

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 369 of 2019

[CRIMINAL JURISDICTION]

STATE

V

NASONI NAQELECA

Counsel : Ms. S. Swastika for the State
Ms. S. Prakash for the Accused

Date of Sentence : 12 May 2020

SENTENCE

1. Nasoni Naqeleca, you stand convicted of the following charges upon you pleading guilty to same;

FIRST COUNT

Statement of Offence

ARSON: contrary to Section 362 (a) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAQELACA on the 27th day of October, 2019 at Manu Village, Tailevu in the Eastern Division, willfully and unlawfully set fire to the dwelling house belonging to **NASONI NAQELACA** and **PAULINA MARAMA**.

SECOND COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: contrary to Section 255 (b) of the Crimes Act, 2009.

Particulars of Offence

NASONI NAQELACA, on the 27th day of October, 2019 at Manu Village, Tailevu in the Eastern Division, with the intent to cause grievous harm to **PAULINA MARAMA**, unlawfully attempted to strike **PAULINA MARAMA** with a weapon, namely a garden fork.

2. You have admitted the following summary of facts;

- 1) *The accused in this matter is NASONI NAQELACA, 29 years old Manu Village, Wainibuka, Farmer.*
- 2) *The complainant in this matter is PAULINA MARAMA, 23 years old, of Mnau Village, Wainibuka, Domestic Duties.*
- 3) *The accused is charged with one count of Arson contrary to section 362 and one count of Act with intent to cause grievous harm contrary to section 255 pursuant to Crimes Act 2009.*
- 4) *The accused is related to the complainant in this matter, whereby he is her defecto partner.*
- 5) *At the time of the alleged offence the accused and the complainant resided together in Manu Village in Tailevu.*

OFFENCE

- 1) *On the 27th day of October 2019 the complainant was home at Manu Village in Tailevu.*
- 2) *When the complainant woke up she saw that her defecto partner (the accused) was not home. She then held her youngest child Meri Natiovari and started walking towards her father's house.*
- 3) *As she was walking towards her father's house she met her defecto partner. She then asked him where he was all night. After the argument, the complainant then handed her youngest child to accused and went to her father's place.*
- 4) *The accused then went and dropped his youngest daughter at his mother's place and went to his residence.*
- 5) *The house was made up of bamboo which was 20 feet in length and 12 feet in width.*
- 6) *The accused went inside his residence, took the children's clothes and mats outside, then poured kerosene in the house. He then set the house on fire.*
- 7) *When the complainant was at her father's residence she heard that a house was on fire in Manu Village. Upon hearing this, the complainant ran home and saw that her house was completely burned down.*
- 8) *As the house was burning down, she questioned her partner as to why he burned the house down and asked him to give her daughter back to [her]. The accused then slapped the complainant on the right side of her face.*
- 9) *The accused then grabbed a garden fork that was placed nearby and threw it at the complainant. The said garden fork missed the complainant and hit a lemon tree but its handle hit the complainant's head.*
- 10) *The matter was reported to the Korovou Police Station.*
- 11) *The complainant was medically examined on the 27th of October 2019.*
- 12) *Upon examination the following was noted by Dr. Sereana:*

- a. *The scalp was tender on palpitation.*
- b. *Bruise on the right cheek.*

CAUTION INTERVIEW AND THE CHARGE:

The accused was then interviewed under Caution on the 28th day of October 2019. The accused in his caution interview question and answer 20 admits that he poured kerosene in the house and set it on fire.

In his caution interview at question and answer 23 the accused admitted that the complainant asked for her daughter after she had left her daughter with him. He further admitted that he was frustrated with the complainant and he took a farming fork and threw it at her.

The accused person in his caution interview question and answer 27 admitted that he was holding to the handle of the fork when he threw the said fork at the complainant. He further admitted that the fork end hit the lemons tree and the handle side hit the complainant's head. At question and answer 30 the accused admitted that he threw his hand at the complainant which landed on her face.

The accused was then charged and produced in Nausori Magistrates Court on the 29th of October 2019.

3. In terms of section 362 of the Crimes Act 2009 (“Crimes Act”) read with section 3(4) of the Sentencing and Penalties Act 2009 (“Sentencing and Penalties Act”), the maximum punishment for the offence of arson is imprisonment for life. The sentencing tariff for this offence is an imprisonment term of 05 years to 12 years [Nakato v State [2018] FJCA 129; AAU74.2014 (24 August 2018)]
4. The maximum penalty for the offence of act with intent to cause grievous harm contrary to section 255 of the Crimes Act is life imprisonment. The sentencing tariff which is often cited for this offence is an imprisonment term between 02 years and 05 years when a weapon is used. [See State Vakalaca [2018] FJHC 455; HAC027.2018 (31 May 2018)]
5. However, as it is evident from the succinct analysis of Prematilaka JA recently in State v Lal [2020] FJCA 44; AAU001.2017 (28 April 2020) on the range of sentences imposed for the offence under section 255 of the Crimes Act, the aforementioned sentencing tariff does not properly reflect the range of sentences

this court had considered it appropriate to be imposed for the said offence over time.

6. In my view, the tariff of 02 years to 05 years does not encapsulate the objective seriousness of the offence of act with intent to cause grievous harm (with or without the use of a weapon) contrary to section 255 of the Crimes Act which carries life imprisonment as the maximum penalty.
7. In *Lal* (supra), Prematilaka JA had observed thus;

[16] In *State v Vakalaca* HAC027 of 2018: 31 May 2018 [2018] FJHC 455 Gounder J once again said

'[13] The offence of Act with Intent to Cause Grievous Harm is punishable by discretionary life imprisonment. The tariff for this offence is between 6 months imprisonment to 5 years imprisonment, and in cases where a weapon is used, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon (State v Mokubula [2003] FJHC 164; HAA0052J.2003S (23 December 2003).'

[17] Thus, *Mokubula* provide general sentencing guidance that tariff for cases under section 255 of the Crimes Act, 2009 committed by any means other than a weapon, is between 6 months to 5 years of imprisonment but if the attack is by a weapon the starting point should range from 02 to 05 years which means that the final sentence could be over 05 years depending on the nature of the weapon and other aggravating circumstances. As stated by the Court of Appeal in *Vosa v State* [2019] FJCA 89; AAU0084.2015 (6 June 2019) the list aggravating and mitigating circumstances set out in *Mokubula* is not exhaustive.

[18] In *State v Rabia* HAC074 of 2011: 22 February 2012 [2012] FJHC 877 the nature of the injuries to the first complainant was very serious and his hand was severed as a result of the accused striking with the cane knife when the victim was 3 months pregnant. Her head was also injured where large amount of tissues were cut. The trial judge referred to *Mokubula* but imposed a sentence of 06 ½ years with a non-parole period of 05 years after taking 05 years as the starting point.

[19] In *State v Tuigulagula* HAC031 of 2010: 15 March 2011 [2011] FJHC 163 where the offence under section 255(a) involved domestic violence in which the victim was left with only a thumb on each hand, had injuries to her scalp and had been traumatized by the attack and the High Court started with a starting point of 06 years and imposed 06 years of imprisonment on the accused and stated as follows. (The Court of Appeal refused leave to appeal against the sentence in *Tuigulagula v State* AAU0070 of 2011: 21 March 2012 [2012] FJCA 18.)

[20] In State v Nalulu [2013] FJHC 358; HAC 155.2010 (23 July 2013) is another example where a starting point of 06 years of imprisonment was taken ending up with a final sentence of 08 years given the seriousness of the circumstances surrounding the offence. It was held in Nalulu '[19] The maximum penalty for act with intent to cause grievous harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Despite the accepted tariff being between 6 months and 5 years (as set by Shameem J in Mokubula (2003) FJHC 164) much higher sentences have been passed when the circumstances dictate. In Tuigulagula HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order.'

[21] Thus, it appears that while Mokubula still holds true as standard guidelines, a starting point above 05 years resulting in a final sentence of 5 years of imprisonment or more would be in order and may indeed be necessary where the gravity of an offence under section 255 of the Crimes Act so warrants. Similarly, in my view, there can be situations where no weapon is used in the attack but the other aggravating circumstances are so serious as to depart from the usual tariff of 6 months to 5 years of imprisonment. The converse also may be true if the mitigating circumstances are so compelling as to demand and justify a lenient sentence. This is mainly due to the fact that the discretionary range in the matter of sentence for an offence under section 255 of the Crimes Act is very wide stretching up to imprisonment of life.

8. The offences you are convicted of are founded on the same facts. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment for the two offences you have committed.

9. Your counsel has submitted that you are 29 years old and you are a farmer by profession. You have two children with the complainant in this case aged 5 years and 2 years. Your counsel has also submitted that your bad judgment on that moment had led you to commit the two offences and that you have acted out of frustration because the complainant was swearing at you. It is submitted that you have apologized to the complainant before you were first produced before the Magistrates Court in view of this matter. You are planning to rebuild the house for your family.

10. I would select 06 years imprisonment as the starting point of your aggregate sentence for the two offences.
11. I consider the following as aggravating factors in this case;
 - a) Your family loss their residence; and
 - b) The nature of the weapon used to strike your *de facto* partner which was a garden fork.
12. I am mindful of the fact that the use of a weapon is taken into account in the relevant tariff for the second count. What would be considered as an aggravating factor is the nature of the weapon used which makes your offending more grievous.
13. Considering the above aggravating factors, I would add 02 years. Now your sentence is a term of 08 years imprisonment.
14. I consider the following as your mitigating factors in addition to the fact that you have entered an early guilty plea;
 - a) You are a first offender;
 - b) You are remorseful;
 - c) The offences were not premeditated but rather impulsive;
 - d) You have apologized to the complainant and you intend to rebuild your house for the family; and
 - e) You have cooperated with the police.
15. In view of the above mitigating factors I would deduct 04 years of your sentence. Now your sentence is an imprisonment term of 04 years.
16. Given that you have entered an early guilty plea I consider it appropriate to grant you a one third reduction of your sentence. Accordingly, I deduct 01 year and 04 months of your sentence to arrive at 02 years and 08 months.

17. I hereby sentence you to an imprisonment term of 02 years and 08 months for the two offences you have committed. I order that you are not eligible to be released on parole until you serve 02 years of that sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Act.
18. Section 24 of the Sentencing and the Penalties Decree reads thus;

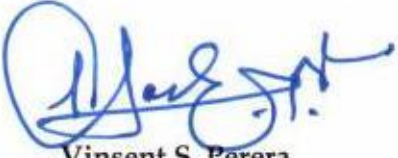
“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”
19. You have been in custody in view of this matter for 06 months and 14 days. The period you were in custody shall be regarded as a period of imprisonment already served by you.
20. In the result, you are sentenced to an imprisonment of 02 years and 08 months with a non-parole period of 02 years. Considering the time spent in custody, the time remaining to be served is as follows;

Head sentence – 02 years; 01 month; and 16 days

Non – parole period – 01 year; 05 months; and 16 days
21. The two offences you have committed are serious. However, as highlighted above, there are strong mitigating factors in this case in your favour. Given the impact on the economy due to the present COVID-19 pandemic faced by the world, your family will further suffer if you are incarcerated for a long period of time. Above all, you have undertaken to rebuild the house for the family. There is no material before me to have doubts about the said undertaking given by you.
22. Therefore, given all the circumstances of your offending, the fact that you are a first offender, the fact that you are the breadwinner of the family, the present situation in the country and especially the fact that you have already spent more than 06 months in custody, I have decided to suspend the remaining period of your sentence for a period of 03 years.

23. I should make it clear that your case was an appropriate case to consider the present situation in the country due to the ongoing pandemic in determining whether your sentence should be suspended. It may not be a factor relevant to every case that would come up for sentencing during this period of time.
24. The court clerk will explain the effects of a suspended sentence. You have to bear in mind that this court is not issuing a Domestic Violence Restraining Order to enable you to provide for your family including your *de facto* partner, the complainant in this case. You have a suspended term of imprisonment hanging over your head for the next 3 years and any form of domestic violence carried out by you (among any other offending) during that period may result in your incarceration in view of this matter.
25. Thirty (30) days to appeal to the Court of Appeal.




Vinsent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused**