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

Criminal Case No. HAC 115 of 2018[LTK]

BETWEEN	:	**STATE**
AND	:	**JOHN GEOFFREY NIKOLIC**
Counsel	:	**Mr L J Burney, Mr Y Prasad & Ms S Kiran for the State** **Mr W Pillay for the Accused**
Date of Hearing	:	**28 - 31 January, 1 February, 11 - 19 February, 8 March 2019**
Date of Sentence	:	**8 March 2019**

SENTENCE

[1] John Geoffrey Nikolic, you stand convicted of two charges of importing an illicit drug and one charge of possessing arms and ammunition without a licence.

[2] I now pronounce your sentence. The facts upon which I base your sentence are as follows.

[3] On 22 June 2018, the Fiji Customs officers boarded and searched a yacht (the vessel) that arrived from abroad at Port Denarau, Nadi. According to the admitted facts, the vessel left Florida, USA on 2 February 2018 and travelled to Columbia, Panama, French Polynesia and Tahiti before arriving in Fiji. The final destination was Brisbane, Australia.

[4] Your wife is the registered owner of the vessel. She was with you on board with three crew members. You were the Captain or the Master and in control of the vessel. Before

the search commenced you authenticated the arrival documents in the presence of the Customs officers.

[5] You and your crew were moved to a sterile area. After a package of 10 bars of cocaine was discovered inside a locker, you were cautioned of your right to remain silent. You chose not to exercise that right. You told the Customs officers that there was another package on the opposite end of the same locker. The second package of 3 bars of cocaine was discovered and retrieved from the location revealed by you. 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%.

[6] It is not clear what your motives were when you told the Customs officers about the second package. It looks like you wanted to gain their trust for them to allow you to speak with your wife. You were allowed to speak with her. You gave an impression that she was not involved and that she was unaware of the packages found on the yacht she owned. She gave an impression of being distressed after learning about your predicament.

[7] After you spoke with your wife, you went inside a toilet and took drug overdose. The search was halted to give you medical attention. After you had received medical attention, the search resumed. But you were taken away and hospitalized.

[8] A further discovery was made of two packages in a different compartment of the vessel. The packages contained two pistols with loaded magazines and ammunition, cocaine and methamphetamine tablets (34.4g) and US$15,000.00 cash. The bars and packages were wrapped in duct tapes. They were concealed and hidden and not visible to the naked eye. The manner in which the illicit drugs, arms and cash were packaged and concealed indicates that you were in a business of dealing with illicit drugs.

[9] Sentencing requires consideration of a number of statutory and common law principles. The ultimate punishment that is imposed on you must reflect the total criminality involved, that is, the punishment must fit the crime you have committed and is just in all circumstances of the case. I am obliged to consider both the objective seriousness of the

offence and the objective seriousness of your actual act. There is no precise formula to be used, but one of the factors to be considered to gauge the objective seriousness of the offence is the maximum punishment prescribed for the offence. The maximum punishment represents the legislature's assessment of the seriousness of the offence. The maximum punishment prescribed for importation of an illicit drug is $1 million fine or life imprisonment or both. For that reason, the offence of importation of an illicit drug is treated a seriousness offence.

[10] I am also obliged to consider, however with care, past cases for the purpose of consistency in sentencing.

[11] 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 (*Bravo v State* [2008] FJCA 72; AAU0094.2008S (5 November 2008)).

[12] 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 a luggage of one of the offenders.

[13] 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 (*Lata v State* [2017] FJCA 56; AAU0037.2013 (26 May 2017)).

[14] In *State v Abourizk* - Sentence [2016] FJHC 340; HAC126.2015 (29 April 2016), the High Court sentenced a foreign male national for possession of 49.9 kg of cocaine with purity between 54 % and 76 % to 14 years' imprisonment after trial. There is an appeal pending against the inadequacy of this sentence in the Court of Appeal (*Abourizk v State* [2018] FJCA 45; AAU0054.2016 (8 May 2018)), and therefore, this case is of limited assistance.

[15] In *State v Hurtado* - Sentence [2017] FJHC 446; HAC073.2014 (27 June 2017), a young offender was convicted of importing 20.5 kg of cocaine with 89% purity and sentenced to 17 years' imprisonment following a retrial.

[16] Although there are not many, the approach to sentencing in cocaine cases is not consistent. And for that reason it not possible to identify an appropriate tariff for the offence. There is no established tariff or a guideline judgment for this offence. While quantity and purity of the illicit drug are relevant considerations, 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.

[17] The approach to sentencing in cases of methamphetamine is consistent. For methamphetamine, the courts are following the New Zealand guidelines set by the New Zealand Court of Appeal in *R v Fatu* [2006] 2 NZLR 72. The courts in Fiji have adopted those guidelines saying the same maximum penalty of life imprisonment is applicable in both jurisdictions (*State v Vakula* [2017] FJHC 963; HAC247.2016S (11 August 2017), *State v Nand* [2018] FJHC 499; HAR03.2017 (12 June 2018), *State v Sukanakoniferedi* - Sentence [2019] FJHC 115; HAC129.2014 (22 February 2019)). The guidelines suggest four bands based on quantities as follows:

(i) Band one – low level importing (less than 5g) – two years six months' to four years six months' imprisonment.

(ii) Band two – importing commercial quantities, (5g to 250g) – three years' six months' to ten years' imprisonment.

(iii) Band three – importing large commercial quantities (250g to 500g) – nine years' to 13 years' imprisonment.

(iv) Band four – importing large commercial quantities (500g or more) – 12 years' to life imprisonment.

[18] Both cocaine and methamphetamine are dangerous illicit drugs. Cocaine is often referred to as the 'rich man's speed'. The effects on the users for both illicit drugs are similar. According to the 1961 and 1971 Conventions on Narcotic Drugs cocaine and methamphetamine are highly addictive drugs and they carry substantial risk to public health. The harm that these drugs cause to the physical and mental health of the users and to safety and wellbeing of the community at large is significant

[19] In *R v Farlane [1992] 3 NZLR 424*, Cooke P in delivering the judgment of the New Zealand Court of Appeal stated the effects of cocaine use at p.426:

> "An effect of the drug is rapid and intense but short-lived euphoria, which may be followed by a 'crack' with severe depressions 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 woman 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."

[20] Further on at p.426, Cooke P went on to say:

> "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."

[21] To maintain consistency in the approach to sentencing I adopt the New Zealand guidelines for importation of methamphetamine for importation of cocaine with some caution that the guidelines are only a yardstick. To determine a just punishment, regard must be made not only to the objective seriousness your offence, but also to the seriousness of your actual act.

[22] Although others may have been involved, you were the principal in the criminal enterprise. The illicit drugs were packaged as individual bars and tablets, wrapped with duct tapes and brought into Fiji on the same vessel and at the same time as part of one transaction. The arms and ammunition and substantial foreign cash found together with the illicit drugs show that you are in a business of dealing with drugs.

[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.

[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.

[25] The maximum penalty prescribed for possessing arms and ammunition without a licence is $50,000.00 fine or 5 years' imprisonment. This offence is rarely prosecuted and therefore, there is no guideline case. I have considered the possession of arms and ammunition in assessing the objective seriousness of the offence of importation of illicit drugs.

[26] I consider the following as the aggravating factors:

- The offences involved planning and sophistication following purchase of a fairly luxury yacht and sailing for months covering destinations such as Columbia, Panama, French Polynesia and Tahiti before arriving in Fiji.
- Concerted efforts were made to avoid detection by switching off the vessel's Automatic Identification System before it entered into Fiji's territorial waters and concealing the illicit drugs and arms and ammunition in different compartments of the vessel not visible to the naked eye.
- Spouse and crew were exposed to the risk of a potential prosecution.

[27] For these factors, I enhance your sentence by 3 years.

[28] Taking all these considerations into account, I sentence you to 23 years' imprisonment for importation of cocaine as convicted on count one, 3 years' imprisonment for importation of cocaine and methamphetamine tablets as convicted on count three and 2 years' imprisonment for possessing arms and ammunition without a licence as convicted on count five. All sentences are made concurrent. The total effective sentence is 23 years' imprisonment. I fix a non-parole period of 18 years.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Gordon & Co for the Accused