

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 291 OF 2020

STATE

-v-

1. SIMIONE GUSUIVALU

2. INOKE RATULEVU

Counsel: Mr. Z. Zunaid for State
Accused in Person

Date of Sentence : 2 December 2020

SENTENCE

1. The offenders were jointly charged with one count of Aggravated Burglary and one count of Theft. The Information is as follows:

Count 1

Statement of offence

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

Particulars of offence

SIMIONE GUSUIVALU & INOKE RATULEVU with others, in the company of each other, on the 30th day of September, 2020 at Navua in the Southern Division, entered into the property of ROHINI LAKSHMAN, as trespassers with intent to commit theft.

Count 2

Statement of Offence

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

Particulars of Offence

SIMIONE GUSUIVALU & INOKE RATULEVU with others, in the company of each other, on the 30th day of September, 2020 at Navua in the Southern Division, dishonestly appropriated 1xRyobi brand drop saw, 1xRyobi brand planner, 1xHitachi brand circular saw, 1xBosch brand heat gun, 1x Ozito brand drill and 1xComrex brand nail gun, the properties of ROHINI LAKSHMAN with the intention permanently depriving ROHINI LUKSHMAN of the said properties.

2. Both the offenders pleaded guilty to the above charges on their own free will. They understood the consequence of the guilty pleas and the sentencing tariffs for each offence. I am satisfied that the guilty pleas are informed and unequivocal and entered freely and voluntarily.
3. The offenders agreed with the following summary of facts when it was read in Court. The facts agreed satisfy all the elements of each offence. The offenders are found guilty and convicted on each count as charged.

4. The facts agreed are that:

The complainant owns a tool shed/tool room which is located about 30 meters away from her house. The complainant stated that around 7.00pm, the complainant left her house with her tenant to do some work and returned around 9.00pm. At around 11.00pm on the 3 September 2020, she heard her dogs barking but it was too dark to see anything. The next morning around 7.00am (1 October 2020) the complainant's house girl stated that the tool room was broken into as the door was left open.

Upon searching, the complainant found the following tools were stolen from her tool shed

- a) 1 x Ryobi branded drop saw valued at \$800.00
- b). 1 x Ryobi branded planner valued at \$300.00
- c). 1 x Hitachi branded circular saw valued at \$650.00 1 x Bosch branded heat gun valued at \$350.00
- d). 1 x Ozito branded drill valued at \$260.00
- e).1 x Comrex brand nail gun valued at \$800.00

All to a total value of \$3, 160.00.

All the items were recovered in this case and were positively identified by the complainant. Items labelled in alphabets b, c, d and e were recovered from the bushes behind A2's dwelling house whilst the other items were recovered from the people whom the accused had sold the items to.

PW2 recalls on the afternoon of the incident both the accused (whom he knows) went to his house and informed him that they are selling some circular saws and some nail guns. Accused 1 told PW2 that the power tools belonged to his father who had passed away and he was now looking to sell his power tools. Around 10.00pm, the accused came to him again with circular saws colored green and a nail gun colored yellow. The accused had come in a vehicle which was driven by PW3. PW2 then called PW4 and informed him that the accused were selling power tools. PW4 was interested in buying the cordless drill. PW2 informed PW4 that the power tools belonged to A1's father who had passed away. At around 9.00pm, PW2, PW3, the accused and PW4 met at the Queens Highway in Viwawa. PW4 then saw there was no cordless drill so he negotiated with the accused and bought the yellow nail gun for \$50.00. On 1st October 2020, police officers recovered the stolen nail gun from PW4. PW4 was not aware that the tool was stolen.

PW5 who knows PW2 stated that on 30 September 2020 at around 8.00pm, PW2 came with an i-Taukei boy in a vehicle and asked if he wanted to buy a drop saw. PW2 informed PW5 that the power tool belonged to the i-Taukei boy's father who had passed away and he needed some cash. PW5 believed the PW2 and purchased the drop saw for \$100.00 from the i-Taukei boy. Police then later managed to recover the stolen item from PW5.

Through investigations, police managed to apprehend PW2 who informed the police that it was the two accused who sold the items. PW6 being a police officer then managed to arrest A2 whilst PW7 arrested A1. A2 then informed the police where he had hidden the

rest of the stolen power tools. Police then went to A2's house and recovered the remainder of the stolen power tools from a nearby bush

A1 was later caution interviewed by the police where he made full admissions. A1 stated that on the day of the incident he met his cousin at around 1.00pm. (A2) (Q&A 27-28). A1 stated that they went to meet PW2 as he knew PW2 wanted to buy power tools so A1 informed PW2 that his father has passed and he is now selling all his power tools. A1 wanted to check if PW2 was interested in buying the power tools (Q&A 37). A1 stated that around 7.20pm he and A2 went to Prince Gopals residence where the bulk was. A1 stated that A2's role was to act as a look-out. A1 stated that his father used to be the care taker for Prince Gopals residence and they all used to live in the compound for 15 years (Q&A 41-47). A1 stated that he broke the pad-lock of the bulk and in the process managed to hurt his right middle finger (Q&A 57). A1 admitted that whilst he began packing the power tools, A2 was on look-out (Q&A 58-59). A1 admitted that they then carried the power tools to the Queens Highway and between 8.00-8.30pm A2 organized a transport to come and pick them (Q&A 66-71). A1 stated that PW2 called him and stated that someone wants to buy the power tools so they made their way to Viwawa junction where they met PW2 and one Indian man (Q&A 72-78). A1 stated that he sold the nail gun and heat gun for \$50.00 and \$80.00 each to the Indian man (Q&A 79-83). A1 confirmed that PW2 and the Indian man did not know that the power tools were stolen (Q&A 73&84). A1 stated that they then went and sold the drop saw to another Indian man for \$100.00 (Q&A 8-93). A1 stated that they went and dropped off the rest of the tools at A2's house (Q&A 94). A1 stated they then went to buy alcohol however PW2 got off at the store. The driver was also given \$20.00 (Q&A 96-101). The accused was shown all the stolen power tools to which he admitted that he and A2 had stolen (Q&A105-112).

A2 was also caution interviewed. A2 stated that on the day of the incident, he met A1 at a shop around 5.00pm (Q&A 31-33). A2 stated that A1 told him that he has a job to do at Pacific Harbour and asked A2 to accompany him (Q&A 36-37). A2 stated that they then went and met PW4 who was A1's friend (Q&A 39). A2 stated that from there they then went to Prince Gopal's residence and entered the compound from the beach side (Q&A 39- 44). A2 stated that they entered the compound around 7.30pm and A1 told A2 to wait outside whilst he broke into the tool room (Q&A 45). A2 admitted that A1 broke into the tool shed and he used A2's phone torch to see. A2 stated that he saw A1 bring out various power tools and he asked A2 to assist him (Q&A 46-51). A2 stated that he then called PW3 to pick them up and later they then met PW2 (Q&A 49-56). A2 stated that they then sold the nail gun for \$40.00 to PW4 who was his uncle (Q&A 56-59). A2 stated that A1 had kept the money. A2 stated that they later went and sold a drop saw to another Indian man for \$100.00 (Q&A 60). A2 admitted that he kept the rest of the unsold power tools at his farm (Q&A 62). The recovered power tools were shown to A2 which he confirmed that he and A1 had stolen from the complainant's shed (Q&A 63-69).

5. The maximum punishment for Aggravated Burglary under Section 313 (1) (a) is an imprisonment term of 17 years.

6. The maximum sentence prescribed by the statute for a particular offence is the ceiling on a punishment that a court can impose for that offence. In the case of Aggravated Burglary, it is 17 years' imprisonment and a wide discretion is given to the sentence to select an imprisonment term within the range 0-17 years, depending on the factual scenario of each case. However this discretion should be exercised according to law - Part II of the Sentencing and Penalties Act which provides guidelines. One of the guidelines among other things stated in Section 4 is that, in sentencing offenders, a court must have regard to current sentencing practice and the terms of any applicable guideline judgment 4(2)(b).

7. In Fiji, there is no guideline judgment for the offence of Aggravated Burglary. When the sentencing range prescribed by the statute for a particular offence is broad, the judges or sentences would come to a general consensus or understanding as to the suitable range of sentence and formulate a tariff for that offence. The sentencing practice is manifested in a tariff, a notion formulated by the courts. A formulation of a tariff generally involves a thorough examination of sentences passed by various judges/ courts and, once formulated, the courts are expected to follow it and pitch the final sentence within the range for the sake of consistency and uniformity in sentencing. However a tariff is not a straight jacket and does not act as a fetter on the sentencing discretion. Therefore the existing tariff can be deviated from so as to cater for exceptional circumstances in a particular case, of course after giving recorded reasons.

8. In *Leqavuni v. State* [\[2016\] FJCA 31](#); AAU 106.2014 (26 February 2016), the Court of Appeal accepted that the current sentencing practice *vis-a-vis* the offence of Aggravated Burglary is reflected in the tariff set by the High Court in *State v. Seninawanawa* [\[2015\] FJHC 261](#); HAC 138.2012 (22 April 2015) which ranges from 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). *Kumar v State* [\[2018\] FJCA 148](#); AAU165.2017 (4 October 2018)

9. The basis of the *Seninawanawa* tariff appears to be the precedents set by the High Court for Burglary under the repealed [Penal Code](#). Under the [Penal Code](#), the maximum punishment for Burglary was life imprisonment. The Parliament, when enacting the Crimes Act, has reduced the maximum punishment for Aggravated Burglary to 17 years. The intention of the Parliament deducible from the reduction is that the maximum sentence of life imprisonment was harsh and excessive for this particular offence. However the tariff set for the [Penal Code](#) offence was continued to be applied by the courts and it has been the general practice of the courts despite the drastic reduction of the maximum sentence.
10. There are exceptional reasons to deviate from the established tariff in the present case and therefore, I would not apply the sentencing tariff ranging from 18 months to 3 years imprisonment in this case.
11. The maximum punishment for Theft is an imprisonment term of 10 years. The tariff for Theft ranges from 4 months to 3 years' imprisonment: *Waga v State* [HAA 17 of 2015].
12. This is an appropriate case where an aggregate sentence could be imposed in terms of Section 17 of the Sentencing and Penalties Act in view that the offenders were convicted on the same facts. Hence, I would impose an aggregate sentence.
13. In assessing the objective seriousness of the offending, I considered the degree of culpability and the loss caused to the complainant. Both the accused are similarly situated as far as the culpability level is concerned. The value of property stolen is approximately \$3000. Having considered these factors, I would pick a starting point of 18 months for each offender. There is degree of preplanning involved in the offending. The prevalence of the offence in the community also influences the sentence. These factors exacerbate the sentence. I would add 12 months for aggravation to arrive at a sentence of 30 months' imprisonment.
14. The two offenders have filed separate mitigating submissions. I considered the mitigation submissions in passing this sentence.
15. *Simione Gusuivalu* is a farmer, 21 years of age. He is a student at Fiji National University studying Bachelor of Education in Industrial Arts. He looks after his parents and does farming to support them. He entered early guilty pleas at the first available opportunity. I consider the early guilty pleas as evidence of genuine remorse. He has also saved court's

time and resources by pleading guilty to the charges at a very early stage of the proceeding. He is a first offender and has maintained a clear record. He has promised not to re-offend and he begs for a second chance to rehabilitate. He has cooperated with police in the investigations and, as a result, all the stolen items have been recovered. He seeks mercy of this Court. He has spent approximately 60 days in remand. I deduct 18 months for the mitigation and the remand period to arrive at a sentence of 12 months' imprisonment.

16. *Inoke Ratulevu* is 20 years of age. He does farming to support his three sisters in their education and looks after his elderly parents. He is planning to start his tertiary education next year at Fiji National University. He entered early guilty pleas at the first available opportunity. He saved time and resources of court by pleading guilty to the charges at a very early stage of the proceedings. He repents that he committed these offences. He is a first and young offender. He seeks mercy of this court. He has promised not to re-offend and he begs for a second chance to rehabilitate. He has cooperated with police at the investigation and all the stolen items have been recovered. He has spent approximately 60 days in remand. I deduct 18 months for the mitigation and the remand period to arrive at a sentence of 12 months' imprisonment.
17. Rehabilitation of young and first offenders should be promoted. Both the offenders are young and first time offenders. They have a good potential for rehabilitation. Correction centers do not always correct young offenders. The primary purpose of this punishment is rehabilitation. I have taken into consideration your potential for rehabilitation in view of your youth and clean record.
18. Taking into consideration the early guilty pleas, genuine remorse, nature and value of goods stolen, age and clear record, I suspend the sentences of each offender for a period of 2 years.

Summary

19. *Simione Gusuivalu* is sentenced to 12 months' imprisonment to be suspended for a period of 2 years.
Inoke Ratulevu, is also sentenced to 12 months' imprisonment to be suspended for a period of 2 years.

20. These lenient sentences are imposed in the hope that the offenders will adhere to the undertaking that not they will never come back to a court after committing an offence. If they are convicted of any offence in the next two years, the suspended sentence may be activated.

Aruna Aluthge

Judge

At Suva

2 December 2020

Counsel: Office of the Director of Public Prosecution for State