

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 116 OF 2020

STATE

-v-

1. **VILIAME MUDU**
2. **MESAKE TAMANI**

Counsel: Mr. Z. Zunaid for State
Ms. T. Kean for 1st Accused, Mr. J. Korotimi for 2nd Accused

Date of Sentence: 30 July 2020

SENTENCE

1. Viliame Mudu and Mesake Tamani, you 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

VILIAME MUDU & MESAKE TAMANI with others, in the company of each other, on the 9th day of April, 2020 at Velelevu in the Central Division, entered into the property of **PRAVEENS KAVA SHOP** 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

VILIAME MUDU & MESAKE TAMANI

With the company of others, in the company of each other, on the 9th day of April, 2020 at Valelevu in the Central dishonestly appropriated the 5 x Colgate, 6x Toothbrush, 4x Softly pads, 20x Disposable blades, 20x Razor blades, 36x Bandages, 36x Panadols, 135x Match sticks, 28x Gas lighters, 3x small candles, 2x Large candles, 7x Toilet paper, 15x Mosquito coils, 33x Tang, 80x Chow noodles, 19x Rewa Life milk, 6x Angel tin fish, 5x Seaking tinfish, 32x Sunbell tuna 10x Oxford corned beef, 7x 1 litre Sprint, 23x canned juice, 17x 600ml juice, 18x 1.25 litre juice, 6x 2.25 litre juice, 2x Fiji water small, 3x Fiji water big, 4x Powerade, 8x Juicy drinks, 3x Mother energy drink and 6x Pulpy drinks, the properties of **PRAVEENS KAVA SHOP** with the intention of permanently depriving **PRAVEENS KAVA SHOP** of he said properties.

2. You pleaded guilty to the above charges on your own free will. You 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. You agreed the following summary of facts when it was read to you in court. The facts agreed satisfy all the elements of each offence you are charged with. You are found guilty and convicted on each count as charged.
4. The facts you agreed are that:
 1. The complainant in this matter is the owner for Praveens Kava which is located in Valelevu. On the 9th of April 2020 at around 3.19pm, she received a call from her parents informing her that there was a break-in at their shop. The complainant then left with her partner to check on the shop.

II. Upon reaching her shop, she noticed that the back door and the padlock were open and the wall of the toilet was broken. As she entered into the shop, she noticed the following items were stolen:

- a. 5x Colgate valued at \$15.00
- b. 6x Toothbrush valued at \$12.00
- c. 4x Softly pads valued at \$11.80
- d. 20x Disposable blades valued at \$20.00
- e. 20x Razor blades valued at \$10.00
- f. 36x Bandages valued at \$7.20
- g. 36x Panadoles valued at \$7.20
- h. 135x Match-sticks valued at \$92.50
- i. 28x Gas lighters valued at \$100.00
- j. 3x Small candles valued at \$7.50
- k. 2x Large candles valued at \$3.40
- l. 7x Toilet paper valued \$21.00
- m. 15x Mosquito coils valued at \$30.00
- n. 33x Tang valued at \$33.00
- o. 80x Chow noodles valued at \$56.00
- p. 19x Rewa life milk valued at \$49.40
- q. 6x Angel tinfish valued at \$22.20
- r. 5x Seaking tinfish valued at \$17.50
- s. 32x Sunbell tuna valued at \$80.00
- t. 10z Oxford corned beef valued at \$41.50
- u. 12x small Golden Country corned beef valued at \$35.40
- v. 12x big Golden Country corned beef valued at \$45.00
- w. 7x 1 litre Sprint valued at \$24.50
- x. 23x canned juice valued at \$50.60
- y. 17x 600ml juice valued at \$47.60
- z. 18x 1.25 litre juice valued at \$86.40
- aa. 6 x 2.25 litre juice valued at \$34.20
- bb. 2x Fiji water small valued at \$4.00
- cc. 3x Fiji water big valued at \$10.20
- dd. 4x Powerade valued at \$14.80
- ee. 8x Juicy drinks valued at \$28.00
- ff. 3x Mother energy drink valued at \$10.50
- gg. 6x Pulpy drinks valued at \$16.80

III. The approximate total value of the items that were stolen was \$1087.20.

IV. PW2 who is a cashier at Wavelink Cake Shop located in Valelevu, stated that on the 9th of April 2020 at around 1.00pm, a i-Taukei boy approached her and asked her if she wanted to buy Rewa Life milk which he was selling at \$1.00 each. PW2 then bought four packets and gave the i-Taukei boy \$4.00.

V. PW2 stated that she knew the i-Taukei boy as she has seen him before. The same i-Taukei boy usually has breakfast at the Cake shop where PW2 is employed every morning.

- VI. A1 was interviewed under caution. In his record of interview A1 stated on the said date of the incident, the accused was selling rolls in front of Savila House in Valelevu (Q&A 22-24). A1 then stated that around 10.00 – 11.00am, he broke into Praveen's kava shop (Q&A 28-29). A1 stated that he entered from the second door outside by pushing the flat iron on top to a room beside the toilet which was only closed by a piece of ply where he gained access to the toilet and entered into the shop (Q&A 30). A1 stated that he then used a key and opened the door which he then climbed in from as his exit point (Q&A 33). A1 then stated that he then brought the cartons outside and taken two cartons behind New World. The two cartons which he had taken contained toilet paper, razor blade packets, gross of matches, about 20 packets of mosquito coils, Bic double blade shavers and one packet of Band Aid plasters (Q&A 35-36). A1 stated that he had left the other three cartons outside and some other people must have taken it (Q&A 37). A1 stated that he was the one who had broken into the shop and he had done it alone (Q&A 38). A1 stated that he had then sold the items to random people (Q&A 39 – 40).
- VII. A2 was interviewed under caution. A2 stated that on the said date of the incident between 9.00 – 11.00am, he was at Savila House selling cigarette rolls to the public (Q&A 29-30). A2 stated that he was with Jim, Mojee and Mudu who are his friends (Q&A 31-32). A2 admitted that he and Jim had broken into Praveens Kava Shop (Q&A 35-37). A2 stated that it was Jim who had planned to break into Praveens Kava shop and A2 then went in alone and broke into the shop (Q&A 38-39). A2 stated that he entered from the side of the shop which was covered with ply board and tin (Q&A 40). A2 stated that he kicked the ply board and tin and saw the key was hanging inside the shop which he then used to open the door (Q&A 41-43). A2 stated that Jim then went inside the shop and started packing the items (Q&A 44) whilst Mudu was guarding outside the shop (Q&A 45). A2 admitted that they packed all the items mentioned in the allegation against him (Q&A 48). A2 stated that they had packed four cartons of items and one shopping bag containing milk (Q&A 49). A2 stated that he then carried the shopping bag to the carpark at the back whilst Jim brought one carton, Mudu brought two cartons and Mojee brought the last carton (Q&A 50-51). A2 admitted that he then brought a taxi whereby Jim, Mudu, Mojee and another i-Taukei youth then boarded the taxi with the four cartons whilst A2 took the shopping bag containing 8x Rewa Life milk (Q&A 55-60). A2 admitted that he then sold the milk for \$1.50 to random people (Q&A 61). A2 stated that Jim and Mudu took the rest of the items (Q&A 67). A2 admits to selling the Rewa Life milk for \$1.00 each to PW2. A2 stated that he only took the Rewa Life milk whilst Jim, Mojee and Mudu took the rest of the stolen items (Q&A 78).
- VIII. Both A1 and A2 in the company of others, entered into the complainant's shop with intent to commit theft and thereafter dishonestly appropriated all the items listed in the Information, with the intention to permanently deprive the complainant of her said properties.
- IX. Only three packets of Rewa Life milk were recovered in this case.

5. The maximum punishment for Aggravated Burglary under Section 313 (1) (a) is an imprisonment term of 17 years and the maximum punishment for Theft is an imprisonment term of 10 years.
6. The tariff for the offence of Aggravated Burglary is between 18 months and 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).
7. The Court of Appeal in *Leqavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016), seems to have endorsed the said tariff. The court observed:

“The learned counsel submitted that the appropriate tariff for the offence of burglary and/ or aggravated burglary is set in *State v Seninawanawa* [2015] FJHC 261; HAC 138.2012 (22 April 2015). Madigan J stated in that case as follows, “The maximum penalty for aggravated burglary is a term of imprisonment for 17 years...The accepted tariff for aggravated burglary is a sentence of between 18 months and 3 years, with 3 years being standard sentence for burglary of domestic premises”...

...“At the time of commission of this offence the tariff that was in operation was between 18 months to 3 years. Considering the fact that the appellant was charged for the offence of aggravated burglary, I am of the view that the point to start should be at the highest level”

8. However, Perera J in *State v Naulu* [2018] FJHC 548 (25 June 2018) justified the new tariff, that was introduced in *State v Prasad* [2017] FJHC 761; HAC254.2016 (12 October 2017), ranging from 6 years to 14 years. This initiative was taken on the basis of what His Lordship described as the alarming disparity between the tariff for aggravated robbery and the tariff for aggravated burglary. It was also emphasised that a new tariff was required to control the situation created by the alarming increase of aggravated burglaries in Fiji.

9. His Lordship took the view that the observation made by the Court of Appeal in *Leqavuni* does not preclude the High Court from revisiting the tariff for the offence of Aggravated Burglary for the reason that the appropriateness of the tariff for the offence of Aggravated Burglary was not an issue before Court of Appeal in that case and therefore that issue was not considered by the Court of Appeal.
10. However, I have thus far continued to apply the *Seninawanawa* tariff on the basis that the Court of Appeal has endorsed the existing tariff. 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 despite the drastic reduction of the maximum sentence, of course, until the *Naulu* tariff was introduced.
11. Even after the introduction of the new tariff, majority of judges appear to prefer the old tariff and the end result is that there are two sentencing tariff regimes in Fiji for the same offence which is highly unacceptable. Due to the huge disparity between the two tariff regimes, sentencing decisions will lead to some degree of inconsistency, resulting in regular appeals. What is more concerned is the sense of injustice and discrimination that may be felt by the offenders receiving harsher punishments under the new tariff regime when equally situated offenders receive lenient sentences (under the old tariff regime) in a different court. In my opinion, the potential damage to the system would be greater when inconsistent sentences are passed than when offenders receive lenient sentences. Therefore, an urgent intervention of the Court of Appeal is warranted to put this controversy to an end.
12. I do agree that, in view of alarming increase of burglaries in Fiji, harsher punishments may be an effective deterrence to arrest the situation. I used the words 'may be' in light of what Professor Mackenzie has said and was accepted by the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507 [21 October 2019]:

"... There is evidence that punishment has a general deterrent effect on crime. Much about this evidence base is still in dispute, and exactly how this effect occurs remains uncertain. It is clear that the possibility of

deterrence depends on the ‘sanction risk perceptions’ of would-be offenders. Sanction risk perceptions can be divided into two categories: perception of *certainty* of sanction, and perception of *severity* of sanction. Among these two, certainty seems on the current available evidence to be by far the more important variable.

Lengthening the sentence of imprisonment applicable to a given crime is not likely to achieve a significant deterrent effect in respect of that crime. At best there is only a modest deterrent effect from increasing already long prison sentences. More likely there is no significant effect in such cases. Increasing the length of shorter sentences may have more deterrent power than increasing the length of already long sentences, but (a) it is probably still not significant enough to be a driver of sentencing policy, (b) doing so raises a host of other problems beyond simply the question of deterrence and (c) even in such cases, increasing the certainty of apprehension and punishment will be a more powerful deterrent than increasing the length of shorter sentences”

13. Having said that, I would apply the sentencing tariff ranging from 18 months to 3 years imprisonment for your case.
14. The tariff for Theft ranges from 4 months to 3 years’ imprisonment: *Waga v State* [HAA 17 of 2015].
15. 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 you were convicted on each count, based on the same facts. Hence, I would impose an aggregate sentence for both of you.
16. In assessing the objective seriousness of the offending, I considered the degree of culpability and the loss caused to the complainant. Both of you are similarly situated as far as the culpability level is concerned. Most of the property stolen are food items and the total value of which is approximately \$1000.00. Having considered these factors, I would pick a starting point of 18 months for each of you.
17. There are no aggravating features in your offending.
18. Separate mitigating submissions have been filed by your counsel. I have considered the mitigation submissions in passing this sentence.

19. *Viliame Mudu*, you are a farmer, 40 years of age, married and a father of two children. You entered early guilty pleas at the first available opportunity. You are a first offender and have maintained a clear record. You have promised not to re-offend and you beg for a second chance to rehabilitate. You have cooperated with police in the investigations. You seek mercy of this court. I consider the early guilty pleas as evidence of genuine remorse. You have also saved court's time and resources by pleading guilty to the charges at a very early stage of the proceeding. You have spent 46 days in remand. I deduct 12 months for the mitigation and the remand period to arrive at a sentence of 6 months' imprisonment.
20. *Mesake Tamani*, you are 24 years of age and a single father. You entered early guilty pleas at the first available opportunity. You have saved time and resources of court by pleading guilty to the charges at a very early stage of the proceedings. You repent that you took a wrong decision due to peer pressure. You are a first and young offender. You seek mercy of this court. You have promised not to re-offend and you beg for a second chance to rehabilitate. You have cooperated with police at the investigation. You have spent 50 day in remand. I deduct 12 months for the mitigation and the remand period to arrive at a sentence of 6 months' imprisonment.
21. Rehabilitation of young and first offenders should be promoted. Both of you are young and first offenders having a good potential of 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.
22. Taking into consideration the early guilty pleas, genuine remorse, nature and value of goods stolen, age and clear record, I suspend the sentences for a period of 2 years.
23. **Summary**

Viliame Mudu you are sentenced to 6 months' imprisonment to be suspended for a period of 2 years.

Mesake Tamani, you are also sentenced to 6 months' imprisonment to be suspended for a period of 2 years.

24. These lenient sentences are imposed in the hope that you will not come back to court after committing an offence again. If you are convicted of any offence in the next two years, the suspended sentence may be activated.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge
Judge

At Suva

On 30 July 2020

Counsel: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence