji to explain the disparity, [State v Balaggan HAC049 of 11: 4 June 2012 FJHC 1147; State v Lata AAU0037 of 2013: 26 May 2017 [2017] FJCA 56; State v Nikolic HAC115 of 2018[LTK].

28. In R. (Uttley) v Secretary of State for the Home Department [2005] 1 Cr.App.R.(S.) 91, the House of Lords considered the meaning of Art.7(1) of the European Convention and found, at page 506 [21], that Art.7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed on the defendant under the **law in force** at the time of his offence was committed.

29. In R v H (J) [2012] 1 WLR 1416, the English Court of Appeal considered the scope of the prohibition on retrospectivity in the context of "cold" cases (cases where the offender is brought to justice many years after the crime was committed) observed:

> In the result therefore in historic cases, provided sentences fall within or do not exceed the maximum sentence which could lawfully have been imposed at the date when the offence was committed, neither the retrospectivity principle nor article 7 of the Contravention are contravened."

30. The full Court of Appeal distilled some guidelines on how to approach sentencing in 'cold cases:

> (a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by established facts.
>
> (b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 *(when the offence was committed)* what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed....."

31. It is my considered view that the words "prescribed punishment" in Section 14 (2) (n) of the Fiji Constitution, should be read in the same way to mean the statutory maximum penalty. There is no tension in my opinion between the approach prescribed by Section 4(2) of the SPA and Section 14(2) (n)] of the Constitution. The State's position on retrospectivity appears to have been accepted by the Court of Appeal in Chand v State [2019] FJCA 192; AAU0033.2015 (3 October 2019). In view of that, I proceed to sentence the offenders in this case on the basis of the Abourizk Guidelines.

32. If I were to accept the argument of the Counsel for Offenders that the Abourizk Guidelines are not applicable to this case, the only option available to me is to gather the sentencing practice from the decided cases in the contemporary past in Fiji although none of them would come even closer to this case in terms of the quantity of the drugs confiscated.

33. In State v Balaggan - Sentence [2012] FJHC 1147; HAC049.11 (4 June 2012), two young offenders were convicted of an attempt to export 521.6 grams of pure cocaine after trial and sentenced to terms of 11 ½ and 10 years imprisonment after deductions

for their respective remand periods. The offence involved a sophisticated method of an attempt to smuggle out of Fiji cocaine soaked in clothes contained in the luggage of one of the offenders. It is significant that the statutory maximum for this offence is 14 years, as opposed to life imprisonment in the present case.

34. In State v Lata [2013] FJHC 136; HAC83.2010 (25 March 2013), the High Court convicted an adult female offender for possession of 1.9 kg of cocaine (purity level was not determined) and sentenced her to 18 years' imprisonment. On appeal, the Court of Appeal reduced the sentence to 15 years' imprisonment with a non-parole period of 10 years (Lata v State [2017] FJCA 56; AAU0037.2013 (26 May 2017)).

35. In State v Bravo - Sentence [2008] FJHC 172; HAC145.2007L (12 August 2008), an adult female offender was convicted of importing 2.1 kg of cocaine with 73% purity after trial and sentenced to 8 years' imprisonment. The drug was packaged and strapped to the offender's body and smuggled into Fiji on a flight. When the case came before the Court of Appeal for leave to appeal, Powell J refused leave saying that the appeal was bound to fail and there was a real risk that a cross-appeal on sentence would see the sentence increased.

36. In State v Rahman - Sentence [2021] FJHC 288; HAC063.2019 (12 October 2021), the sentencing judge used Abourizk Guideline and decided that a term of 23 years' imprisonment was an appropriate sentence for possession of 39.5kg of cocaine. He fixed a non-parole period of 14 years. The State has informed that it has applied for leave to appeal against this sentence as being unduly lenient in the light of the Abourizk Guideline Judgment.

Harm Factor

37. According to the Abourizk Guidelines, this case falls into category 05 of more than 01 kilogram and carries a sentence from 20 years to life imprisonment. Objectivity and consistency are best served if the weight calculations proceed on a basis that is referable to purity. At the trial, it was revealed that the purity level of cocaine taken from each sample exceeded 50%. Even though the total weight of 49.9 kilograms does not

represent the pure cocaine content, there is a high concentration of cocaine in each sample and the actual quantity of pure cocaine must necessarily attract a sentence far above the bottom end of the tariff which is 20 years imprisonment.

38. The potential harm that would be caused by this enormous quantity of cocaine is substantial. The harm inflicted on the community is particularly important in sentencing for commercial drug offending because of its corrosive effect on communities.

39. Gounder J in State v Balaggan (2012) FJHC 1147; HAC049.11 (4 June 2012) emphasised the nature and the effect of cocaine as follows:

> "In the drugs world, cocaine is classified as the "rich man's speed". Cocaine is administered either by snorting or injecting. In R v Farlane [1992] 3 NZLR 424, Cooke P in delivering the judgment of the New Court of Appeal stated the effects of cocaine use at p.426:
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> "An effect of the drug is rapid and intense but short-lived euphoria, which may be followed by a 'crack' with severe depression and paranoia. In turn, a craving for and psychological dependence on the drug may arise. Regular users face increased risks of heart attacks and strokes from bleeding into the brain resulting from high blood pressure. Among pregnant women who use cocaine, there is a high incidence of miscarriages and their babies may have cocaine-related disorders. Hallucinations, as of insects crawling under the skin, occur in heavy users."
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> Further on at p.426, Cooke P went on to say:
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> "Addicts spend heavily to obtain their weekly supplies and sometimes are driven to crime to support their habit. The high profits also attract criminal elements....In addition to the social dangers of increased cocaine use, there is the cost to the community of detection and enforcement measures."

40. Although the large quantity of cocaine found in the possession of the offenders should have been in transit from one country to another, the risk of it infiltrating into the local market cannot be ruled out. Therefore, the potential harm of the offending is enormous both locally and internationally.

Culpability Factor

41. Where an offender fits within any particular band, the ultimate sentence will depend not just on the quantity and purity of the drug involved but also on the role played by

the offender. The role is generally divided into three categories [Zhang v R [2019] NZCA 507; [2019] 3 NZLR 648]. First (and attracting a more substantial scale) there is the "leading role". This applies where the offender is directing or organising buying and selling on a commercial scale and/or is closely connected to the product source and/or has an expectation of substantial financial gain. The second is the "significant role". That is where the offender has an operational or management function within a chain, has subordinates (who may have been recruited or intimidated by the offender) and/or is motivated by financial or other advantage. The third tier is the "lesser role". Here the offender will probably have performed a limited function under direction and/or may have been engaged by duress, naivety or other vulnerability.

42. I do not agree with the State's submission that there is no evidence to suggest there is any distinction between the culpability of each offender for this very serious offence. It was evident that the drugs originated from a foreign source. Mr Abourizk has come from Australia to carry out the operation. He had in his possession a large amount of foreign and local currency at the time of the offence. He no doubt had the operational or management function in his own operation and with his money, he had the capacity to involve and influence people like Mr Muriwaqa in the operation. Although Mr Abourizk may not have been the head of the whole drug operation, he played a significant role motivated solely or primarily by financial advantage with the understanding of some awareness of the scale of operation. Therefore, I identify Mr Abourizk as a person who played a significant role.

43. Whereas Mr Muriwaqa played a comparatively lesser role in terms of culpability. I agree with his counsel that he should not be at the same level as a manufacturer or supplier of drugs in Fiji. He hired HM-046 for two days and transported or couriered the bags for a considerable distance culminating in Vuda Point. He is more susceptible to being exploited by those higher-ups in the international trade of illicit drugs.

44. According to Abourizk Guidelines, the bottom edge of category 5 is reserved for those who are found in possession of 1 kilogram of hard drugs. In the present case, the quantity is approximately 50 times more than that. Given the high quantity of cocaine involved in this case, the culpability and harm factor of this offence is considerably

high and should attract a higher starting point. I start Aboirizk's sentence at 29 years' imprisonment from the lower end of the tariff. A starting point of 28 years fits the level of culpability for Mr Muriwaqa.

Aggravating Factors:

45. Apart from the commercial aspect which I alluded to, the manner in which the drugs were concealed in the boot of the vehicle suggests that this is a planned and sophisticated operation. There are no aggravating factors other than that. I do not intend to increase the sentence on that account because I believe this aggravating factor is subsumed in the starting point given that the quantity-based tariff takes cognizance of this aspect of aggravation.

Mitigating Factors

46. Both Mr Abourizk and Mr. Muriwaqa were convicted and sentenced to 14 years of imprisonment in 2016 at their first trial and that sentence was increased by the Court of Appeal to 25 years imprisonment with a non-parole period of 23 years. Mr Naivalu drew the Court's attention to the facts in the permanent stay application filed on behalf of Mr Abourizk.

47. In that application, Mr. Abourizk complained of a 'travesty of justice' in that: he has been incarcerated for the past 8 years and held back in remand awaiting retrial despite his conviction being quashed by the Supreme Court; despite all five assessors returning an opinion of not guilty for being convicted and sentenced to 14 years imprisonment; having his appeal to the Court of Appeal dismissed and sentence being further enhanced to 25 years imprisonment and so on. Mr Naivalu urged this Court to consider the enormous hardships his client had to undergo due to what he called a 'wrongful conviction' forcing him to go up the ladder of the courts seeking justice.

48. This is an exceptional case in that this Court is called upon to sentence a prisoner after a re-trial for an offence committed approximately eight years ago. The State having conceded that the guideline judgment indicates that an ultimate sentence upwards of 25 years' imprisonment would be warranted in all the circumstances of this case, nevertheless, suggests that, having regard to the fact that this sentencing exercise is

after a re-trial, it would not be appropriate to impose a sentence above that considered appropriate by the Court of Appeal. I agree with the State and take this exceptional situation into consideration and give a substantial discount of four (4) years for both offenders.

49. Mr Naivalu, on behalf of Mr. Abourizk, deposed in his affidavit for permanent stay application that his client has been incarcerated for the last 8 years, 3 years of which were spent in solitary confinement in the Maximum-Security Complex at Naboro; that these years within the prison system, particularly those within solitary confinement, he has had an immense impact on his mental and psychological state; that following solitary confinement, he has developed issues with basic communication, recall and comprehension; that these issues became such a concern that he has sought the help of psychologist on a bi-weekly basis; that in compounding these pressures, his mental acuity has also been affected by the fact that his only child was born whilst he was in custody and has only seen her on four occasions since; that, in 2020, he was advised via a letter that his wife had commenced divorce proceedings and wished to cease communications in an effort to move forward with her life; that he has been in perpetual grief ever since and battles depression daily and he instructs that his mental state is of such fragility that there are times he has trouble remembering even simple things on a daily basis and so on.

50. None of these claims are supported by evidence. There is no medical evidence to substantiate that Mr Abourizk is suffering from such a medical condition as claimed by his counsel.

51. The fact remains that the Applicant is a foreigner and, although there is no evidence that he was in solitary confinement, he is serving his prison term on foreign soil far away from his immediate family who had limited opportunity to pay him a visit. Mr Abourizk is in his thirties and had maintained a clear record until he was convicted in this matter. However, good character is of little mitigatory value in cases of this nature.

52. Gounder J in State v Balaggan cited Aramah (1983) 76 Cr.App.R.190, the English Court of Appeal judgment where it was observed:

> that the good character of a courier, as he usually was, is of less importance than the good character of an accused in other cases. The Court took the view that drug-

> smuggling organizers deliberately recruit persons who will exercise the sympathy of the court. The point the Court makes is that the personal circumstances of an accused are secondary because of the deterrent element to sentences imposed in respect of drug-smuggling offences

53. Having considered all the mitigating circumstances, I give a further discount of one year to arrive at an interim sentence of 24 years' imprisonment for Mr. Abourizk. He has already served approximately 8 years in a correction facility either as a convict or remandee. I deduct 8 years on that account to arrive at a final sentence of 16 years imprisonment.

54. Mr. Muriwaqa is an ordinary Fijian in his fifties. He has no previous conviction for the operational period. I give a further discount of one year to arrive at a final sentence of 23 years' imprisonment. He also has already served approximately 8 years in a correction facility either as a convict or remandee. I deduct 8 years on that account to arrive at a final sentence of 15 years imprisonment.

Non-Parole Period

55. In fixing the non-parole period, the Courts must be mindful of the effective deterrent aspect as well the rehabilitation prospects of the offenders.

56. Mr Abourizk is young and a first offender. The Assistant Commissioner of Corrections in a letter informs that Mr Abourizk has become a 'trust boy' of the institution during his remand at the Suva Remand Centre. He is now the chief cook at the Remand Centre in charge of cooking duties for the officers and the inmates and he attends to his duties unsupervised. He cooperates with the authorities and actively participates in religious counselling. His rehabilitation is high. I fix a non-parole period of 10 years.

57. Mr Murivaqa has maintained a clear record for the past 10 years. I fix a non-parole period of 10 years for Mr Muriwaqa also.

58. Summary

Mr Joseph Abourizk is sentenced to an imprisonment term of sixteen (16) years with a non-parole period of ten (10) years effective from today. Mr Abourzk is eligible for parole when he has served 10 years of his term of imprisonment.

Mr Mosese Muriwaqa is sentenced to an imprisonment term of fifteen (15) years with a non-parole period of ten (10) years effective from today. He is eligible for parole when he has served 10 years of his term of imprisonment.

59. 30 days to appeal to the Court of Appeal.

Aruna Aluthge

Judge

31 July 2023

Solicitors:

Office of the Director of Public Prosecutions for State

Naivalu Law and John Rabuku Lawyers for Offenders