

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

CRIMINAL APPEAL NO. AAU 024 of 2019
[In the High Court at Lautoka Case No. HAC 115 of 2018]

BETWEEN : **JOHN GEOFFREY NIKOLIC**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Andrews, JA
Andrée Wiltens, JA

Counsel : **Mr. G. O’Driscoll for the Appellant**
Ms. M. Vosawale for the Respondent

Date of Hearing : **08 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

A. **Introduction**

[1] John Geoffrey Nikolic was convicted after trial of (i) importing an illicit drug without lawful authority, namely 12.9 kg of cocaine, (ii) importing an illicit drug without authority, namely 34.4 gms of cocaine and methamphetamine tablets, and (iii) possession of arms and ammunition without holding an arms licence, namely two pistols, capable of causing fatality at 100m range, and two magazines loaded with 112 rounds of live ammunition.

- [2] These items, together with US \$15,000 cash, were brought into Fiji on 22 June 2018 secreted in various places on the yacht, Shenanigans, in the name of Mrs Nikolic but skippered by Mr Nikolic assisted by 3 crew members. The yacht had travelled from Florida, via Columbia, Panama, French Polynesia and Tahiti. The items found were all seized by Fiji Revenue and Customs officers on arrival of the vessel at Denerau.
- [3] Mr Nikolic was sentenced by his Honour Judge Goundar (“the judge”) on 8 March 2019 to a term of 23 years imprisonment, with a non-parole period of 18 years.
- [4] Mr Nikolic, having abandoned his appeal against conviction, now appeals his sentence. He was denied leave to appeal by Justice Prematilaka by decision of 25 October 2021, but renewed his application on 23 August 2022 as permitted pursuant to section 35 of the Court of Appeal Act 1978.
- [5] Mr O’Driscoll, acting for Mr Nikolic, contended that (i) the judge had taken an excessively high starting point when compared with comparable cases in Fiji and other jurisdictions; (ii) inadequate discounts were allowed for mitigating factors; (iii) an excessive and unnecessary uplift for “aggravating factors” had been made; and (iv) an excessively harsh non-parole period had been imposed without any justification.
- [6] Ms Vosawale sought to uphold the sentence as appropriate and reasonable having regard to the circumstances of the case and Mr Nikolic.

B. Sentence

- [7] The judge referred to Customs officers searching the vessel and finding a package containing ten bars of 96.5% – 99.9% pure cocaine hidden in the starboard side of the Lazerette locker. At that point Mr Nikolic was cautioned. Regardless, he then advised the officers of another similar package on the port side of the locker, which when retrieved was found to contain a further 3 bars of cocaine of 2% - 2.9% purity. Mr Nikolic then spoke with his wife, before going into a bathroom and attempting to commit suicide. He was given medical assistance before being taken to hospital.

- [8] The officers then went on to find two further well-hidden packages in a different compartment of the yacht, which packages contained the pistols, ammunition, cash and the cocaine and methamphetamine pills.
- [9] The judge considered the manner in which the recovered exhibits were packaged and concealed indicated that Mr Nikolic was in the business of dealing with illicit drugs. He next pointed out the seriousness of the offending being reflected in the maximum sentence for importing illicit drugs, namely imprisonment for life or a fine of \$1 million.
- [10] The judge considered the precedent Fiji authorities of *State v Bravo*¹ (importing 2.1 kg of 73% pure cocaine strapped to the body; end sentence of 8 years imprisonment after trial, although leave to appeal was declined on the basis the sentence was likely to be increased), *State v Balaggan*² (sophisticated attempt to export 521.6 gms of pure cocaine; end sentences of 11.5 and 10 years imprisonment, after trial, and after remand periods had been deducted. Note: the maximum penalty for the offending was 14 years imprisonment), *State v Lata*³ (possession of 1.9kg cocaine of undetermined purity, end sentence 15 years imprisonment with non-parole period of 10 years), *State v Abourizk*⁴ (possession of 49.9kg of 54%-76% pure cocaine, end sentence 14 years imprisonment, although it was noted there was an appeal on foot), and *State v Hurtado*⁵ (importing 20.5 kgs of 89% pure cocaine; end sentence 17 years imprisonment, after trial).
- [11] The judge expressed his view that the approach in Fiji to sentencing for this type of offending was not consistent and noted that there was no tariff decision. He recorded that the Courts of Fiji had adopted the New Zealand methamphetamine guidelines in respect of cases involving large amounts of drugs: *R v Fatu*⁶. In terms of that guideline, the importation of large commercial quantities of methamphetamine (i.e. more than 500gms) was classed as coming within Band Four, with a sentence start point ranging from 12 years to life imprisonment. The judge considered methamphetamine and cocaine to be similar due to the highly addictive nature of the drugs and the substantial

¹ [2008] FJHC 172

² [2012] FJHC 1147

³ [2017] FJCA 56

⁴ [2016] FJHC 340 The High Court decision

⁵ [2017] FJHC 446

⁶ [2006] 2 NZLR 72 (CA)

resulting risks to public health. Accordingly, although with some caution and recognizing that guidelines are only a yardstick, the judge adopted the New Zealand methamphetamine guidelines in relation to the importation of cocaine into Fiji.

[12] Having regard to the facts, the judge accepted that there may have been others involved in the offending but found that Mr Nikolic was "...the principal in the criminal enterprise". He considered the primary purpose of sentencing for drugs dealing offending was deterrence, both personal and general. He noted there was no suggestion that Mr Nikolic was a user or an addict, and accordingly found that rehabilitation was not a relevant factor in the sentencing exercise.

[13] Based on the harm the drugs could potentially cause to the community and the sheer quantity and purity involved, the judge picked as the sentence start point a term of 22 years imprisonment in respect of importing the cocaine, and 3 years imprisonment for importing the methamphetamine and cocaine tablets. We note that no mention of the arms/ammunition charge is made at this stage of the sentencing judge's reasoning.

[14] In terms of mitigation, the judge considered Mr Nikolic's personal circumstances. Mr Nikolic was 45 years old, married with two teenage children. He was a foreigner to Fiji, although his nationality was seen as neither aggravating nor mitigating. Significantly, the judge noted that Mr Nikolic had made no attempt to explain his conduct or express remorse. Although Mr Nikolic has no previous record, the judge found that counted for little in the circumstances of his offending. Accordingly, a nominal reduction of 4 months was made from the sentence start point for Mr Nikolic's personal circumstances, a further reduction of 12 months for his lack of previous criminal record, and 8 months to reflect the time spent in custody on remand.

[15] The judge next noted the maximum penalty for the arms and ammunition offending was 5 years imprisonment or a fine of \$50,000. Again, he noted the lack of a tariff judgment dealing with sentencing for this type of offending.

[16] The following aggravating factors were then set out:

- The offences involved planning and sophistication;

- Concerted efforts were made to avoid detection by switching off the yacht's Automatic Identification System prior to entering Fiji territorial waters, and the concealing of the illicit drugs and the arms and ammunition in different compartments; and
- Mr Nikolic had by his action exposed his spouse and crew to the risk of criminal prosecution.

[17] The sentence was accordingly enhanced by 3 years imprisonment to take those matters into account.

[18] The end sentences imposed were 23 years imprisonment for the importation of cocaine, 3 years imprisonment for the importation of the methamphetamine and cocaine tablets, and 2 years imprisonment for the possession of the arms and ammunition, all to be served concurrently.

[19] The judge concluded his sentencing remarks without further elaboration: "I fix the non-parole period at 18 years".

C. Appellant's Submissions

[20] Mr O'Driscoll had filed extensive submissions, much of which related to the sentencing regimes for cocaine offending in New Zealand, Australia, Canada and the United Kingdom.

[21] With respect, there is little to be gained from such comparisons. Fiji is dealing with the problem of hard drugs coming into the country in its own manner; and Mr Nikolic's sentence must be considered in light of the Fiji situation. What other jurisdictions do to deal with such offending will rarely be helpful. Accordingly we have not set out Mr O'Driscoll's comparisons with other jurisdictions.

[22] We go on now to consider Mr O'Driscoll's further written submissions, but note that before us in his oral submissions he concentrated particularly on what he submitted was the excessive start point and unreasonable imposition of the non-parole period.

(i) Start Point

- [23] In relation to relevant previous Fiji sentencing authority, Mr O’Driscoll pointed to *State v Kai*⁷ (importation of 29.9kgs of heroin, sentenced to 15 years imprisonment for his significant role, with non-parole period of 14 years, after trial) and *State v Hurtado*⁸.
- [24] Mr O’Driscoll took support from these authorities for his proposition that Mr Nikolic’s sentence was excessive due to neither of the sentences imposed in *Kai* and *Hurtado* being appealed. He submitted that comparison with the sentences imposed in these cases showed that the sentence imposed for Mr Nikolic was not in parity with other similar cases in Fiji.
- [25] Mr O’Driscoll was critical of the judge for not following his own dictum when setting the sentence start point for importing cocaine at 22 years imprisonment, when the guideline indicated a range between 12 years and life imprisonment. In *Koroivuki v State*⁹, the judge had previously stated:
- “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.”*
- [26] He submitted in writing that 14 years imprisonment was the appropriate sentence start point but in oral submissions accepted that 15 or 16 years was appropriate.
- [27] Mr O’Driscoll submitted that Mr Nikolic’s role in the offending should be considered as “significant”, not the more serious “leading” role – taking those terms from the authority of *Zhang v R*¹⁰. He submitted that Mr Nikolic was a courier, with an

⁷ [2015] FJHC 665

⁸ *supra*

⁹ [2013] FJCA 15

¹⁰ [2019] NZCA 507

operational/management function within a larger chain, and with no substantial influence on others in the chain of responsibility for sourcing or distributing the drugs. In support of this contention, he pointed to the fact that Mr Nikolic took the major risk of transporting the drugs which is uncharacteristic of a leading role, that Mr Nikolic was found with a relatively small amount of cash consistent with it being “expenses money”, and the fact that Mr Nikolic has no previous history relating to drugs.

[28] Mr O’Driscoll was somewhat hampered in making this submission in light of the judge’s finding that Mr Nikolic was the principal in the criminal enterprise, as well as the complete lack of explanation regarding the offending by Mr Nikolic at any stage of the investigation or trial process.

[29] We record at this point that the material presented to this court at the commencement of the appeal (a Psychological Evaluation Report prepared by a Corrections Services Psychologist, a letter by the Seventh-day Adventist Church, a letter by the Christian Mission Fellowship, and a 4-page document headed as Appeal Statement of John Nikolic prepared by Mr Nikolic setting out, among other things, his explanation for the offending) cannot be considered by this court when evaluating the correctness or otherwise of the sentence imposed in 2019. For such material to have been considered on appeal, it would have had to be before the sentencing judge. We set that material to the side.

(ii) Mitigating Factors

[30] Mr O’Driscoll further submitted that insufficient discount was given for Mr Nikolic’s personal background. He pointed to what he considered a change of attitude by the courts, away from unsympathetic indignation and harsh punishment towards empathetic understanding and effective rehabilitation. He relied on the statement in *Zhang*, where the Court stated:

“...we consider that personal mitigating circumstances relating to the offender...are applicable to all instances of Class A drug offending, as in any other offending.”

[31] He pointed also to section 4(2) of the Sentencing and Penalties Act 2009 which requires a sentencing court to take into account the offender's previous character, as well as the presence of any aggravating or mitigating factor concerning the offender.

[32] Mr O'Driscoll submitted insufficient consideration was given to Mr Nikolic's position as a foreign national. He pointed out that Mr Nikolic knew no one in Fiji and accordingly had no support system here; he did not speak i-Taukei or a Hindustani language and was unfamiliar with local culture; he was unable to participate in any work to release programmes; and that it was accordingly more difficult for him to adjust to Fiji prison conditions.

[33] Mr O'Driscoll had submitted in writing that the appropriate discount for Mr Nikolic's personal factors was a deduction of 3 years from the sentence start point, but in oral submissions did not strongly press the point and appeared to accept the 2 years allocated.

(iii) Uplift

[34] Mr O'Driscoll had also submitted in writing that the excessively high sentence start point should have already included all the aggravating factors of the offending, and for the judge to uplift the sentence start point to take into account the additional aggravating factors he had listed by 3 years, was unjustified and an error. Again, however, in oral submissions he seemed to accept the 3 years uplift allowed was reasonable.

(iv) Non-parole Period

[35] Mr O'Driscoll submitted that the non-parole period was both unjustified and unexplained. He acknowledged that at the date of sentencing, there was no mandatory requirement (as there now is) for a non-parole period to be imposed, but submitted that in the exercise of the discretion "...a reasoned analysis is required, both as regards the imposition of a minimum period of imprisonment and its length", as per *Zhang*.

[36] The irony of Mr O’Driscoll criticizing the judge for adopting a New Zealand guideline case (*Fatu*) yet himself relying on other aspects of sentencing law in New Zealand (*Zhang*) is not lost on this Court. We note that in New Zealand the imposition of a minimum term of imprisonment (the equivalent of non-parole) requires judicial consideration of whether the sentence imposed is insufficient to meet all or any of the sentencing purposes, namely to hold the offender accountable, to denounce the offending, to deter the offender and others and to protect the community. It follows as a result that in New Zealand reasons are provided; but there is nothing in the Fiji legislation requiring reasons to be given. Accordingly Mr O’Driscoll criticism of the sentencing judge not setting out his reasons for imposing a non-parole period is rejected.

[37] Mr O’Driscoll pointed out that a sentence of 23 years imprisonment results in a prisoner having to serve 15 years 8 months before being eligible for parole; a period which he submitted was more than sufficient to meet the purposes and principles of sentencing in Mr Nikolic’s case. Alternatively, he submitted a non-parole period of not more than 50% of the end sentence was appropriate.

(v) Summary

[38] Mr O’Driscoll in writing had submitted the present sentence be quashed, and that taking the appropriate sentence start point for Mr Nikolic of a term of 14 years imprisonment, and with suitable deductions for his personal circumstances, the end sentence of 11 years imprisonment be imposed in its place. He submitted that a non-parole period was unnecessary, but if it was to be imposed, it should be for no more than 50% of the head sentence.

D. Respondent’s Submissions

[39] Ms Vosawale submitted that the sentence start point selected by the judge was justified, and indeed that a higher starting point could have been imposed when all the identified aggravating factors were taken into account. She pointed to the Court of Appeal’s

decision in *Abourizk and Another v State*¹¹, which was published shortly after Mr Nikolic was sentenced and is now the guideline judgment in relation to sentencing for hard drugs in Fiji. The following tariffs have been established:

- Category 1: up to 5gms 2.5 to 4.5 years imprisonment;
- Category 2: 5 to 250gms 3.5 to 10 years imprisonment;
- Category 3: 250 to 500gms 9 to 16 years imprisonment;
- Category 4: 500 to 1kg 15 to 22 years imprisonment;
- Category 5: More than 1 kg 20 years to life imprisonment.

[40] Applying the new tariff, Ms Vosawale submitted that looking at the volume of drugs involved in this case alone, the sentence start point would be in Category 5, warranting a sentence start point of between 20 years and life imprisonment.

[41] Even having regard to the *Fatu* tariff, she submitted the sentence start point of 22 years was appropriate as Mr Nikolic had imported more than 20 times the volume of cocaine to fit into the bottom of Band Four, and done so as the principal offender.

[42] Ms Vosawale noted the commercial quantity of drugs in this case, and the dangers emanating from that. She submitted that Mr Nikolic had sought to exploit the lack of surveillance and security along Fiji's borders, citing the following remarks in *State v Balaggan*¹² as apposite:

"Fiji does not have a sophisticated intelligence service to detect drug-smuggling. Our border security measures are not apt to deal with sophisticated drug smuggling....Any punishment for dealing in hard drugs must therefore reflect the vulnerability of Fiji becoming a hub for the international drugs smugglers."

[43] Ms Vosawale also submitted that, as there was no discernable error, there was no cause to review the judge's exercise of his discretion to impose a non-parole period of 18 years.

¹¹ [2019] FJCA 98 The Court of Appeal decision

¹² *supra*

D. Discussion

[44] It is clear that for this Court to interfere with the sentence imposed, one or more of the following errors on the part of the learned sentencing judge would have to be demonstrated, as per *Naisua v State*¹³:

- Acted on a wrong principle;
- Allowed extraneous or irrelevant matters to guide or affect him;
- Mistook the facts;
- Failed to take into account some relevant consideration.

[45] Further guidance as to the correct approach can be gleaned from *Koroicakau v State*¹⁴, where it was held that the ultimate sentence rather than each step in the reasoning process must be considered, and even if the starting point was too high, it does not follow that the sentence ultimately imposed will fall outside the appropriate range for the offending.

[46] We are mindful also of the role of the Court of Appeal, as set out in *Sharma v State*¹⁵:

“In determining whether the sentence discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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 by a sentencing judge lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.”

¹³ [2013] FJSC 14

¹⁴ [2006] FJSC 5

¹⁵ [2015] FJCA 178

[47] In *Peni Turogo v State*¹⁶, it was held:

“...when revising sentences, an appellate tribunal must be reasonably satisfied that the sentence imposed is manifestly excessive or wrong in principle or there exist exceptional circumstances demanding its revision.”

[48] Although there was no tariff judgment available to assist the learned judge at the date of this sentencing, there was some guidance available relating to the sentencing of cocaine offending in *Lata v State*¹⁷. The relevant factors to take into account were listed as:

- The type of offence committed, namely whether it is importation, exportation, acquiring, offering, supplying, transferring, transporting, using, manufacturing or possessing;
- Quantity;
- Purity and market value;
- Planning, organization, sophistication and the methods adopted to avoid detection;
- Vulnerability of Fiji becoming a hub for traffickers;
- Whether the drug was intended for the local market;
- The purpose of the offending, whether commercial or for individual use;
- The role played by the accused, whether leading, significant but not leading, or lesser;
- Willingness of the accused to co-operate with the authorities; and
- Whether the accused pleaded guilty, and if so, at what stage of the proceedings.

[49] It is clear the judge took all these factors into account, and based his sentence on the following matters. The offending involved the importation into Fiji by sea of 12.9kgs of cocaine - 10kgs was of very high purity, the remainder was of very low purity. There was no indication of the value of the drugs. Considerable efforts had been made to effect concealment and to avoid detection, demonstrating careful planning. The drugs were

¹⁶ [2017] CAV 40/16

¹⁷ *supra*

likely not intended for the local market, but Fiji was used (abused) to facilitate the transfer to the ultimate destination. The drugs were not for personal consumption, and Mr Nikolic was neither addicted nor a user of the drug – this was a commercial undertaking. Mr Nikolic was found to be the principal, a finding we do not consider unavailable to the judge. Apart from pointing to the second parcel of concealed drugs, he did not co-operate with the authorities, remaining silent as to the background behind the offending. He did not plead guilty.

[50] No matter how one regards what occurred, the offending was extremely serious, warranting a condign response from the Court on behalf of the community.

[51] It cannot be seriously argued, that prior to this Court's decision in *Abourizk*, the judge erred in adopting the guideline judgment of *Fatu*. We note that guideline has previously been used in other cases in Fiji.

[52] Mr O'Driscoll's criticism of the 22 years imprisonment start point being excessive is reliant in part on the above-quoted statement in *Koroivuki*, but that *obiter* should not be seen as a rigid rule.

[53] In our assessment, the sentence start points of 22 years imprisonment for the cocaine importation and 3 years imprisonment for the methamphetamine and cocaine tablets importation, taking all the aggravating factors of the drug offending into account, are both well within the ranges set out in *Fatu*. The additional possession of arms and ammunition charge was subsumed into the assessment of the seriousness of the overall offending.

[54] Alternatively, no criticism could have followed had the learned judge taken the importation of cocaine as the lead charge with an uplift being applied to deal with the additional importation of the tablets. Using such methodology, a further uplift for the arms/ammunition offending would be justified, as the combination of drugs and arms multiplies the dangers to the public significantly. The end result, in our view, would be much the same.

- [55] Mr O’Driscoll, before us came to accept the reasonableness of the 3 year uplift ascribed by the learned judge for planning, sophistication, attempts to conceal and avoid detection, and exposing Mrs Nikolic and the crew to prosecution; as well as the deduction of 2 years for personal mitigating factors and time on remand. We do not see any basis for interfering with the assessments of the judge.
- [56] Looking at the overall situation, we consider that the end sentence of 23 years imprisonment is within range.
- [57] Mr O’Driscoll is correct to submit the non-parole period of 18 years was imposed without further explanation. We note that numerous cases have considered whether reasons for the imposition of non-parole periods are required, with the consensus being that reasons appear to be provided more often if no non-parole period is imposed. We acknowledge several comments suggesting that if reasons are provided the appearance of arbitrariness can be avoided, but even in those cases the lack of reasons was insufficient for the sentence to be disturbed: e.g. *Nacani Timo v State*¹⁸, and *Rohit Prasad v State*¹⁹.
- [58] Accordingly, we do not accept Mr O’Driscoll’s criticism.
- [59] We note further that this non-parole period is quite removed from the length of the head sentence compared with other cases (e.g. *Bogidrau v State*²⁰, where the head sentence was 6 years 6 months imprisonment, with a non-parole period of 5 years; and *Miniuse Ravasu v State*²¹, where an end sentence of 13 years 8 months was imposed, with a non-parole period of 13 years). Where the two terms are too close, it can deny or discourage the possibility of rehabilitation, as well as undermining the deterrent effect of the sentence: *Tora v State*²². Neither of those negative aspects apply to the non-parole period imposed on Mr Nikolic.
- [60] In the circumstances we see no error in the imposition of the 18-year non-parole period.

¹⁸ [2019] CAV 22/18;

¹⁹ [2018] FLR 961

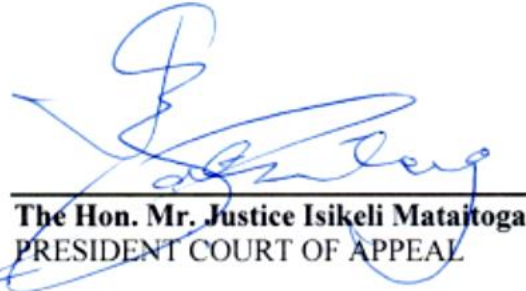
²⁰ [2016] FJSC 5

²¹ [2018] AAU 118/14


²² [2015] FJCA 20

Order of the Court:


1. The appeal is dismissed.



The Hon. Mr. Justice Isikeli Maitoga
PRESIDENT COURT OF APPEAL



The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL



The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

Solicitors:

O'Driscoll Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent