

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 138 of 2019

STATE

V

ETIKA TOKA

Counsel : Ms. Sujata Lodhia with Mr. Rajneel Kumar for the State
Ms. Lavinia David for the Accused

Sentence : 1 November 2019

SENTENCE

[1] Etika Toka, as per the Amended Information filed by the Director of Public Prosecutions (DPP) you were charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

ETIKA TOKA & ANOTHER, on the 24th day of June 2018, at Pacific Harbour in the Central Division, in the company of each other, entered into Skinny Bean Café, the property of JANICE BENTLEY as trespassers, 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

ETIKA TOKA & ANOTHER, on the 24th day of June 2018, at Pacific Harbour in the Central Division, in the company of each other, dishonestly appropriated \$2500.00 cash, the property of **JANICE BENTLEY**, with intention of permanently depriving the said **JANICE BENTLEY** of the said property.

- [2] This matter was first called before the High Court on 25 April 2019 and the State was granted time to file Information and Disclosures.
- [3] On 23 May 2019, the DPP filed the Information and Disclosures relevant to the case. However, on 20 June 2019, an Amended Information was filed.
- [4] On the same day, you were ready to take your plea. You pleaded guilty to both counts in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charges against you and the consequences of your plea.
- [5] Thereafter, on 9 July 2019, the State filed the Summary of Facts. On 18 July 2019, 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 two counts in the Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the two counts as charged.
- [6] I now proceed to pass sentence on you.
- [7] The Summary of Facts filed by the State was as follows:
 - "1. *The complainant (PW1) in the matter is Janice Bentley, 33 years old, businesswoman, resides at Villa 38, River Drive, Pacific Harbour.*
 2. *The accused is Etika Toka, 26 years old, Carpenter, Resides at Sawani, Suva.*
 3. *The accused is charged and has voluntarily pleaded guilty to one count of aggravated burglary and theft contrary to Section 313 (1) (a) and 291 (1) of the Crimes Act 2009.*
 4. *On 25th June 2018, at about 8.00 am, the complainant found out that her cafe was broken into. The complainant then checked the CCTV footage and saw that the previous night, there were 2 persons that had entered the cafe. She*

further saw that one person was holding an umbrella and the other was wearing a hoody.

5. *The complainant saw that the locker was open and only two of her staff members had the key to the locker namely Lavenia and Miriama Sotia.*
6. *The complainant then checked her cash which she received from sales for the period between 22nd June 2018 and 24th June 2018. She had hidden about \$2,500 underneath the tilt at the cafe but discovered that it was missing. Apart from the complainant, her staff members knew where the cash was hidden.*
7. *The last time the complainant saw the cash under her tilt was on the afternoon of 24th June 2018 at 4.00 pm after her staff members left the cafe.*
8. *PW2 namely Miriama Sotia is the accused's girlfriend. Sometime in December 2018, the accused returned home and told her that he broke in the complainant's cafe with another person in June 2018. The accused told her that on one of the day's when she was sleeping at home, he took the keys for the locker and broke into the complainant's cafe with another person and stole the cash. The accused took the keys without PW2's knowledge.*
9. *On 9th April 2019, the accused was interviewed under caution by DC 5167 Krishneel Chand at Navua Police Station.*
10. *In his caution interview, the accused voluntarily admits that he took the keys to the locker without his girlfriend's knowledge. He further admits that he broke into the complainant's cafe. He opened the padlock on the door with the key and went inside. He then searched around. He saw a cupboard at the counter and saw an envelope inside it. There was \$2,500 cash in it. He then shared the money with his friend. A copy of the caution interview is attached herewith as Annexure 1."*

- [8] Etika Toka you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [9] Section 4(1) 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. The factors are as follows:

4. — (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.

[10] I have duly considered the above factors in determining the sentence to be imposed on you.

[11] In terms of Section 313 (1) of the 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); *State v. (Taione) Waqa & 2 others* [2018] FJHC 1209; HAC 92.2018 (18 December 2018); and *State v. Michael Bhan* [2019] FJHC 661; HAC 44.2019 (4 July 2019).

[15] 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.

[16] 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.”

[17] Since the theft in this case involved cash valued at \$2500.00, and was consequent to you entering the commercial property of the complainant 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.

[18] 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."

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

[20] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, Etika Toka, I commence your sentence at 6 months for the second count of Theft.

[21] The aggravating factors 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 and her property.
- (iii) You trespassed on private property/commercial property belonging to the complainant in the late hours of the night.
- (iv) I find that there was pre-planning on your part in committing these offences. You were aware that your girl-friend Miriama Sotia was working at the Cafe belonging to the complainant. You had admitted to your girl-friend that one day when she was sleeping at home, that you took the keys for the locker and broke into the complainant's Cafe with another person and stole the cash. This clearly shows pre-planning on your part.
- (v) None of the stolen cash was recovered.
- (vi) You are now convicted of multiple offending.

[22] In mitigation you have submitted as follows:

- (i) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (ii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.
- (iii) That you entered a guilty plea at the first available opportunity in these proceedings.

[23] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence for count one would be 4 years and 6 months imprisonment. Your sentence for count two would be 3 years and 6 months imprisonment.

[24] I accept that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct one year from your sentences. Now your sentence for count one would be 3 years and 6 months imprisonment. Your sentence for count two would be 2 years and 6 months imprisonment.

[25] 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 a further discount of one year for each count.

[26] In the circumstances, your sentences are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act-
2 years and 6 months imprisonment.

Count 2- 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 will be 2 years and 6 months imprisonment.

[27] The next issue for consideration is whether your sentences should be suspended.

[28] 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.

[29] Etika Toka you are 28 years of age [Date of birth 4 August, 1991]. You are said to be currently residing at Sawani Village, Naitasiri with your wife. Before being arrested for this case, you were said to be working at Point Construction as a Carpenter usually earning \$180.00 per week.

[30] You have admitted that what you did was wrong, and taken full responsibility for your actions. You have submitted that you committed these offences without comprehending the gravity of your actions.

[31] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

[32] 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."

[33] Etika Toka, however, you cannot be considered as a first offender. Approximately 5 months after committing the offences you are charged with in this case, you committed a similar offence of Burglary and Theft in the Pacific Harbour area. For that matter you were sentenced by the Navua Magistrates Court to 22 months imprisonment, which term of imprisonment was suspended for 3 years. The said sentence was imposed on you on 4 February 2019.

[34] For these reasons, I am not inclined to suspend your entire sentence. I am of the opinion that a custodial sentence is appropriate in the given circumstances so as to denounce your conduct and to deter you and other like persons from committing such criminal acts, and also to protect the community.

[35] In the result, I order that you should serve in custody 1 year of your sentence of 2 years and 6 months imprisonment. The balance term of 1 year and 6 months imprisonment I suspend for a period of 5 years.

[36] However, since it is my opinion that the chances for your rehabilitation is high, pursuant to the provisions of Section 18 (2) of the Sentencing and Penalties Act, I will not impose or fix a non-parole period to be served by you.

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

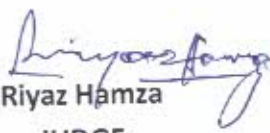
"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

[38] You were arrested for this case on 9 April 2019 and remanded in custody. You have been in remand since that day. Therefore, you have been in remand custody for about 7 months for this case. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 7 months be considered as served by you in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[39] In the result, your final sentence is as follows: You are sentenced to a term of 2 years and 6 months imprisonment. I order that you should serve in custody 1 year of said sentence. Considering the 7 months you have spent in remand the remaining period to be served by you would be 5 months imprisonment. Your balance term of 1 year and 6 months imprisonment is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

[40] 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 1st Day of November 2019

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