

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 10 of 2019

STATE

V

- 1. ARIKELEO TOGA**
- 2. SAKIUSA NAVAKADRETIA**
- 3. SAILOSI BOLAVUCU & ANOTHER**

Counsel : Ms. P.K. Lata for the State.
: Ms. A. Bilivalu [LAC] for the Accused.

Date of Sentence : 30 August, 2019

SENTENCE

1. The accused persons are charged by virtue of the following amended consolidated information filed by the Director of Public Prosecutions dated 17th May, 2019:

COUNT 1

Statement of Offence

AGGRAVATED BURGLARY: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA AND SAKIUSA NAVAKADRETIA on the 5th day of December, 2018, at Nadi in the Western Division in the company of each

other broke and entered into Angels Pawn Shop, as a trespasser, with intent to commit theft.

COUNT 2

Statement of Offence

THEFT: contrary to section 291(1) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA AND SAKIUSA NAVAKADRETIA on the 5th day of December, 2018, at Nadi in the Western Division in the company of each other dishonestly appropriated (stole) 9 mobile phones, 4 Bluetooth speakers, 3 Binoculars, 3 Guitars, 3 Laptops, 2 Caps, 1 Brown Ba, 1 Nikon camera lens 1 Brown Desert Boot, 1 Torch, 1 Black Bose headset, 1 Sony music system, 1 Ladies Watch, all to the total approximate value of \$10,374.00, the property of Angels Pawn Shop with the intention of permanently depriving Angels Pawn Shop of the said properties.

COUNT 3

Statement of Offence

AGGRAVATED BURGLARY: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA, SAILOSI BOLAVUCU and JOAPE RALULU on the 6th day of December, 2018, at Nadi in the Western Division in the company of each other broke and entered into Angels Pawn Shop, as a trespasser, with intent to commit theft.

COUNT 4

Statement of Offence

THEFT: contrary to section 291(1) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA, SAILOSI BOLAVUCU and JOAPE RALULU on the 6th day of December, 2018, at Nadi in the Western Division in the company of each other dishonestly appropriated (stole) 2 Samsung mobile phones, 1 Sony PSP play station, 1 Apple Charger and 1 bag, all to the total value of \$1,150.00 the property of Angels Pawn Shop with the intention of permanently depriving Angels Pawn Shop of the said properties.

2. On 10th June, 2019 accused one, two and three who were represented by counsel pleaded guilty as follows:
 - (a) Accused one pleaded guilty to count one and two;
 - (b) Accused two pleaded guilty to count one and count two;
 - (c) Accused three pleaded guilty to count three and count four.

3. On 16th August, 2019 accused one, two and three admitted the amended summary of facts read by the State Counsel. The summary of facts was as follows:
 1. *The complainants are Nilema Samantha (hereinafter PW1), 28 years, Lawyer of Voivoi, Nadi and Nitin Nishal Prasaad (hereinafter PW2), 34 years, self-employed of Voivoi, Nadi.*
 2. *Accused 1 is Arikeleo Toga (hereinafter A1), 35 years, Farmer of Korovisina Bila back road, Nadi.*
 3. *Accused 2 is Sakiusa Navakadretia (hereinafter A2), 24 years, unemployed of Korovisina Bila back road, Nadi*
 4. *Accused 3 is Sailosi Bolavucu (hereinafter A3), 22 years, Unemployed of Korovisina Bila back road, Nadi*
 5. *On the 4th day of December, 2018 OPW2 closed the shop and securely locked the doors and windows. On the 5th day of December, 2018 at around 5.00am PW1 checked the shop's camera surveillance through her phone and notice that the cameras were distorted and the camera positioning was facing the wall.*

6. PW1 reported the matter to police. When reaching their shop with police, PW1 discovered that someone had broken into the shop by removing the burglar bars and entering through the small sliding window of the washroom situated at the back of the building.
7. The Police did the investigations and recovered some of the items which were positively identified by the complainant that were 1 Toshiba laptop, 2 HP Laptop, 4 Bluetooth speakers, 2 caps, 3 binoculars, 9 mobile phones, ultra fire torch, 1 ladies watch, 1 brown dessert boot, 1 Bose head phone. 2 guitars, 1 Sony radio. 1 Nikon camera lens, 1 apple iPod charger, 1 apple mac book charger, 2 bag, 2 laptop charger and 1 radio charger.
8. A1 and A2 were arrested and interviewed under caution whereby they admitted that they planned to break into Angel's Pawn shop at Namaka. They forcefully removed the grills of the toilet windows of the shop and climbed inside the shop. They entered the shop and ransacked the shop. They found a torchlight in the shop and they used it to look for items to steal. [Q&A 26-42 of A1 and Q&A 21-37 of A2].
9. A1 admitted stealing 2 music box, 2 binoculars, camera lens, black earphone, 2 flat caps, 3 touchscreen mobile phones branded Samsung and Vido and black Sony music system [Q&A 44-63]. A2 admitted stealing 2 music box, 3 guitars, 3 laptop branded Toshiba and HP, 3 mobile phones, 1 binoculars, a pair of brown desert boots [Q&A 40-66]. Both of them then packed all the stolen items in a brown bag and went away from the shop.
10. On the 6th day of December, 2018, A3 broke into Angel's Pawn Shop. At about 1.30am PW2 was sleeping at home when security alarm triggered on PW2's mobile phone. When PW2 checked on the camera CCTV footage, he saw movement inside his shop of some mask man.
11. PW2 then called the police and alerted them. PW2 got inside his vehicle with PW1 and went to check his shop. Police arrived at the shop but the culprits had escaped. PW2 then went inside the shop and noticed all his shop stuff was damaged and scattered.
12. A3 was arrested and interviewed under caution whereby he admitted to that allegation at Q&A 22 of his record of interview. He admitted that they went to angel Pawn shop, opened a small window and went inside the shop. He admitted stealing the PSP PlayStation, 1 x apple charger, J1 Mini Prime, 2 Apple iPhones and J2 Samsung phone [Q&A 26-50].
13. The police went and searched A3's house whereby they recovered 1 Samsung mobile phone, Sony PSP play station, 1 apple charger and a black bag which was positively identified by PW1 and PW2.

14. A1 is charged with two counts of Aggravated Burglary contrary to section 313 (1) (a) of the Crimes Act 2009 and two counts of Theft contrary to section 291 (1) of Crimes Act 2009. A1 has pleaded guilty to one count of Aggravated Burglary and one count of Theft as follows:

COUNT 1
Statement of Offence

AGGRAVATED BURGLARY: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA AND SAKIUSA NAVAKADRETIA on the 5th day of December, 2018 at Nadi in the Western Division, in the company of each other broke and entered into Angels Pawn Shop, as a trespasser, with intent to commit theft.

COUNT 2
Statement of Offence

THEFT: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA AND SAKIUSA NAVAKADRETIA on the 5th day of December, 2018 at Nadi in the Western Division, in the company of each other broke dishonestly appropriated (stole) 9 mobile phones, 4 Bluetooth speakers, 3 Binocular, 3 Guitars, 3 Laptops, 2 Caps, 1 Brown bag, 1 Nikon camera lens, 1 Brown Desert Boot, 1 Torch, 1 Black Bose headset, 1 Sony music system, 1 Ladies Watch, all to the total approximate value of \$10,374, the property of Angels Pawn Shop with the intention of permanently depriving Angels Pawn Shop of the said properties.

15. A2 is charged with one count of Aggravated Burglary contrary to section 313 (1) (a) of the Crimes Act 2009 and one count of Theft contrary to section 291 (1) of the crimes Act 2009. A2 has pleaded guilty to both the counts as follows:

COUNT 1
Statement of Offence

AGGRAVATED BURGLARY: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA AND SAKIUSA NAVAKADRETIA on the 5th day of December, 2018 at Nadi in the Western Division, in the company of each other

broke and entered into Angels Pawn Shop, as a trespasser, with intent to commit theft.

COUNT 2
Statement of Offence

THEFT: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA AND **SAKIUSA NAVAKADRETIA** on the 5th day of December, 2018 at Nadi in the Western Division, in the company of each other dishonestly appropriated (stole) 9 mobile phones, 4 Bluetooth speakers, 3 Binocular, 3 Guitars, 3 Laptops, 2 Caps, 1 Brown bag, 1 Nikon camera lens, 1 Brown Desert Boot, 1 Torch, 1 Black Bose headset, 1 Sony music system, 1 Ladies Watch, all to the total approximate value of \$10,374, the property of Angels Pawn Shop with the intention of permanently depriving Angels Pawn Shop of the said properties.

16. A3 is charged with one count of Aggravated Burglary contrary to section 313 (1) (a) of the Crimes Act 2009 and one count of Theft contrary to section 291 (1) of the Crimes Act, 2009. A3 has pleaded guilty to both the counts as follows:

COUNT 3
Statement of Offence

AGGRAVATED BURGLARY: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA , **SAILOSI BOLAVUCU** and JOAPE RALULU on the 6th day of December, 2018 at Nadi in the Western Division, in the company of each other broke and entered into Angels Pawn Shop, as a trespasser, with intent to commit theft.

COUNT 4
Statement of Offence

THEFT: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ARIKELEO TOGA, **SAILOSI BOLAVUCU** and JOAPE RALULU on the 6th day of December, 2018 at Nadi in the Western Division, in the company of each other dishonestly appropriated (stole) 2 Samsung mobile phones, 1 Sony PSP play station, 1 Apple charger and 1 bag, all to the total approximate value of

\$1,150.00 the property of Angels Pawn Shop with the intention of permanently depriving Angels Pawn Shop of the said properties.

4. After considering the summary of facts read by the State Counsel which was admitted by the three accused persons and upon reading their caution interviews, this court is satisfied that these three accused persons have entered an unequivocal plea of guilty on their own freewill. This court is also satisfied that the three accused persons have fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused persons satisfies all the elements of the offences they are charged with.
5. In view of the above, this court finds the three accused persons guilty as charged and they are convicted accordingly.
6. The two offences with which accused one, two and three have been convicted are founded on the same facts hence it is only proper that an aggregate sentence be imposed.
7. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”
8. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the offences the three accused persons are charged with.
9. Both counsel have filed written sentence and mitigation submissions for which this court is grateful.

10. The counsel for the accused persons presented the following personal details and mitigation on behalf of accused one, two and three:
11. Accused One - Arikeleo Toga
- a) He is 35 years of age;
 - b) Was a subsistence farmer;
 - c) Pleaded guilty at the earliest opportunity;
 - d) Genuinely remorseful;
 - e) Some stolen items were recovered;
 - f) Cooperated with the police.
12. Accused Two - Sakiusa Navakadretia
- a) He is 24 years of age;
 - b) Was a subsistence farmer;
 - c) Pleaded guilty at the earliest opportunity;
 - d) Genuinely remorseful;
 - e) Some stolen items were recovered;
 - f) Cooperated with the police
13. Accused Three - Sailosi Bolavucu
- a) First offender;
 - b) He is 22 years of age;
 - c) Single father of two children
 - d) Sole breadwinner of the family looks after his sickly mother;
 - e) Active member of the Heritage Family Centre International Church;
 - f) Genuinely remorseful;
 - g) Some stolen items were recovered;
 - h) Cooperated with the police.

TARIFF

14. The maximum penalty of the offence of aggravated burglary is 17 years imprisonment.

15. The accepted tariff for this offence is a sentence between 18 months to 3 years imprisonment (see *Leqavuni v. State, Criminal Appeal No. AAU 106 of 2014 (26 February, 2016)*).
16. For the offence of theft the maximum penalty is 10 years imprisonment.
17. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:

- (i) For the 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."*

AGGRAVATING FACTORS

18. The following aggravating factors are obvious:

- a) Early morning invasion

The accused persons broke and entered into the shop during the early hours of the morning when there is not much movement.
The accused persons were bold and undeterred.

- b) Planning

There is some degree of planning involved the burglar bars were removed and entry was gained from the back of the building

through the small sliding window. To avoid detection the surveillance cameras were distorted.

c) Shop was targeted

A shop was targeted at the Central business area of Nadi. There has been an increase in such criminal activities where commercial entities are targeted (see *State v Taione Waqa and others, HAC 92 of 2018*). Furthermore, the accused persons damaged the properties of the victim and also ransacked the entire shop.

PREVIOUS CONVICTIONS

19. The first accused has 7 previous convictions whereas the second accused has 2 previous convictions.
20. Both accused one and two are serving an imprisonment term of 17 months with a non-parole period of 11 months respectively for one count of aggravated burglary and one count of theft. Accused one and two are sentenced as follows:
21. Considering the objective seriousness of the offending, I select 18 months imprisonment (lower range of the tariff) as the aggregate sentence of both the offences. For the aggravating factors I increase the sentence by 3 years. The interim sentence of imprisonment now stands at 4 ½ years imprisonment.
22. For the mitigation presented the sentence is reduced by six months, (both the accused persons have previous convictions hence they do not receive any discount for good character) the sentence is now 4 years imprisonment. For the early guilty plea the sentence is further reduced by 1 year 4 months the interim sentence is now 2 years and 8 months imprisonment.

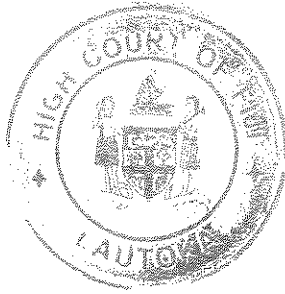
23. Both the accused persons were remanded for 8 months and 20 days in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I deduct 9 months as a period of imprisonment already served.
24. The final aggregate sentence for the two offences committed by accused one and accused two is 1 year 11 months imprisonment.
25. Accused three is sentenced as follows:
26. Considering the objective seriousness of the offending, I select 18 months imprisonment (lower range of the tariff) as the aggregate sentence for both the offences. For the aggravating factors I increase the sentence by 3 years. The interim sentence of imprisonment now stands at 4 ½ years.
27. For the mitigation I reduce the sentence by 1 year bringing the sentence to 3 ½ years. For the early guilty plea I further reduce the sentence by 1 year 2 months bringing the interim sentence to 2 years 4 months. This accused has been in remand for 8 months 20 days in accordance with section 24 of the Sentencing and Penalties Act I exercise my discretion to further reduce the sentence by 9 months as a period of imprisonment already served. The final sentence is 1 year 7 months imprisonment.
28. The final aggregate sentence for the third accused is 1 years 7 months imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence of all the accused persons since it does not exceed 3 years imprisonment.
29. In order to suspend the sentence of all the accused persons this court has to consider whether the punishment is justified taking into account the seriousness of the offences committed by the accused. In this regard the guidance offered by Goundar J. in *Balagan vs. State, Criminal Appeal No. HAA 031 of 2011 (24 April, 2012)* at paragraph 20 is helpful:


“Neither under the common law, nor under the Sentencing and Penalties [Act], there is an automatic entitlement to a suspended sentence. Whether an offender’s sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. For instance, a young and a first time offender may receive a suspended sentence for the purpose of rehabilitation. But, if a young and a first time offender commits a serious offence, the need for special and general deterrence may override the personal need for rehabilitation. The final test for an appropriate sentence is whether the punishment fits the crime committed by the offender?”

30. Taking into account the fact that the first and second accused persons have previous convictions and the offences committed are serious and very prevalent which was carried out on a business entity makes a suspended sentence in the circumstances inappropriate.
31. In view of the above, there are no special reasons which would convince this court to impose a suspended sentence. The accused persons have chosen to take a short cut in life which is unacceptable and must be denounced in every sense of the word.
32. Although the accused persons are young offenders this court has to balance rehabilitation with retribution, special and general deterrence. In considering a term of imprisonment this court has taken into account deterrence over rehabilitation. The previous convictions of the first and second accused persons give an indication that rehabilitation has not worked for these accused persons.
33. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a term of imprisonment is just in all the circumstances of the offending for the first and second accused.

34. As for the third accused he is a first offender who appears to have fallen into the wrong company, he is in his early twenties who is genuinely remorseful for what he has done. This court is satisfied a partial suspended sentence for the third accused is justified in the circumstances of this case. In considering partial suspension this court has taken into account rehabilitation over deterrence and retribution.
35. It is noted that the first and second accused persons are serving a term of imprisonment of 17 months with a non-parole period of 11 months to be served before they are eligible for parole. In this sentence a non-parole period will be imposed under section 18 (6) of the Sentencing and Penalties Act for the sake of the completeness a non-parole period in this sentence will be effective over the non-parole of 11 months already imposed in an earlier sentence for the first and second accused.
36. In accordance with section 18 (4) of the Sentencing and Penalties Act I impose 1 year imprisonment as a non-parole period to be served before both the accused persons are eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the first and second accused persons which is just in the circumstances of this case.
37. In summary accused one and two are sentenced to 1 year and 11 months imprisonment respectively as an aggregate sentence for both the offences. This sentence is to be served concurrently with any other sentences served with a non-parole period of 1 year to be served before both the accused persons are eligible for parole. This non-parole period will prevail over the non-parole period of 11 months already imposed in an earlier sentence.
38. The third accused is sentenced to 1 year and 7 months imprisonment which is partially suspended after he serves 11 months imprisonment. The balance term of imprisonment is suspended for 2 years effective from the time he is released from the Corrections Center. The effect of suspended sentence is explained to the third accused.

39. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
30 August, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.