

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 44 of 2019

STATE

V

MICHAEL BHAN

Counsel : Mr. Rajneel Kumar for the State
Mr. Kavshik Prasad for the Accused

Sentence Hearing : 5 June 2019

Date of Sentence : 4 July 2019

SENTENCE

[1] Michael Bhan, you were charged with the following offences:

FIRST COUNT

Statement of Offence (a)

AGGRAVATED BURGLARY: Contrary to Sections 45 and 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence (b)

MICHAEL BHAN with another, on the 11 January 2019, at Nabua in the Central Division, entered into the premises of **SAROJINI** as trespassers, with intent to commit theft therein.

SECOND COUNT

Statement of Offence (a)

THEFT: Contrary to Sections 45 and 291 (1) of the Crimes Act 2009.

Particulars of Offence (b)

MICHAEL BHAN with another, on the 11 January 2019, at Nabua in the Central Division, dishonestly appropriated (stole), assorted properties, all to the total value of FJ\$6469.00, the property of **SAROJINI**, with the intention of permanently depriving the said **SAROJINI** of the said property.

- [2] This matter was first called before the High Court on 5 February 2019 and the State was granted time to file Information and Disclosures.
- [3] On 27 February 2019, the Director of Public Prosecutions (DPP) filed the Information and Disclosures relevant to the case.
- [4] When the matter came up before me on 30 April 2019, 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 the same day, the State filed the Summary of Facts. On 14 May 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 accused in this matter is Michael Bhan, a 22 year old casual construction worker of Cunningham Stage 1 Settlement, Suva.*
 2. *The victim in this matter is Sarojini, a 30 year old female assistant of Nabuni Settlement, Cunningham, Suva.*

3. *At about 03.00 hours, on 11 January 2019, Sarojini was asleep with her husband in their living room when she awoke to visit the washroom. When Sarojini stood up she noticed an unknown person standing inside their house and realized the person to be an intruder so she alerted her husband who chased the said intruder. The said intruder then escaped through the back door and made good his escape by jumping off their back porch.*

4. *Sarojini checked inside her home after the said intruder fled and she noted the following properties, belonging to her, as having been stolen:*
 - a. *Assorted jewelleries worth FJ\$5,000.00;*
 - b. *Some clothes;*
 - c. *two mobile phones (a Sony Experia mobile phone worth FJ\$1,000.00 and a ZX (Alcatel) mobile phone worth FJ\$129.00);*
 - d. *a handbag containing her eye glasses, assorted cards and cash of FJ\$300.00 and a wallet containing assorted cards and cash of FJ\$40.00 (all with a total discernible value of FJ\$6469.00).*

5. *The matter was reported to the Nabua Police Station and investigations resulted in the accused being arrested and being interviewed under caution on 21 January 2019.*

6. *During his interview the accused made voluntary admissions (Q & A 28-90) that he returned to Cunningham Stage 1 sometime after 03.00 hours, on 11 January 2019, after clubbing, where he met his friend Tomasi. They shared a cigarette and strolled towards Nabuni Settlement. Tomasi asked the accused to break into a house with him where the accused was to act as a lookout. The accused followed Tomasi to a grey house, which was Sarojini's house and they went to the back of Sarojini's house. The accused kept a lookout while Tomasi removed 05 louver blades from a window. Tomasi went inside Sarojini's house through the said window. After 05 minutes inside, Tomasi opened the back door and told the accused to run by which time Tomasi was carrying a ladies handbag. They ran towards Cunningham Stage 1 and stopped near a shop. Tomasi showed the*

accused a small ladies purse with FJ\$30.00 cash inside and a mobile phone. The accused received FJ\$20.00 cash for his part as a lookout while Tomasi took all other items. The accused then went to his own home and Tomasi went towards Caubati. The accused gave the Police a last known area of residence and description of Tomasi and his family, however, related checks yielded nil arrests. The accused took part in scene construction and cooperated with investigations (attached: Record of Interview of Michael Bhan dated 21/01/19).

7. *The accused was jointly charged with a first count of aggravated burglary contrary to Section 313 (1) (a); and a second count of theft contrary to Section 291 (1) of the Crimes Act 2009. The accused has nil priors.”*

[8] Michael you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[9] 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.

[10] Section 45 of the Crimes Act No. 44 of 2009 (Crimes Act), which are provisions dealing with complicity and common purpose, reads as follows:

“45. — (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) for the person to be guilty —

(a) the person’s conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) Subject to sub-section (6), for the person to be guilty, the person must have intended that —

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person —

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling or procuring the commission of that offence.

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either—

(a) is guilty of a particular offence otherwise than because of the operation of sub-section (1); or

(b) is guilty of that offence because of the operation of sub-section (1)—

But is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.”

[Emphasis is mine]

[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); and **State v. (Taione) Waqa & 2 others** [2018] FJHC 1209; HAC 92.2018 (18 December 2018).

[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 property valued at \$6469.00, and was consequent to you entering the dwelling house 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, Michael, 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, Michael, 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 in the late hours of the night.
- (iv) You are now convicted of multiple offending.

[22] 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. Further you provided the Police with information on the last known whereabouts of the principal offender, to the best of your knowledge. However, the principal offender remains at large.

- (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) 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 2 years. Now your sentence for count one would be 3 years and six months imprisonment. Your sentence for count two would be 2 years and six months imprisonment.

[24] I accept that you are a person of previous good character and 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 2 years from your sentences. Now your sentence for count one would be 1 year and six months imprisonment. Your sentence for count two would be six 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 6 months for count one. Since I propose to make your sentences concurrent I do not deem it necessary to grant you any further discount for count two in lieu of this factor.

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

Count 1- Aggravated Burglary contrary to Sections 45 and 313 (1) (a) of the Crimes Act-12 months' imprisonment.

Count 2- Theft contrary to Sections 45 and 291 (1) of the Crimes Act – 6 months' imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 12 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] Michael you are said to be 22 years of age. Your date of birth is 22 September 1996. You are single and said to be residing with your mother at Cunningham Stage 1. Before being arrested for this case, you were said to be working as a casual construction worker at Cunningham Stage 1 Settlement. Currently you say that you are working as a Merchandizer at Extra Fresh Supermarket at Flagstaff. You submit that you aspire to be a recording rap artist.

[30] You have admitted that what you did was wrong, and taken full responsibility for your actions. It seems that the offences were committed by you due to lack of good judgment on your part. You have also promised that you would lead a crime free life if you are granted a non-custodial sentence.

[31] You were arrested for this case on 21 January 2019 and remanded in custody. You were granted bail by this Court on 5 February 2019. Therefore, you have been in remand custody for 16 days for this case.

[32] 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.”

[33] 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.”

[34] I have considered the following circumstances:

- You are young offender;

- 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 the first available opportunity;
- You have already spent 16 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 sentence for a period of 3 years. You are advised of the effect of breaching a suspended sentence.

[35] In the result, your final sentence of 12 months' imprisonment, is suspended for a period of 3 years.

[36] 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 4th Day of July 2019

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