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

CRIMINAL APPEAL NO. AAU 65 of 2021
[In the High Court at Suva Criminal Case No. HAC 063 of 2019]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**JOSHUA AZIZ RAHMAN**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Dr. A. Jack for the Appellant**
	:	**Mr. D. Sharma for the Respondent**
Date of Hearing	:	**09 August 2023**
Date of Ruling	:	**12 February 2024**

RULING

[1] The respondent had been charged and convicted in the High Court at Suva for possession of 39.5 kilograms of cocaine contrary to section 5(1) of the Illicit Drugs Control Act. The charge is as follows:

> *'Statement of Offence*
>
> ***UNLAWFUL POSSESSION OF ILLICIT DRUGS****: Contrary to Section 5(a) of the Illicit Drugs Control Act 2004 and Section 46 of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***JOSHUA AZIZ RAHMAN*** *with another between 23 January 2019 and on 14 February 2019 at Caubati in the Central Division, without lawful authority, was found in possession of illicit drugs namely cocaine weighing 39.5 kilograms.*

[2] After trial, the learned High Court judge had convicted the respondent and sentenced him on 12 October 2021 to a head sentence of 23 years of imprisonment. The effective sentence became 20 years' with a non-parole period of 14 years after discounting the remand period.

[3] The appellant's appeal against sentence is timely.

[4] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The grounds of appeal raised by the appellant is as follows:

Sentence

Ground 1

'The learned sentencing judge erred in failing to have sufficient regard to the guideline judgment in Abourizk v State [2019] FJCA 98; AAU 54 of 2016 (7 June 2019) which caused him to impose an unduly and manifestly lenient sentence.'

[7] I have summarized the factual background to the case in my ruling in the respondent's appeal AAU 68 of 2021 against conviction and sentence and needs no repetition.

Ground 1

[8] The appellant submits that the learned trial judge correctly concluded that the crime for which he was sentencing the appellant fell into category 5 of the tariff recommended by the Court of Appeal in its guideline judgment in ***Abourizk v State***[1]. However, the appellant submits that the trial judge failed to give sufficient consideration to that guideline judgment.

[9] ***Abourizk*** sentencing guidelines were validated and approved by the Acting Chief Justice in the Supreme Court decision in **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023).

[10] The appellant's argument is based on the apparent inconsistency between the sentence meted out in **State v Nikolic** - Sentence [2019] FJHC 167; HAC115.2018[LTK] (8 March 2019) and that of the appellant. The total weight of cocaine involved in ***Nikolic*** was 12.9kg. For 3 bars, the purity was fairly low, 2 – 2.9%. For 10 bars, the purity was fairly high, 96.5 – 99.9%. Nikolic was sentenced to 23 years in prison with a non-parole period of 18 years by the same trial judge. This was even before this Court issued its guideline judgment in ***Abourizk***. The appellant submits that the respondent's offending involved more than 03 times as much cocaine (with an average purity of 81%) yet received a sentence 8 months less than Nikolic.

[11] A single judge of this court has already allowed leave to appeal against the sentence imposed on Nikolic in **Nikolic v State** [2021] FJCA 172; AAU24.2019 (25 October 2021) to the appellant.

[12] Abourizk was found in possession of cocaine weighing 49.9 kilograms (purity level of cocaine taken from each sample exceeded 50%) and the Court of Appeal imposed 25

[1] **Abourizk v State** [2019] FJCA 98; AAU 54 of 2016 (7 June 2019)

years' imprisonment with a non-parole period of 20 years. He was retried, convicted and sentenced using ***Abourizk*** guidelines by a different trial judge to an imprisonment term of sixteen (16) years with a non-parole period of ten (10) years because he has already served approximately 08 years in a correction facility – See **State v Abourizk** - Sentence [2023] FJHC 517; HAC126.2015 (31 July 2023).

[13] The trial judge in the case against the respondent had stated that he was using **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019) as a guideline sentence in sentencing the respondent to 23 years. The appellant's submission is that these guidelines have not been applied in the respondent's case consistently by the trial judge compared to the sentence meted out to Nikolic by the same judge.

[14] The Court of Appeal said in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) that:

> *'[45] Sentencing is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.*
>
> *[46] Sentencing guidelines are designed to find the correct equilibrium between giving a sentencing magistrates or judges sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases. Justice O'Regan in **R v Taueki** [2005] NZCA 174; [2005] 3 NZLR 372 (CA) went to significant lengths to highlight the need to avoid a 'rigid or mathematical approach'.*

[15] Sentencing must achieve justice in individual cases and that requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed. The prime justification and function of the guideline judgment is to promote consistency in sentencing levels nationwide. Like cases should be treated in like manner, similarly situated offenders should receive similar sentences and outcomes should not turn on the identity of the particular judge. Consistency is not of course an absolute and sentencing is still an evaluative exercise. The guideline judgments are 'guidelines'

(and not tramlines from which deviation is not permitted), and must not be applied in a mechanistic way. The bands themselves typically allow an overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified (vide **Zhang v R** [2019] NZCA 507).

[16] These sentiments were echoed again by the Court of Appeal in **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023).

[17] The appellant (then respondent) has agreed in AAU 68 of 2021 that leave may be granted for the sentence appeal of the respondent (then appellant) to proceed to the full bench of this Court only to enable the full court the opportunity to replace the allegedly manifestly lenient sentence imposed in this case with a higher sentence which properly reflects the gravity of the offending in this case, and current sentencing practice in Fiji.

[18] Therefore, without expressing any view on the prospect of this appeal, I allow leave to appeal against sentence in this appeal too so that the full court may consider both appeals against sentence together.

Order of the Court:

1. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Office of the Director of Public Prosecution for the Appellant
R. Patel Lawyers for the Respondent