

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 358 of 2018

STATE

V

TVK

Counsel : Ms. Swastika Sharma for the State
Mr. Lisiate Qetaki for the Juvenile

Date of Hearing : 28 November 2018

Date of Punishment : 13 December 2018

The name of the Juvenile has been suppressed. Accordingly, he will be referred to as TVK.

PUNISHMENT

[1] TVK, you were charged with the following offences:

COUNT ONE

Statement of Offence (a)

AGGRAVATED BURGLARY: Contrary to Section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence (b)

TVK with **ANOTHER**, on the 15th day of September 2018, at Tacirua in the Central Division, entered into the dwelling house of **FAIYAZ FARZAN ALI** as trespassers, with intent to commit theft therein.

COUNT TWO

Statement of Offence (a)

THEFT: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence (b)

TVK with **ANOTHER**, on the 15th day of September 2018, at Tacirua in the Central Division, dishonestly appropriated 1 pair of black dressing shoes valued at \$79.00, the property of **FAIYAZ FARZAN ALI**, with the intention of permanently depriving the said **FAIYAZ FARZAN ALI** of the said property.

COUNT THREE

Statement of Offence (a)

AGGRAVATED BURGLARY: Contrary to Section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence (b)

TVK with **ANOTHER**, on the 15th day of September 2018, at Tacirua in the Central Division, entered into the dwelling house of **ERONI RAITATAMATA** as trespassers, with intent to commit theft therein.

COUNT FOUR

Statement of Offence (a)

THEFT: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence (b)

TVK with **ANOTHER**, on the 15th day of September 2018, at Tacirua in the Central Division, dishonestly appropriated 1 x Spida canvas valued at \$120.00, 1 x Asics brand canvas valued at \$80.00 and 1 x Havaiana's slippers valued at \$45.00, all to the value of approximately \$245.00, the properties of **ERONI RAITATAMATA**, with the intention of permanently depriving the said **ERONI RAITATAMATA** of the said property.

- [2] This matter was first called before the High Court on 28 September 2018. The State was granted 21 days to file Information and Disclosures, relevant to the case, and the matter was adjourned for 19 October 2018.
- [3] On 19 October 2018, the Director of Public Prosecutions (DPP) filed Information and Disclosures.

- [4] When the matter came up before me on 15 November 2018, your plea was taken. You pleaded guilty to all four counts in the Information. Court was satisfied that you fully understood the nature of the charges against you and the consequences of your pleas. Court found that you pleaded guilty on your own free will and free from any influence.
- [5] However, on 22 November 2018, the State amended count 4 in the information. Accordingly, your plea was taken once again. Thereafter, on the same day, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty pleas to be unequivocal. I found that the facts support all elements of the four counts in the Information, and found the four counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea in respect of the four counts as charged.
- [6] I now proceed to impose the punishment against you.
- [7] The Summary of Facts filed by the State was that:

"1. The complainants are:

(i) Faiyaz Farzan Ali, 34 years old, Commercial Manager, residing at Lot 14, Niubalavu Road, Tacirua (PW1).

(ii) Eroni Raitatamata, 32 years old, Prisons Officer, residing at Lot 14, Niubalavu Road, Tacirua (PW2).

- 2. The juvenile is TVK, 15 years old – DOB 27/02/2003, student, residing at Waisasa Settlement, Tacirua.*
- 3. This matter came to light when Valelevu Police Operation team brought in under arrest the juvenile and another. They informed police that they broke into a house in Niubalavu Road.*
- 4. At about 3.50 a.m. on 15/09/2018, police went to PW1's house and told him that a robbery took place at PW1's home. PW1 went outside his house and didn't see any disturbances. PW1's wife then told him that his working shoes were missing.*
- 5. Police then told him that they have apprehended 2 itaukei boys with few pair of shoes. PW1 walked to the police vehicle and saw his pair of shoes which is black in colour and valued at \$79.00. After that the police left with the boys and shoes.*
- 6. Police also went to PW2's residence and informed PW2 that 2 itaukei boys have informed them that they stole shoes from PW2 residence. Shoes were shown to PW2 and he identified his shoes as 1 x Spida canvas valued at*

\$120.00; 1 x Asics brand canvas valued at \$80.00 and 1 x Havaiana's slippers valued at \$45.00.

Caution Interview

7. *The juvenile was caution interviewed on 15th September 2018 whereby he admitted to committing the offence. The juvenile states that he stole items from a veranda at Tacirua. He further states, that he was looking out if anyone was coming while the other person went to the veranda and stole the shoes. They then packed the shoes in a bag and left the premises.*
8. *Attached is the juvenile's caution interview.*

Recovery

9. *All the items – shoes was recovered.*

Appearance in Court

10. *The juvenile appeared in the Nasinu Magistrates Court on 17th September 2018 and he first appeared in the Suva High Court on the 28th September 2018."*
- [8] TVK, you have admitted to the above Summary of Facts and taken full responsibility for your actions. You have submitted that you committed these offences without comprehending the gravity of your actions.
- [9] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the punishment to be imposed on you.
- [10] In terms of Section 313 (1) of the Crimes Act No. 44 of 2009 (Crimes Act), "A person commits an indictable offence (of Aggravated Burglary) if he or she-
- (a) *Commits a burglary in company with one or more other persons; or*
- (b) *....."*

The offence of 'Burglary' is defined at Section 312 (1) of the Crimes Act as follows: "A person commits an indictable offence (which is triable summarily) if he or she enters or remains in a building as a trespasser, with intent to commit theft of a particular item of property in the building".

The offence of Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

- [11] The tariff for the offence of Aggravated Burglary is between 18 months to 3 years imprisonment. This tariff has been adopted in several decided cases: *State v. Mikaele Buliruarua* [2010] FJHC 384; HAC 157.2010 (6 September 2010); *State v. Nasara* [2011] FJHC 677; HAC 143.2010 (31 October 2011); *State v. Tavualevu* [2013] FJHC 246; HAC 43.2013 (16 May 2013); *State v. Seninawanawa* [2015] FJHC 261; HAC 138.2012 (22 April 2015); *State v. Seru* [2015] FJHC 528; HAC 426.2012 (6 July 2015); *State v. Drose* [2017] FJHC 205; HAC 325.2015 (28 February 2017); and *State v. Rasegadi & Another* [2018] FJHC 364; HAC 101.2018 (7 May 2018).
- [12] The Court of Appeal in *Leqavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary is between 18 months to 3 years.
- [13] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary: Vide *State v. (Venasio) Cawi & 2 others* [2018] FJHC 444; HAC 155.2018 (1 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 536; HAC 92.2018 (20 June 2018); *State v. Pita Tukele & 2 others* [2018] FJHC 558; HAC 179.2018 (28 June 2018); and *State v. (Taione) Waqa & 2 others* [2018] FJHC 995; HAC 92.2018 (17 October 2018).
- [14] In terms of Section 291 (1) of the Crimes Act “A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property”. The offence of Theft in terms of Section 291 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [15] In *Ratusili v. State* [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:
- (i) *For a first offence of simple theft the sentencing range should be between 2 and 9 months.*
 - (ii) *Any subsequent offence should attract a penalty of at least 9 months.*
 - (iii) *Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.*
 - (iv) *Regard should be had to the nature of the relationship between offender and victim.*
 - (v) *Planned thefts will attract greater sentences than opportunistic thefts.”*
- [16] Although the theft in this case involved property valued at \$324.00, since the theft was consequent to you entering the dwelling house of the complainants’ as a trespasser, this cannot be considered as theft simpliciter. Therefore, it is my opinion that the

appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

- [17] In determining the starting point within a tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"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 time. 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."

- [18] In terms of the Juveniles Act (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

- [19] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

"(1) No child shall be ordered to be imprisoned for any offence.

(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.

(3) A young person shall not be ordered to be imprisoned for more than two years for any offence."

Emphasis is mine.

- [20] The aggravating factors in this case are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You paid scant regard to the privacy of the complainant's and their property.
- (iii) You trespassed on private property in the dead of the night.
- (iv) There was some degree of pre-planning in committing these offences.

- (v) You are now convicted of multiple offending.

[21] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
- (ii) That you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have sought forgiveness from this court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions.
- (iv) All of the stolen property has been recovered.
- (v) That you entered a guilty plea at the first available opportunity in these proceedings.

[22] Considering all the aforementioned factors, and the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, I impose on you a punishment of 12 months' imprisonment for counts one and three; and 6 months' imprisonment for counts two and four.

[23] In the circumstances, your punishments are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 12 months' imprisonment.

Count 2- Theft contrary to Section 291 (1) of the Crimes Act – 6 months' imprisonment.

Count 3- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 12 months' imprisonment.

Count 4- Theft contrary to Section 291 (1) of the Crimes Act – 6 months' imprisonment.

I order that all the aforesaid punishments to run concurrently. Therefore, your final total term will be 12 months' imprisonment.

[24] The next issue for consideration is whether your punishments should be suspended.

[25] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[26] TVK, you are said to be 15 years of age (DOB: 27/02/2003). You are a student attending Assemblies of God School in Kinoya. You are said to be residing at Tacirua with your mother and five siblings. Your father is said have left when you were in class 5 and since then, you have never seen him nor are you aware of his whereabouts.

[27] You have admitted that what you did was wrong, and taken full responsibility for your actions. You have also admitted that the offences were committed due to lack of good judgment on your part. You have also promised that you would lead a crime free life if you are granted a non-custodial punishment.

[28] You were arrested for these offences on 17 September 2018. Thereafter, you were detained at the Suva Boys Centre until 19 October 2018, when you were granted bail by this Court. Accordingly, you were detained for over one month for this case.

[29] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[30] I have considered the following circumstances:

- You are a very young offender;
- You have been of previous good character;
- You have fully cooperated with the Police;
- You have accepted responsibility for your conduct;

- You submit that you are truly remorseful of your actions and have sought forgiveness from this Court;
- You have assured Court that you will not re-offend.
- You entered a guilty plea at the first available opportunity;
- You were detained at the Suva Boys Centre for over one month.

Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishment for a period of 3 years. You are advised of the effect of breaching a suspended punishment.

[31] In the result, your final punishment of 12 months' imprisonment, is suspended for a period of 3 years.

[32] You have 30 days to appeal to the Court of Appeal if you so wish.



Riyaz Hamza
 Riyaz Hamza
 JUDGE
 HIGH COURT OF FIJI

AT SUVA

Dated this 13th Day of December 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
 Solicitors for the Accused : Office of the Legal Aid Commission, Suva.