

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 92 of 2018

STATE

V

1. TAIONE WAQA

2. LEDUA TIKOTANI

3. SAIRUSI NAIROSO

Counsel : Ms. Moumita Chowdhury for the State
Ms. Shantel Hazelman for the 3rd Accused

Sentence Hearing : 11 June 2018

Sentence : 20 June 2018

SENTENCE

[1] Sairusi Nairoso, you were charged along with Taione Waqa and Ledua Tikotani on the following Consolidated Information:

COUNT 1

Statement of Offence

BURGLARY: contrary to Section 312(1) of the Crimes Act 2009.

Particulars of Offence

TAIONE WAQA on the 23rd day of January 2018 at Nabua in the Central Division, entered into **SUBRAIL'S FURNITURE SHOP** as a trespasser, with intent to commit theft therein.

COUNT 2

Statement of Offence

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

Particulars of Offence

TAIONE WAQA on the 23rd day of January 2018 at Nabua in the Central Division, dishonestly appropriated 1 x money safe box approximately valued at \$1,000, the property of **SUBRAIL'S FURNITURE SHOP** with intention of permanently depriving **SUBRAIL'S FURNITURE SHOP** of its property.

COUNT 3

Statement of Offence

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

Particulars of Offence

LEDUA TIKOTANI & SAIRUSI NAIROSO with another on the 23rd day of January 2018 at Nabua in the Central Division, entered into **SUBRAIL'S FURNITURE SHOP** as trespassers, with intent to commit theft therein.

COUNT 4

Statement of Offence

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

Particulars of Offence

LEDUA TIKOTANI & SAIRUSI NAIROSO with another on the 23rd day of January 2018 at Nabua in the Central Division, dishonestly appropriated 1 x Genpower brand generator approximately valued at \$499; 1 x TCL brand 32 inch LED television approximately valued at \$849 and 1 x TCL brand 40 inch LED television approximately valued at \$1,299; all to the total value of \$2,647; the properties of **SUBRAIL'S FURNITURE SHOP** with intention of permanently depriving **SUBRAIL'S FURNITURE SHOP** of its properties.

- [2] From the record I find that the State filed Consolidated Information in Court on 2 May 2018. As per the Consolidated Information filed only counts 3 and 4 are in respect of you.
- [3] When this matter was called next, before His Lordship Justice Daniel Goundar, on 31 May 2018, your plea was taken. Accordingly, you pleaded guilty to both counts 3 and 4 in the Consolidated Information, and the matter was fixed for sentencing on 11 June 2018.
- [4] When the matter came up before me on 11 June 2018, your plea was taken once again. You pleaded guilty to both counts 3 and 4 in the Consolidated 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] Thereafter, 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 plea to be unequivocal. I found that the facts support all elements of the counts 3 and 4 in the Consolidated Information, and found both counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of both counts 3 and 4 as charged.
- [6] I now proceed to sentence you.
- [7] The Summary of Facts filed by the State was that:
 - "1. The complainant (PW1) in the matter is Avinesh Anand Chandra, 37 years old, Manager at Subrail's Furniture Shop, Nabua, resides at Lot 37, Stage 3 Balolo, Narere.
 2. PW2 is PC 5143 Inake, police officer based at Totogo Police Station.

3. *PW3 is Maikeli Turuva, 41 years old, carpenter, resides at Wailea Settlement, Raiwaqa.*
4. *The accused is Sairusi Nairoso, 23 years old, resides at Nanuku Settlement, Vatuwaqa.*
5. *The accused is charged and has voluntarily pleaded guilty to 1 count of aggravated burglary and theft contrary to Section 313(1) (a) and 291 (1) of the Crimes Act 2009.*
6. *On 22nd January 2018, at about 5.45 p.m., the complainant after work, securely locked up Subrail's Furniture Shop at Nabua.*
7. *On 23rd January 2018, at about 7.50 a.m., the complainant went to work. When he tried to open the main door he noted that it was already open. The complainant then went to the top floor to get money. When the complainant went to the office area, he saw that items were scattered and a money safe box valued at \$1,000 was missing. There was no cash inside it.*
8. *The complainant further noted that 1x TCL brand 40 inch LED TV valued at \$1,299; 1 x TLC brand 32 inch LED TV valued at \$849 and 1 x Genpower brand generator valued at \$499 were also missing from the display areas.*
9. *Matter was reported to Nabua Police Station and investigations led to the accused being arrested.*
10. *On 19th February 2018, at about 6.00 p.m., PC 5143 Inoke was on mobile patrol with D/CPL 4654 Tabalailai, DC 4108 Eroni and SC 4306 Romeo when he received information about the accused.*
11. *The officers went to the house of the accused at Nanuku Settlement, Vatuwaqa and arrested him.*
12. *At the time of arrest, PC 5143 Inoke informed the accused of his rights, the reason for arrest and cautioned him.*
13. *After the caution, PC 5143 Inoke questioned the accused on the allegation and he admitted to committing the alleged offence.*
14. *The accused further informed PC 5143 Inoke that he sold the TV that he stole from Subrail's furniture shop to a couple at Wailea Settlement, Raiwaqa.*

15. *Thereafter, a search was conducted at the said house on the same day and police managed to recover a TCL brand LED TV.*
16. *According to the owner of the house, Maikeli Turuva, on 23rd January 2018, at about 9 a.m., the accused and another who are his family friends sold to him the said TV for \$50. The arrangement was that the accused would later pay him back and take back the TV.*
17. *The accused was interviewed under caution on 20th February 2018.*
18. *In his interview, the accused states that on 23rd January 2018 between 3.30 a.m. and 5.30 a.m., he was at the corner shop in Nabua which is when one of his accomplice's came and asked him to follow him. He followed his accomplice to Subrail's furniture shop in Nabua.*
19. *He then noticed that the back door was open, went inside with his accomplice and took a TCL brand flat screen TV while his accomplice took another flat screen TV and a generator.*
20. *The accused carried the TV to MGM Primary School. He stopped a taxi at the junction of Rifle Range and took the TV to Wailea settlement in Raiwaqa at one "Sera's" house for her to keep it. He knows Sera through his sister as they used to school together. After dropping the TV, he went home.*
21. *The accused was then shown the said TV in his caution interview and he admitted that it was the same TV that he stole. A copy of the caution interview is attached herewith as Annexure 1.*
22. *The items were later identified by the complainant at Nabua Police Station on 20th February 2018 as properties belonging to Subrail's furniture shop.*
23. *Police also managed to recover the other TV and the generator that were stolen by the accomplice in this matter."*

[8] Sairusi you have admitted to the above Summary of Facts and taken full responsibility for your actions.

You have submitted that on the day of the offending you were told by Ledua Tikotani to follow him. You followed to Subrail's Furniture Shop. You both entered through the back door which was open. You took one 32 inch LED flat screen television.

[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 sentence 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] This tariff of 18 months to 3 years for Aggravated Burglary has also been approved by the Court of Appeal in *Leqavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016).

[13] 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.

[14] 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."*

[15] Considering the fact that the theft in this case involved property to the total value of \$2,647, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment.

[16] In determining the starting point within a tariff, the Court of Appeal, in *Laisasa 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."

[17] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Sairusi, I commence your sentence at 18 months for the third count of Aggravated Burglary.

[18] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Sairusi, I commence your sentence at 6 months for the fourth count of Theft.

[19] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You paid no regard to the privacy of a shop owner.
- (iii) There was some degree of pre-meditation in committing these offences.
- (iv) You are now convicted of multiple offending.

[20] In mitigation you have submitted as follows:

- (i) That you are 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.
- (v) All of the stolen property has been recovered.
- (iv) That you entered a guilty plea at the first available opportunity.

[21] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence for count three is 4 years and six months. Your sentence for count four is 3 years and six months.

[22] I accept that you are a person of previous good character and that you have cooperated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 2 years from your sentence. Now your sentence for count three is 2 years and six months. Your sentence for count four is 1 year and six months.

[23] I accept that you entered a guilty plea at the first available opportunity. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you further discount of 6 months for count three. Since I propose to make your sentences concurrent I do not deem it necessary to grant you any further discount for count four in lieu of this factor.

[24] In the circumstances, your sentence is as follows:

Count 3 - Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act – 2 years' imprisonment.

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

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term of imprisonment will be: 2 years' imprisonment.

[25] The next issue for consideration is whether your sentence should be suspended.

[26] 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.

[27] Sairusi you are 25 years of age (DOB 4 June 1993). You are residing with your father, your de-facto partner, your sister and her husband, at Nanuku Settlement in Vatuwaqa. Your father is 70 years old and said to be dependent on you for financial support. On some occasion you work as a delivery boy at Tappoo's Bulk at Garden City, Raiwaqa earning \$120 per fortnight.

[28] You are said to be coming from an impoverished background. Your mother is said to have left your family in 2004 and moved on with a new relationship. You were only 11 years of age at the time she left. You have studied only up to Form 2.

[29] You have admitted that what you did was wrong, and taken full responsibility for your actions. You have also admitted that you were gullible and 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 sentence.

[30] 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."

[31] In this regard I also wish to refer to the case of *State v Vilikesa Tilalevu and Savenaca Mataki* [2010] FJHC 258, (20 July 2010) where His Lordship Nawana J held in relation to the first offenders:

"I might add that the imposition of suspended terms on first offenders would infect the society with a situation – which I propose to invent as 'First Offender Syndrome – where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule".

- [32] It cannot be denied that the two offences you have committed are serious offences, and the prevalence of these offences are rapidly increasing in our society today. As a result, the safety and security of every law abiding citizen is at peril. You have perpetrated these offences at a reputed business establishment. Such business establishments are also at peril.
- [33] You are now 25 years of age. In January of this year, the time you committed these offences, you were 24. This is an age at which you should be taking more responsibilities for your actions. However, most regrettably, you have failed to do so.
- [34] Section 4 (1) of the Sentencing and Penalties Act provides:

"(1) The only purposes for which sentencing may be imposed by a court are –

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes".

- [35] Taking all these factors into consideration, I am not inclined to grant you a suspended sentence.
- [36] However, considering the fact that the chances for your rehabilitation is high, I will refrain from imposing a non-parole period in terms of Section 18 of the Sentencing and Penalties Act.

[37] Section 24 of the Sentencing and Penalties Act reads thus:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

[38] You have been in remand for this case since you were arrested on 19 February 2018 and was bailed by this Court on 29 March 2018. Accordingly, you have been in custody for nearly 40 days. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 2 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[39] In the result, your final sentence will be 2 years' imprisonment. Considering the time you have spent in remand, the time remaining to be served would be 1 year and 10 months imprisonment.

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



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 20th Day of June 2018

Solicitors for the State
Solicitors for the Accused

: Office of the Director of Public Prosecutions, Suva.
: Office of the Legal Aid Commission, Suva.