

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. Sujata Lodhia for the State

2nd Accused appears in person

Sentence Hearing : 18 December 2018

Sentence : 18 December 2018

SENTENCE

[1] **Ledua Tikotani**, you were charged along with Taione Waqa and Sairusi Nairoso 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 15 May 2018, your plea was taken. Accordingly, you pleaded not guilty to both counts 3 and 4 in the Consolidated Information.
- [4] When the matter came up before me on 12 December 2018, you informed Court that you wish to plead guilty to the two charges against you. Court then fixed the matter for 14 December 2018 for you to take your plea once again. Accordingly, on 14 December 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, 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 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] For the record, it must be stated that the 1st accused in this case (Taione Waqa) pleaded guilty to the charges against him and was sentenced by this Court on 17 October 2018; and similarly the 3rd accused (Sairusi Nairoso) pleaded guilty to the charges against him and was sentenced by this Court on 20 June 2018.
- [7] Ledua Tikotani, I now proceed to sentence you.
- [8] 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. *The accused is Ledua Tikotani, 29 years old, unemployed, resides at Lot 1, Volavola Street, Navasia, Narere.*

3. *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.*
4. *On 22nd January 2018, at about 5.45 p.m., the complainant after work, securely locked up Subrail's Furniture Shop at Nabua.*
5. *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.*
6. *The complainant further noted that 1x TCL brand 40 inch LED TV valued at \$1,299; 1 x TCL brand 32 inch LED TV valued at \$849 and 1 x Genpower brand generator valued at \$499 were also missing from the display areas.*
7. *Matter was reported to Nabua Police Station and investigations led to the accused being arrested on 16th February 2018.*
8. *The accused was interviewed under caution on 16th February 2018.*
9. *In his interview, the accused states that on 23rd January 2018 between 3.30 a.m. and 5.30 a.m., he was with his accomplices at the corner shop in Nabua when one of his accomplice's told him that he had taken out a money safe box from Subrail's Furniture shop and left the shop open for them to go and steal other items. The accused then went to Subrail's Furniture shop with another. They entered the shop from the back door. He took 1 flat screen TV and 1 generator, while his accomplice took another flat screen TV.*
10. *He carried the items to Luke Street, Nabua and then loaded the items in a taxi and took it to the fish market in Suva to sell it. He sold the items to one Pita who sells fish at a stall in the market for \$200. The accused then bought clothes and food with the money that he received.*
11. *The accused was then shown the 1 Genpower brand generator and 1 TCL 32 inch LED TV during his interview and he admitted that those are the items he sold. A copy of the caution interview is attached herewith as Annexure 1.*
12. *On 16th February 2018, at about 11.30 a.m., police recovered 1 Genpower brand generator and 1 TCL 32 inch LED TV from Pita Kean's*

house at Vuci Road, Nausori (the person whom the accused named in his interview). The items were later identified by the complainant at the Nabua Police Station as items belonging to Subrail's furniture shop.

13. *The other TV stolen by one of the co-accused was also recovered.*"

- [9] Ledua you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [10] 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.
- [11] 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.

- [12] 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).
- [13] 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.
- [14] 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); *State v. (Taione) Waqa & 2 others* [2018] FJHC 995; HAC 92.2018 (17 October 2018); *State v. Maika Raisilisili* [2018] FJHC 1190; HAC 355.2018 (13 December 2018); and *State v. TVK* HAC 358.2018 (13 December 2018).

[15] His Lordship Justice Goundar in *State v Apisai Takalaibau* – Sentence [2018] FJHC 505; HAC 154 of 2018 (15 June 2018); making reference to statistics of Aggravated Burglary cases filed in the High Court in 2017 and 2018, stated that “A factor that influences sentencing is the prevalence of the offence in the community…….The more prevalent is an offence, the greater the need is for deterrence and protection of the community.”

[16] 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.

[17] 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.”

[18] Considering the fact that the theft in this case involved property to the total value of \$2,647, and also due to the fact that there was some degree of pre planning in committing this crime, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment.

[19] 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."

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

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

[22] 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 an owner of a commercial property.
- (iii) There was some degree of pre-meditation in committing these offences.
- (iv) You are now convicted of multiple offending.

[23] The mitigating factors are as follows:

- (i) You have sought forgiveness from this court for your actions and also for your conduct in Court. You have submitted that you are truly remorseful of your actions.
- (ii) All of the stolen property has been recovered.
- (iii) You have entered a guilty plea prior to this matter being fixed for trial.

[24] As per the Antecedent Report filed there are three previous convictions recorded against you imposed by the Magistrate's Court of Suva – for House Breaking and Larceny; for Forfeiture of Bail Bond and for Serious Assault. In addition, you admit that there are three pending cases against you in the Magistrate's Court of Suva. Therefore, this Court cannot consider you as a person of previous good character.

[25] Ledua you are 29 years of age (DOB 28 September 1989) and unmarried. Prior to your arrest you were residing at Vatuwaqa. You state that you do not know the whereabouts of your parents. You say that you were raised by your maternal grandmother. Prior to your arrest you submit that you were employed at an

engineering company in Lautoka, where you were employed for 2 months. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

- [26] 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.
- [27] Although belated, I accept your remorse as genuine. Accordingly, considering your show of remorse and also the fact that all the stolen items were recovered, I deduct 12 months from your sentence. Now your sentence for count three is 3 years and six months. Your sentence for count four is 2 years and six months.
- [28] You entered a guilty plea prior to this matter been fixed for trial. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a 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.
- [29] In the circumstances, your sentences are as follows:

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

Count 4- Theft contrary to Section 291 (1) of the Crimes Act – 2 years and 6 months' imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term of imprisonment will be: 3 years' imprisonment.

- [30] 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.

[31] However, considering the fact that there are three previous convictions recorded against you and three pending cases, Court will not consider making an order in terms of Section 26 of the Sentencing and Penalties Act.

[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] 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".

[34] Accordingly, I sentence you to a term of imprisonment of 3 years. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 2 years of that sentence.

[35] 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."

[36] You have been in remand for this case since you were arrested on 16 February 2018. Accordingly, you have been in custody for 10 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the

period of 10 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.


[37] In the result, you are sentenced to a term of imprisonment of 3 years with a non-parole period of 2 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 2 years and 2 months.

Non-parole period - 1 year and 2 months.

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




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 18th Day of December 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the 2nd Accused : 2nd Accused appears in person.