IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 338 of 2018

STATE

V

1. SIMIONE VAKACAVUTI

2. DB

Counsel	:	Mr. Rajneel Kumar with Ms. Sheenal Swastika for the State Ms. Swarvana Prakash for the 1st Accused
Date of Hearing	:	3 September 2019
Date of Punishment	:	7 November 2019

The name of the Juvenile has been suppressed. Accordingly, he will be referred to as DB.

PUNISHMENT

[1] DB, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged, along with Simione Vakacavuti, with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SIMIONE VAKACAVUTI AND DB, on the 18th of August 2018, at Naloto Village, Tailevu, in the Eastern Division, entered into the house of **NEMAI RATABACACA** as a trespasser, with intent to steal.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SIMIONE VAKACAVUTI AND DB, on the 18th of August 2018, at Naloto Village, Tailevu, in the Eastern Division, stole 1 x Hisense Led TV Screen valued at $750.00 and 1 x camouflage bag valued at $60.00 all to the total value of $810.00, the property of **NEMAI RATABACACA** and **MESULAME TIKOMAIVULINITU**.

[2] On 29 November 2018, the DPP filed the Information; while on 8 February 2019, the Disclosures relevant to the case were filed.

[3] On 14 March 2019, you were ready to take your plea. On that day you pleaded not guilty to both counts in the Information. However, on the 3 May 2019, your plea was taken once again and 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.

[4] Thereafter, the State filed the Summary of Facts. On 9 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 plea 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 in respect of the two counts as charged.

[5] I now proceed to impose the punishment against you.

[6] The Summary of Facts filed by the State was as follows:

*""**BRIEF BACKGROUND***

It was alleged that on the 18th of August 2018, one Simione Vakacavuti, 19 years old, unemployed of Naloto Village, Tailevu, and DB, 17 years old, unemployed, of Naloto Village, Tailevu, allegedly entered Nemai Ratabacaca's house through the window of

one of the bedrooms and stole one Hisense Led TV screen valued at $750.00 and one camouflage backpack valued at $60.00, all to the total value of items stolen was $810.00.

The first accused and the juvenile persons have pleaded guilty to the Aggravated Burglary contrary to Section 313 (1) (a) and Theft contrary to Section 291 (1) of the Crimes Act 2009.

OFFENCE

On the 18th of August 2018, Simione Vakacavuti and DB were at Naloto Village, Tailevu for a family function. During the course of the family function, the accused persons planned to break into Nemai Ratabacaca's house with the intention to steal.

As they arrived at Nemai Ratabacaca's house, Simione Vakacavuti removed the louver blades from a window of a bedroom. Simione Vakacavuti entered the house using the window, and then he opened the kitchen door for DB to enter the said house. They took one Hisense LED TV Screen valued at $750.00 and one camouflage backpack valued at $60.00, all to the total value of $810.00.

They existed the house through a door of the kitchen and Simione took the flat screen television to the cassava patch next to DB's house while DB took the camouflage bag into his house. Afterwards, DB packed the flat screen in a sack to load on to the carrier that was to leave for Suva, so that they could sell the items.

Before the carrier could leave for Suva, the two accused were then searched and the same stolen items were recovered.

CAUTION INTERVIEW AND THE CHARGE

Simione Vakacavuti and DB were arrested on the 18th August 2018.

Simione was then interviewed under caution on the 18th of August 2018 and he had admitted to the unlawful acts in ***Questions and Answers 19-31.***

In addition, DB was also interviewed on the same day, and he admitted to the unlawful acts in ***Questions and Answers 13-30.***

They were charged on the 19th of August 2018.

In light of the above, the first accused and the juvenile have pleaded guilty to the Aggravated Burglary contraction to Section 313 (1) (a) and Theft contrary to Section 291 (1) of the Crimes Act 2009 on the 3rd of May 2019 on their own free will."

[7] DB, you have admitted to the above Summary of Facts and taken full responsibility for your actions. You have submitted that you understand the seriousness of the offences you have been charged with.

[8] 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 punishment to be imposed on you.

[9] 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.

[10] 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).

[11] 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.

[12] 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); ***State v. Michael Bhan*** [2019] FJHC 661; HAC 44.2019 (4 July 2019); and ***State v. Etika Toka*** HAC 138.2019 (1 November 2019).

[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] Since the theft in this case involved property valued at $810.00, and was consequent to you entering the residential premises of the complainants 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.

[16] 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."

[17] In terms of the Juveniles Act (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

[18] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

"(1) No child shall be ordered to be imprisoned for any offence.

(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.

(3) A young person shall not be ordered to be imprisoned for more than two years for any offence."

Emphasis is mine.

[19] The aggravating factors in this case are as follows:

(i) The frequent prevalence of these offences in our society today.

(ii) You trespassed into the residential premises of the complainant thereby paying scant regard to the privacy of the complainant.

(iii) I find that there was pre-planning on your part in committing these offences. You have admitted in the Summary of Facts that during the course of the family function you were attending, that you, along with the Simione Vakacavuti, had planned to break into the premises of the complainant with the intention to steal This clearly shows pre- planning on your part.

(iv) You are now convicted of multiple offending.

[20] In mitigation you have submitted as follows:

(i) That you are a 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.

(iv) All of the stolen property has been recovered.

(v) That you entered a guilty plea at an early stage of these proceedings.

[21] Considering all the aforementioned factors, and the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, I impose on you a punishment of 2 years imprisonment for count one; and 12 months imprisonment for count two.

[22] In the circumstances, your punishments are as follows:

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

Count 2- Theft contrary to Section 291 (1) of the Crimes Act – 12 months imprisonment.

I order that the aforesaid punishments to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[23] The next issue for consideration is whether your punishments should be suspended.

[24] 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.

[25] DB, you are currently 19 years of age (DOB: 30/09/2000). Therefore at the time of offending you would have been 17 years and 11 months old, and as such a Juvenile.

[26] You are said to be single and residing at Naloto, Village, Verata, Tailevu, with your parents. You are said to be employed at Ashabhai Distributors Limited as a delivery boy earning around $210.00 per week.

[27] You were arrested for this case on 18 August 2018 and remanded in custody. You were granted bail by this Court on 10 September 2018. Therefore, you have been in remand custody for about 24 days for this case.

[28] 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."*

[29] 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."*

[30] I have considered the following circumstances:

- You are a very young offender (A Juvenile at the time of the offending);
- You have been of previous good character;
- You have fully cooperated with the Police;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have sought forgiveness from this Court;
- You have assured Court that you will not re-offend;
- You entered a guilty plea at an early stage of these proceedings;
- You have already spent 24 days in remand custody for this case.

Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishment for a period of 5 years. You are advised of the effect of breaching a suspended punishment.

[31] In the result, your final punishment of 2 years imprisonment, is suspended for a period of 5 years.

[32] 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 7th Day of November 2019

Solicitors for the State: Office of the Director of Public Prosecutions, Suva.
Solicitors for the 1st Accused & Juvenile: Office of the Legal Aid Commission, Suva.