

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 208 of 2018

STATE

V

S.V [Juvenile One]

AND

J.H.B [Juvenile Two]

Counsel: Ms. S. Naibe for the State.
Ms. J. Singh [LAC] for both Juveniles.
Ms. M. Simpson for and on behalf of the Social
Welfare Department.

Date of Hearing: 10 March, 2020

Date of Punishment: 29 April, 2020

PUNISHMENT

(The names of both juveniles are suppressed they will be referred to as "S.V" and "J.H.B" respectively).

1. The juveniles are charged by virtue of the following information filed by the Director of Public Prosecutions dated 20th December, 2019:

Count One

Statement of Offence

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

Particulars of Offence

S.V and **J.H.B** on the 10th day of November, 2019 at Lautoka in the Western Division, entered into the **WASHDOWN BAR NIGHTCLUB** as a trespasser with intent to commit theft.

Count Two

Statement of Offence

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

Particulars of Offence

S.V and **J.H.B** on the 10th day of November, 2019 at Lautoka in the Western Division, dishonestly appropriated 5 x Fiji Gold, 2 x Fiji Bitter Extra, 6 x Loin Beer, 3x Fiji Bitter stubby, 24x Heineken, 71 x Rum & Cola, 2 x Fusion Tribe, 7 x Raspberry Tribe and 2 x Bourbon Tribe, the property of **WASHDOWN BAR NIGHTCLUB** with the intention of permanently depriving the said **WASHDOWN BAR NIGHTCLUB**.

2. On 17th January, 2020 both the juveniles pleaded guilty to the above two counts in the presence of their counsel. Thereafter on 21st February, 2020 both the juveniles admitted the summary of facts read by the State Counsel as follows:

“The complainant in this matter is Eileen Philitoga (PW1) 24 years old, of Rifle Range, Lautoka.

The juveniles in this matter are:

1. *SV (Juvenile 1) 17 years old, Form 6 Student at St. Thomas High School, of Namoli Village, Lautoka; and*

2. *JHB (Juvenile 2) 14 years old, Student of Sigatoka Village, Sigatoka.*

On the 10th of November 2019 at about 4.30am, PW1 closed the nightclub which is located at Vitogo Parade, Lautoka. PW1 closed the doors and windows of the bar and left for home. Then at about 10.48am she was informed by the Bar Manager (PW2) that the nightclub had been broken into. PW1 came and checked the nightclub and found the following items to be missing:

- 5 x Fiji Gold (long necks) valued at \$50.00*
- 2 x Fiji Bitter (Extra) valued at \$24.00*
- 6 x Lion Beer valued at \$48.00*
- 3 x Fiji Bitter stubby valued at \$18.00*
- 24 x Heineken cans valued at \$920.00*
- 71 x Rum & Cola valued at \$568.00*
- 2 x Fusion Tribe valued at \$16.00*
- 7 x Raspberry Tribe valued at \$56.00*
- 2 x Bourbon Tribe valued at \$16.00*

All to the total value of \$1,408.00

The matter was reported to the Police, investigations were conducted and both juveniles were arrested and interviewed under caution.

Juvenile1 admits to entering Wash Down Nightclub and removing the drinks from therein. He stated that he went together with Juvenile 2 to the back of the nightclub and climbed over the gate and went up to the night club. He then said that he entered the window at the right side of the building and broke the ply board that was nailed across the window. He punched it and it broke and he entered the club. Juvenile 2 was waiting beside the window. He then went to the cooler and took out some liquor and gave it to Juvenile 2 to pack it in a black travelling bag. They then took the

bag and placed it beside the gate on the corner of the building and only took 4 bottles. They then walked towards the juice stand and met Spencer and Apete. They gave them the drinks and they walked back to their home. After a while other boys came and picked them up in a black fielder car driven by an ITaukei man. They went to pick up the bag which was left at the Wash Down bar gate. When they reached the gate, he got off and climbed over the gate. The others were waiting for him but suddenly a Police officer came and arrested them. The Police officer also took the bag of liquor. [Attached herein is the record of interview of juvenile 1].

Juvenile 2 stated that he went with Juvenile 1 and they entered Wash Down nightclub premises. He said Juvenile 1 entered the night club and he was told to wait while he passed over the bag containing the liquor to him. Juvenile then came out and they left the bag at the back of the building. They then went back to Namoli village and a car was parked outside Juvenile 1's house. He admitted that they were stopped by Police but he ran away. He admitted that he was standing outside the night club while Juvenile 1 passed the bag containing liquor to him. [Attached herein is the record of interview of juvenile 2].

Both juveniles were charged for Aggravated Burglary and Theft. Both juveniles sought forgiveness for what they did. [Attached herein are the charge statements of both the juveniles].

3. After considering the summary of facts read by the State Counsel which was admitted by both the juveniles and upon reading their caution interviews and the charge statements, this court is satisfied that both the juveniles have entered an unequivocal plea of guilty on their own freewill.

4. This court is also satisfied that both the juveniles have fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of both the offences. Both the juveniles also admitted committing the offences in the company of each other.
5. In view of the above this court finds both the juveniles guilty as charged.
6. The learned counsel for both the juveniles presented the following mitigation and personal details:

JUVENILE ONE – SV

- (a) The juvenile was 17 years of age at the time of the offending;
- (b) He is going to school and is in year 12;
- (c) First and young offender;
- (d) A person of good character;
- (e) The juvenile seeks the forgiveness of this court;
- (f) Genuinely remorseful for his actions;
- (g) He regrets what he has done;
- (h) Has entered an early guilty plea;
- (i) Cooperated with the police during the investigations;
- (j) Substantial recovery of stolen items.

REASONS FOR COMMITTING THE OFFENCES

7. The counsel for the juvenile in her written mitigation states that the juvenile committed the offences due to peer pressure and wrong decision making.

JUVENILE TWO – J.H.B

- (a) The juvenile was 14 years of age and a young offender;
- (b) Last year the juvenile was in year 8;
- (c) He is now attending High School in year 9;
- (d) Is living with both his parents at Sigatoka village;
- (e) He promises not to reoffend;
- (f) Seeks forgiveness of the court;
- (g) Is genuinely remorseful;
- (h) Has cooperated with the police during investigations;
- (i) Entered early guilty plea;
- (j) Substantial recovery of stolen items.

TARIFF

- 8. The maximum penalty of the offence of aggravated burglary is 17 years imprisonment.
- 9. 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)*).
- 10. For the offence of theft the maximum penalty is 10 years imprisonment.
- 11. 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.”*

12. Both juveniles fall under a special categorization than adults when it comes to punishment under section 30(3) of the Juveniles Act as young persons which prescribes the maximum punishment for young persons at 2 years imprisonment.

AGGRAVATING FACTORS

Early morning Invasion

- (a) Both juveniles entered the nightclub during the early hours of the morning after the closing hours of the nightclub. Both climbed over the gate and entered the nightclub by breaking the ply board.

Planning

- (b) There is high degree of planning involved by both the juveniles they knew how to get into the compound and through which point to enter and exit the nightclub.

Commercial Enterprise

- (c) The juveniles targeted a commercial enterprise in the central business division of Lautoka City. Both the juveniles were bold and undeterred.

SOCIAL WELFARE REPORT

13. As per the order of this court the Social Welfare Department conducted a home assessment before compiling a pre-punishment report.

Juvenile One – S.V

14. According to the case officer from the Social Welfare Department the juvenile was remanded by the Magistrates Court at Lautoka at the Fiji Juvenile Rehabilitation and Development Center for some time. The juvenile the youngest of five siblings is being looked after by his mother after his father passed away in 2002.
15. This incident happened when the juvenile was living with his sister at Namoli Village. The juvenile is currently residing with his mother at Nadera HART Home and attending Besdon College in New Town, Suva, in Year 12. During the interview the case officer was informed by the juvenile that it was a frightful experience for the juvenile to appear in court. The juvenile has made a promise to himself that he would never reoffend or fall into peer group influence again and this would be his first and last case.

PARENTAL VIEW/SUPPORT

16. The mother of the juvenile Losana Kana blames herself for the juvenile's action since she did not spend quality time with him. Losana was always busy with making ends meet for the family. The mother of juvenile, however, is confident that the juvenile being an intelligent child will definitely find his way towards a bright future.

RECOMMENDATIONS

17. The case officer recommends the following for the first juvenile:
- (a) The juvenile be given a chance to rehabilitate himself since he has a good family support;
 - (b) A Probation Officer be appointed to supervise the rehabilitation program of the juvenile;
 - (c) A progress report be submitted to the court each month or as otherwise directed by the court and that the Probation Officer and the juvenile attend court on these occasions;
 - (d) The juvenile to live with his mother and be supervised by an appointed community volunteer.

Juvenile Two – J.H.B

18. According to the case officer the juvenile is the eldest in his family with three young siblings. The juvenile regrets what he has done and he is also embarrassed. He does not want to be in conflict with the law again and has learnt his lesson when he was remanded at the Juvenile Center.

PARENTS VIEWS/SUPPORT

19. The parents of the juvenile are now living together after 20 years of separation. The parents are fully committed towards their son's future. The juvenile is enrolled at a High School in Sigatoka in Year 9.

RECOMMENDATIONS

20. The case officer recommends that the juvenile be under probationary supervision.

DETERMINATION

21. The mother of the first juvenile and both parents of the second juvenile have as part of their commitment agreed to be bonded in the sum of \$300.00 each in respect of the good behaviour of their sons.
22. The two offences for which both the juveniles have been found guilty are founded on the same facts hence it is only proper that an aggregate punishment be imposed.
23. 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.”
24. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate punishment for the two offences.
25. Considering the objective seriousness of the offences committed 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 2 ½ years. The interim punishment now stands at 4 years imprisonment. For the early

guilty plea, mitigation, and the remand period the interim punishment is reduced by 2 years and 2 months.

26. The final aggregate punishment for the two offences is 1 year and 10 months imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final punishment since it does not exceed 3 years imprisonment.
27. In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:

"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as

sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

28. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing immediate imprisonment or a suspended punishment.
29. The juveniles are young persons as per the Juveniles Act, they are generally of good character, isolated offences committed by the first juvenile, they were 17 and 14 years of age respectively at the time of the offending, pleaded guilty at the earliest opportunity, are genuinely remorseful, substantial recovery of stolen items, cooperated with police and they take full responsibility of their actions. These special reasons render immediate imprisonment inappropriate.
30. Both the juveniles with parental and family guidance, supervision and support have a bright future ahead of them, an imprisonment term will not augur well for their future, the juveniles have been in custody at the Fiji Juvenile Rehabilitation and Development Center which is in itself an adequate and appropriate punishment, an experience that will remind them to keep away from trouble. This court has taken into account rehabilitation over and above deterrence.
31. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that the punishment is just in all the circumstances of the case.
32. The society does not condone such activities and this court also denounces such behaviour.

33. This is an opportunity for both the juveniles to stop entering the world of uncertainty but lead a happy life with their parents and siblings. The only reason why the punishment is below the tariff is because the Juveniles Act imposes a limit on the punishment of young persons.
34. In summary both the juveniles are given a punishment of 1 year and 10 months imprisonment as an aggregate punishment for both the offences. It is noted that the second juvenile has been punished for 1 year and 10 months imprisonment for a similar offending in HAC 79 of 2019 where the punishment of 1 year and 10 months was suspended for 3 years.
35. This current offending is within the three year suspension period of the first offending. This court is concerned that in HAC 79 of 2019 the date of the allegation was 17th March, 2019 and after about 8 months on 10th November, 2019 these new allegations have come about.
36. This court will not consider the breach of suspended punishment since the Director of Public Prosecutions has not charged the juvenile under section 28 of the Sentencing and Penalties Act for breach of suspended punishment. In this regard the second juvenile is very lucky.
37. In accordance with section 18 (6) of the Sentencing and Penalties Act the non-parole period in this case will apply retrospectively to the non-parole period imposed in HAC 79 of 2019. To give effect to the punishment in this matter 2 months from this punishment is to be served consecutively with the punishment in HAC 79 of 2019. This means the second juvenile will serve a punishment of 2 years imprisonment for HAC 79 of 2019 and this matter which is suspended for three years.

38. The punishment of the first juvenile is also suspended for three years. The effect of suspended punishment is explained to both the juveniles. The following orders are to take effect immediately.

ORDERS

- a) The first juvenile is given a punishment of 1 year and 10 months imprisonment as an aggregate punishment for the two counts mentioned in the information which is suspended for 3 years with immediate effect. The second juvenile is given a punishment of 1 year and 10 months imprisonment out of which 2 months from the punishment in this file is to be served consecutively with the punishment in HAC 79 of 2019. This means the second juvenile is to serve a punishment of 2 years imprisonment which is suspended for 3 years.
- b) The mother of the first juvenile and the parents of the second juvenile are to sign a good behaviour bond on behalf of the juveniles in the sum of \$300.00 each;
- c) The Social Welfare Department is to immediately arrange for the appointment of a Probation Officer, a Community Volunteer and also to arrange for the counseling of both the juveniles in the presence of their parents with the view of assisting them in keeping out of peer group influence and to engage in education and training;
- d) The Social Welfare Department is also at liberty to work out any programs or plans which will be in the interest of both the juveniles;

- e) It is the responsibility of the parents of both the juveniles to ensure that the juveniles obey any directions given by the Social Welfare Department;
- f) A copy of this punishment is to be served on the Officer in Charge of the Social Welfare Department.
- g) 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

29 April, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for both the Juveniles.