

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 124 of 2018

STATE

V

- 1. SAIRUSI TAGIVETAUA**
- 2. EVENI KOROITUKU**

Counsel : Ms. L. Latu for the State.
: Mr. S. N. Luvena for the First Accused.
: Ms. K. Vulimainadave for the Second Accused.

Date of Sentence : 03 September, 2018

SENTENCE

1. The accused persons are charged by virtue of the following information filed by the Director of Public Prosecutions dated 8 August, 2018.

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SAIRUSI TAGIVETAUA and EVENI KOROITUKU on the 5th day of July, 2018 at Tavua, in the Western Division, entered the house of **LISIATE FOTOFILI** as a trespasser with the intention to steal from therein.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SAIRUSI TAGIVETAUA and EVENI KOROITUKU on the 5th day of July, 2018 at Tavua, in the Western Division, dishonestly appropriated (stole) Samsung J5 Prime mobile phone valued at \$500.00 the property of **LISIATE FOTOFILI** with the intention of permanently depriving the said **LISIATE FOTOFILI** of the said property.

2. When the matter was called in this court, both the accused persons who were represented by counsel pleaded guilty to the above two counts.
3. Thereafter the accused persons admitted the summary of facts read by the State Counsel which can be briefly stated as:
4. On 5th July, 2018 at about 8pm, the complainant went to sleep at his residence situated at Ajay Kumar Building, Tavua Town. At about 10pm he was awoken when he heard someone moving around his house. When he got out of his bed he heard the front door close.
5. The complainant also heard someone else moving around his house verandah and jump at the back of his house. When he went to check, he saw the back gate swinging.
6. The complainant went inside his house to check for his phone since he wanted to take photos when he noticed his phone was missing. The mobile phone was a Samsung J5 Prime valued at \$500.00. The face of the phone was white and the rear was silver.

7. A report was lodged at the Tavua Police Station and an investigation was carried out. Two eye witnesses Lola Wati and Akanisi Raici saw the accused persons coming out of the complainant's gate at about 10pm the first accused came out of the front porch and the second accused by the stairs.
8. When the accused persons came out of the complainant's gate Lola saw the first accused holding a mobile phone which was a J5 mobile with a silver back cover. Lola knew both the accused persons since they were from the same village.
9. Both accused were arrested and caution interviewed on 6 July, 2018. The first accused admitted committing both the offences as alleged in the company of the other accused. He told the police where he had hidden the stolen phone. He also confirmed that they had damaged the phone since both the accused were trying to remove the sim. A copy of the caution interview of the first accused was attached to the summary of facts.
10. The second accused was also interviewed on the 6th he also admitted committing both the offences in the company of the other. A copy of the second accused caution interview was attached to the summary of facts.
11. Both admitted entering the complainant's house from the back door, it was dark and they saw the light flicking on the mobile phone which was on the mattress.
12. The first accused picked the mobile phone and both came out of the house by following the route they had taken to get into the complainant's house. Both were standing in front of the complainant's house when they saw the gate open, they entered because there was no movement inside the house of the complainant.
13. After considering the summary of facts read out by the State Counsel which was admitted by both the accused and upon reading their caution

interviews, this court is satisfied that both have entered an unequivocal plea of guilty on their own freewill. This court is also satisfied that both the accused have fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by both the accused persons satisfies all the elements of both the offences.

14. In view of the above, this court finds both the accused persons guilty as charged and they are convicted accordingly.
15. The two offences with which both the accused persons have been convicted are founded on the same facts hence it is only proper that an aggregate sentence be imposed.

16. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

17. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the two offences.

FIRST ACCUSED

18. In a thoughtful and comprehensive mitigation, the learned counsel for the first accused presents the following personal details, circumstances of the offending and mitigation on behalf of the first accused:

- (a) He is a first offender, 21 years of age, lives with his parents and 3 other siblings, he is the eldest and only son;
- (b) Currently a third year student doing Bachelor of Engineering (Electrical/Electronics) at the University of the South Pacific;
- (c) Is a recipient of Tertiary Education Loans Scheme (TELS);
- (d) He was intoxicated at the time, however, the accused understands this does not justify his actions, the accused admits it was a lapse of judgment on his part and he takes full responsibility of his action;
- (e) What he did was out of character and an aberration from his blameless life so far;
- (f) Pleaded guilty at the earliest opportunity, had cooperated with the police and also admitted his wrong doing;
- (g) Was remorseful of his action, assures the court that he will not re-offend;
- (h) Has spent about 15 days in remand and has learnt his lesson and realizes that he must keep out of trouble;
- (i) Has a very supportive family who provide him with rehabilitation and purpose in life. He had achieved a lot in a short time which speaks volumes of his intention to continue and complete his degree and pursue a career in electrical engineering to support his parents and younger siblings.
- (j) The accused seeks leniency, forgiveness and mercy of the court;

- (k) There has been full recovery of the stolen item and there was no violence used by the accused during the offending;
- (l) The accused has paid the sum of \$500.00 as restitution for the damage caused to the phone of the complainant by payment into court (R/No. 357180 dated 17 August, 2018);
19. This court is mindful of the achievement of the first accused which is no doubt impressive and exemplary. This is also supported by the three (3) character references attached to the mitigation submission filed on behalf of the first accused. Counsel for the first accused seeks a suspended sentence.

RESTITUTION

20. The first accused has paid \$500.00 as restitution which also speaks volumes of his remorse which this court accepts as genuine remorse.
21. The Supreme Court of Fiji in *Manoj Khera -v- the State [2016] FJSC 2; CAV 0003 of 2016 (1 April, 2016)* mentioned about the effect of restitution on sentence, at paragraph 7, Gates C.J. stated:

“...Restitution if made genuinely in a spirit of remorse can reduce the harshness otherwise due in final sentences...”

22. In *State -vs. - Jocelyn Deo, Criminal Appeal No. HAA 0008 of 2005*, Shameem J. made a valuable comment about restitution in the following words:

“... The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession and restitution to the victim as evidence of such remorse and apology.”

23. Section 4 (2) (h) of the Sentencing and Penalties Act allows a sentencing court to consider restitution. The relevant section is as follows:-

“(2) In sentencing offenders a court must have regard to -

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this [Act].”

24. The above provision of the Sentencing and Penalties Act makes it mandatory for a sentencing court to consider restitution.

SECOND ACCUSED

25. The counsel presented the following mitigation on behalf of the second accused:
- (a) The accused is 20 years of age;
 - (b) Pled guilty at the earliest opportunity, is a student of the Fiji National University;
 - (c) Lives with his mother and younger siblings since his father passed away;
 - (d) Is a first offender;
 - (e) Has cooperated with the police during investigation;
 - (f) Promises not to re-offend has learnt a valuable lesson in life;
 - (g) Time spent in remand;
 - (h) The offence committed has been out of character (2 character references provided), peer pressure;
 - (i) No violence used on the victim;
 - (j) Seeks forgiveness of the court.
26. Counsel seeks a non-custodial sentence.

TARIFF

27. The maximum penalty of the offence of aggravated burglary is 17 years imprisonment.
28. The accepted tariff for this offence is a sentence between 18 months to 3 years imprisonment (see *Leqavuni v. State, Criminal Appeal No. AAU 106 of 2014 (26 February, 2016)*).
29. For the offence of theft the maximum penalty is 10 years imprisonment.
30. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:
 - (i) *For the 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.”*

AGGRAVATING FEATURES

Night time Invasion

- (a) The accused persons entered the complainant's house when the complainant was sleeping. It was late at night and the accused persons were bold and undeterred. The complainant's peaceful sleep was disturbed by the uninvited invasion of his property.

Planning

- (b) There is some degree of planning by both accused persons who were standing in front of the complainant's gate. They only entered the property after they were satisfied that there was no one in the house. They knew the entry and exit points of the house and had entered through the back door.

Victim Impact Statement

- (c) The complainant has been personally affected by the incident, he was unable to sleep that night which caused him anxiety. As a result, the complainant has relocated to Rakiraki.
31. Considering the objective seriousness of the offending, I select 18 months imprisonment (lower range of the tariff) as the aggregate sentence of both the offences. For the aggravating factors I increase the sentence by 3 years. The interim sentence of imprisonment now stands at 4 ½ years imprisonment. For the early guilty plea, mitigation, and the remand period the interim sentence is reduced by 2 years.
32. The final aggregate sentence for the two offences is 2 ½ years imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspended the final sentence since it does not exceed 3 years imprisonment.
33. In *State vs. Alipate Sorovanalagi and others, Revisional Case No. HAR 006 of 2012 (31 May 2012)*, Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraphs 22 and 23:

"[22] I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be

exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case.

*[23] In **DPP v Jolame Pita** (1974) 20 FLR 5, Grant Actg CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg CJ laid down guidelines for imposing suspended sentence at p.7:*

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

34. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing immediate imprisonment or suspended sentence.
35. The accused persons are first offenders of comparatively good character, no violence used by them, isolated offences committed, both are in their early


twenties, pursuing University education, pleaded guilty at the earliest opportunity, were remorseful, restitution effected, cooperated with Police and takes full responsibility of their actions. I consider these special reasons as rendering immediate imprisonment inappropriate.

36. Both the accused persons are young offenders, with a bright future ahead of them, an imprisonment term will not augur well for their future, they have been in remand for about 15 days which is in itself an adequate and appropriate punishment, an experience that will remind them of their misdeeds and act as a motivation to keep away from trouble. This court has taken into account rehabilitation over and above retribution.
37. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that the punishment is just in all the circumstances of the case.
38. In summary both the accused are sentenced to 2 ½ years imprisonment respectively as an aggregate sentence for both the offences which is suspended for 3 years. The effect of suspended sentence is explained to both the accused.



At Lautoka

3 September, 2018


Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Howell & Associates, Tavua for the First Accused.

Officer of the Legal Aid Commission for the Second Accused.