

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 171 OF 2018

STATE

-V-

- 1. MALAKAI CAKAUNITABUA**
- 2. LEKIMA TUNIDAU**

Counsel: Ms. S. Serukai for the State
Mr. Prasad K. for the 1st and 2nd Accused

Sentence Hearing : 06 August 2018

Sentence: 13 August 2018

SENTENCE

1. The 2nd accused Mr. Lekima Tunidau, you are charged with the following offence:

FIRST COUNT

Statement of Offence

ATTEMPTED AGGRAVATED BURGLARY: Contrary to Section 44 and 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MALAKAI CAKAUNITABUA and **LEKIMA TUNIDAU** on the 18th day of April 2018 at Nausori Town in the Central Division, attempted to break and enter into a Vodaphone Booth as a trespasser with intent to steal from therein.

2. This matter was first called before the High Court on 14th day of May 2018. On that day State was given time to file Information and Disclosures, relevant to the case, and the matter was adjourned for 31st of May 2018.
3. When this matter was called on 31st of May, State has moved for further time to file Information and Disclosures and this was fixed to be mentioned on 15th of June 2018.

4. Thereafter on the 15th of June, this matter was fixed to be mentioned on 9th of July 2018.
5. When this matter was mentioned, before His Lordship Justice Daniel Goundar, on 09th of July 2018, the Director of Public Prosecutions (DPP) filed Information and Disclosures and the charge was read over and explained to you. Having understood the charge, you pleaded guilty to the charge, on your own free will, without any threat or intimidation and the Court was pleased to fix this matter before me for sentencing on 16th of July.
6. When the matter came up before me on 16th of July 2018, your plea was taken again and you and the 1st Accused pleaded guilty to the charge in the Information. Since the plea of guilt of the 1st Accused was contrary to the defence counsels' instructions, defence moved for time for fresh instructions and the matter was refixed for 19th of July 2018.
7. On the 19th of July, pleas were taken again and the 1st Accused changed his earlier plea and pleaded not guilty whereas, you the 2nd Accused maintained your plea of guilt firmly. I am satisfied that you fully understood the charge against you and the consequences of your plea and the matter was fixed for 06/08/2018 for summary of facts.
8. Thereafter, the State filed the Summary of Facts on the 06th of August 2018 and the said Summary of Facts were read over and explained to you and you having understood, agreed and accepted the said summary of facts to be true and correct, and the matter was fixed for sentencing to this day.
9. Having retaken your plea and having duly considered the material before me, I find your guilty plea to be unequivocal and made with your own free will. I also find that the summary of facts supports all elements of the charge in the Information, and find the charge proved on the Summary of Facts agreed by you. Accordingly, I find you guilty on your own plea and I convict you of the count as charged.
10. I now proceed to sentence you.
11. The Summary of Facts filed by the State discloses that:
2nd Accused – Lekima Tuinidau (age 19) hereinafter "A2")

Location of Offence – Nausori town, Central Division.

On 18th of April 2018, at about 2.00 am the A2 met up with another at the Nausori Bus Stand.

They forcefully broke into the window of the Vodafone booth located at the Nausori Bus Stand, with intention to steal. Whilst the other was trying to open the window, A2 was about 5 meters away, keeping a look out. There was a lock for the window, and when the lock finally broke A2 tried to climb through the same window. At the time they were trying to get inside the Vodafone Booth through the same window, the police patrolling that early morning found A2 and the other by the Vodafone Booth.

A2 was arrested and A2 in his caution interview admits the unlawful act.

12. You have admitted to the above Summary of Facts and taken full responsibility for your actions.
13. 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.
14. The legislation relevant to the charged offence would be section 44 and section 313(1)(a) of the Crimes Act 2009.

In terms of section 313 of the Crimes Act of 2009;

Aggravated burglary

313. — (1) A person commits an indictable offence if he or she —

- (a) commits a burglary in company with one or more other persons; or
- (b) commits a burglary, and at the time of the burglary, has an offensive weapon with him or her.

Penalty — Imprisonment for 17 years.

- (2) for the purposes of this Decree, an offence against sub-section (1) is to be known as the offence of aggravated burglary.

In terms of section 44 of the Crimes Act of 2009;

44. — (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
15. Therefore, the offence carries a maximum penalty of 17 years imprisonment.
16. In **State v. Nakini**[2012] FJHC 1154; HAC 50 of 2012.Mr. Justice Thurairaja held:
“The tariff for this offence (Aggravated Burglary) appears to range from 18months to 3 years depending on the gravity and nature.”.
17. This tariff has been accepted and adopted in many cases. Recently, In **State v. Venasio Saketa Cawi and others** [2018] FJHC155 of 2018 Mr. Justice Hamza has held;
“The tariff for the offence of Aggravated Burglary is between 18 months to 3 years imprisonment.”
18. 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.
19. Regarding best sentencing practices, in **Koroivuki v. State** [2013] FJCA15 ; the Court of Appeal provided guidelines in determining the starting point during sentencing within a said tariff and 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 time. As a matter of good practice, the starting point should be picked from the lower or middle range of 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. Considering all the above, I adopt the tariff for the offence of Attempted Aggravated Burglary as between 18 months to 3 years imprisonment and decide that the starting point should be 24 months imprisonment.
21. The State has submitted the following aggravating factors against you:
That by trying to break into the property of other people, you showed lack of respect to the property rights of others.

22. In mitigation this Court observes the following:
- (i) The damage caused to the property was minimal.
 - (ii) You are only 19 years old.
 - (iii) You have submitted that you are truly remorseful of your actions.
 - (iv) You have sought forgiveness from this Court and has assured that you will not re-offend
 - (v) You have fully cooperated with the police.
23. As stated in paragraph 20 above, starting from 24 months imprisonment I enhance the sentence by 2 months due to aggravating factors set out above in paragraph 21 to become it a 26 months' imprisonment and reduce back 4 months due to mitigating factors set out above in paragraph 22 as I find that mitigating factors are stronger in compared to the aggravating factors and I arrive to 22 months imprisonment.
24. You have tendered a plea of guilt at the first opportunity and I reduce further 4 months from the above sentence giving merit to it and the sentence now stands at 18 months imprisonment, which would be the appropriate term for the offence you are convicted to have committed.
25. You have been in remand since 18th of April to this date, for a period of nearly 4 months and when that 4 months are deducted from the sentence above, the remainder you have to serve would be 14 months imprisonment with a non-parole period of 8 months.
26. The next issue for consideration is whether your sentence should be suspended.
27. 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.

28. 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."

29. You have no previous convictions or pending cases and you are a first time offender. Therefore, it is my opinion that the chances for your rehabilitation are high. Therefore, I deem it appropriate to suspend your sentence for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

30. In result, your sentence of fourteen (14) months imprisonment is suspended for a period of 5 years.

31. You have 30 days to appeal to the Court of Appeal if you so desire.


Chamath S. Morais
JUDGE



HIGH COURT OF FIJI
AT SUVA

Dated on this 13th day of August 2018

Solicitors for the State: Office of the Director of Public Prosecutions, Suva.

Solicitors for the Accused: Office of the Legal Aid Commission, Suva.

