

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 441 of 2018

STATE

V

1. ESALA VAKAWALETABUA

2. SEKONAIA QALOBUA

Counsel: Ms. Sujata Lodhia for the State
Ms. Sokoveti Daunivesi with Ms. Swarvana Prakash for the 1st Accused

Sentence Hearing: 22 July 2020

Sentence: 11 August 2020

SENTENCE

- [1] Esala Vakawaletabua, as per the Information filed by the Director of Public Prosecutions (DPP), you, together with Sekonaia Qalobua, were charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ESALA VAKAWALETABUA and SEKONAIA QALOBUA, on 18th November 2018, at Suva, in the Central Division, in the company of each other, broke and entered into the property of MAFI VAKACEGU, as trespassers, with intent to commit theft.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ESALA VAKAWALETABUA and **SEKONAIA QALOBUA**, in the company of each other, on 18th November 2018, at Suva, in the Central Division, dishonestly appropriated (stole) 1x HTC mobile phone and 1 x Alcatel Touch mobile phone, the properties of **MAFI VAKACEGU** and **DILA VOSANISIGA DAVETA** with intention of permanently depriving them of the said properties.

- [2] This matter was first called before the High Court on 7 December 2018. On 25 March 2019, the DPP filed the Disclosures relevant to the case, while the Information was filed on 30 April 2019. The plea was taken on the same day, and you both pleaded not guilty to the two charges.
- [3] Esala, on 5 September 2019, you informed Court that you wish to change your plea. Accordingly, on the same day you pleaded guilty to both counts in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charges against you and the consequences of your plea.
- [4] The Summary of Facts were filed in Court on 18 September 2019. However, you were not present in Court since 17 October 2019. Therefore, a bench warrant had to be issue against you. You were re-arrested by the police on 19 May 2020 and produced in Court the next day. On that day (20 May 2020) the Summary of Facts were read out and explained to you. You understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the two counts in the Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the two counts as charged.
- [5] I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:

- "1. The accused in this matter is Esala Vakawaletabua, (DOB 26/07/85), an unemployed Fijian citizen who was aged 33 years on 18 November 2018.*
- 2. The victims in this matter are Mafi Vakacegu (aged 52 years), caretaker of Turner House and her sister-in-law, Dila Vosanisiga Daveta (aged 49 years) who was visiting Mafi Vakacegu at the material time.*
- 3. On 18 November 2018, Mafi Vakacegu and Dila Vosanisiga Daveta had securely locked Mafi Vakacegu's room located inside Turner House, situated along Nasese, Suva and gone out while they had left their mobile phones inside the said room of Mafi Vakacegu.*
- 4. Later during that afternoon, at about 13.30 hours, Mafi Vakacegu and Dila Vosanisiga Daveta returned to Turner House and found 03 louver blades had been removed from a window of Ms Vakacegu's said locked room and items were scattered inside. Ms*

Vakacegu referred the matter to the Police and noted that her HTC brand mobile phone was missing while Ms Daveta noted that her Alcatel brand mobile phone was missing.

5. *Investigations were conducted and the accused was arrested and interviewed under caution on 22 November 2018 wherein he voluntarily admitted to having acted with another on 18 November 2018 where they had removed 03 louver blades from a window of Ms Vakacegu's room and entered inside the said room and stolen a HTC phone and another mobile phone. The accused admitted that after stealing the said 02 mobile phones he sold them for FJ\$20.00 each and shared the money with another.*
6. *The accused was charged with the offences of aggravated burglary and theft. The accused is not a first offender."*

[7] Esala, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[8] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) *The only purposes for which sentencing may be imposed by a court are —*

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[9] I have duly considered the above factors in determining the sentence to be imposed on you.

[10] In terms of Section 313 (1) of the Crimes Act, "A person commits an indictable offence (of Aggravated Burglary) if he or she-

(a) Commits a burglary in company with one or more other persons; or

(b)"

The offence of 'Burglary' is defined at Section 312 (1) of the Crimes Act as follows: "A person commits an indictable offence (which is triable summarily) if he or she enters or remains in a building as a trespasser, with intent to commit theft of a particular item of property in the building".

The offence of Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

- [11] The tariff for the offence of Aggravated Burglary is between 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).
- [12] The Court of Appeal in *Leqavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary is between 18 months to 3 years.
- [13] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary: Vide *State v. (Venasio) Cawi & 2 others* [2018] FJHC 444; HAC 155.2018 (1 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 536; HAC 92.2018 (20 June 2018); *State v. Pita Tukele & 2 others* [2018] FJHC 558; HAC 179.2018 (28 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 995; HAC 92.2018 (17 October 2018); *State v. (Maika) Raisilisili* [2018] FJHC 1190; HAC 355.2018 (13 December 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 1209; HAC 92.2018 (18 December 2018); *State v. Michael Bhan* [2019] FJHC 661; HAC 44.2019 (4 July 2019); *State v. Etika Toka* HAC 138.2019 (1 November 2019); *State v. Vakacavuti* HAC337.2018 (7 November 2019); *State v. Vakacavuti* [2019] FJHC 1088; HAC338.2018 (7 November 2019); *State v. Peniasi Ciri and Another* [2020] FJHC 63; HAC14.2019 (6 February 2020); *State v. Maikeli Turagakula and Another* [2020] FJHC 101; HAC416.2018 (19 February 2020); *State v. (Sachindra Sumeet) Lal & Another* [2020] FJHC 147; HAC71.2019 (26 February 2020); *State v. (Rupeni) Lilo* [2020] FJHC 401; HAC225.2018 (9 June 2020); *State v. (Taniela) Tabuakula* [2020] FJHC 464; HAC106.2020 (23 June 2020); *State v. Usaia Delai* HAC 07.2020 (6 August 2020); and *State v. Eric Male Robarobalevu* HAC 102.2020 (6 August 2020).
- [14] In terms of Section 291 (1) of the Crimes Act "A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property". The offence of Theft in terms of Section 291 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [15] In *Ratusili v. State* [2012] FJHC 1249; HAA011.2012 (1 August 2012); His Lordship Justice Madigan proposed the following tariff for the offence of Theft:

- “(i) For a 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.”*

[16] Since the theft was consequent to you and your accomplice entering a residential premises as trespassers, this cannot be considered as theft simpliciter. Furthermore, in my view this was a pre-planned theft. Therefore, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[17] In determining the starting point within a tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

[18] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence Esala, I commence your sentence at 18 months imprisonment for the first count of Aggravated Burglary.

[19] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Esala, I commence your sentence at 6 months imprisonment for the second count of Theft.

[20] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You and your accomplice trespassed into a residential premises thereby paying scant regard to the property rights and privacy of the owners of the said property.

- (iii) I find that there was some degree of pre-planning on your part (and the accomplice) in committing these offences.
- (iv) You are now convicted of multiple offending.

[21] In mitigation you have submitted as follows:

- (i) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (ii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.
- (iii) That you entered a guilty plea during these proceedings.

[22] Esala, considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence for count one would be 4 years and 6 months imprisonment. Your sentence for count two would be 3 years and 6 months imprisonment.

[23] I accept that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering the mitigating factors, I deduct 1 year and 6 months from your sentences. Now your sentence for count one would be 3 years imprisonment. Your sentence for count two would be 2 years imprisonment.

[24] I accept that you entered a guilty plea during the course of these proceedings, but it cannot be said that you entered the plea at the earliest opportunity. In fact, on 30 April 2019, when your plea was first taken you had pleaded not guilty to the two charges. About 4 months later you changed your plea. However, I accept that in doing so you saved time and resources of this Court in proceeding with the matter for trial. For your early guilty plea I grant you a further discount of 12 months each for counts one and two.

[25] In the circumstances, your sentences are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act-2 years imprisonment.

Count 2- Theft contrary to Section 291 (1) of the Crimes Act –1 year imprisonment.

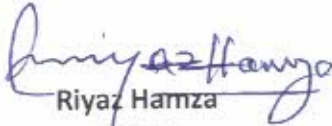
I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[26] Esala, you are now 35 years of age [Your Date of birth is 27 June 1985]. You are said to be in a de-facto relationship and having a son who is in Form 2 at Naqara District School in Kadavu. You are said to be currently residing at Tuirara Feeder Road, Tovata for the purposes of this

case. However, you are a permanent resident of Naqara in Kadavu, where you are employed as a subsistence farmer. You are said to be the sole bread winner of your family.

- [27] Esala, you have admitted to the Summary of Facts and taken full responsibility for your actions. In your caution interview statement, you have admitted to accompanying your accomplice to the place where the complainant Mafi Vakacegu was residing (Turner House, Suva), removing 3 louver blades from her room and then taking the 2 mobile phones belonging to her and her sister-in-law Dila Vosanisiga Daveta.
- [28] Esala, you cannot be considered as a first offender. As per the Antecedent Report filed, 11 previous convictions have been recorded against your name. The latest previous conviction was for the offence of Theft, where the Magistrate's Court of Kadavu passed sentence on you on 6 September 2012. Six years later you have committed similar property offences of Aggravated Burglary and Theft.
- [29] Esala, you were arrested for this case on 22 November 2018 and was granted bail by the High Court of Suva on 7 December 2018. However, since you were not present in Court since 17 October 2019, a bench warrant had to be issue against you. You were re-arrested by the police on 19 May 2020 and produced in Court the next day and your bail was cancelled. You have been in remand custody since that day. Therefore, you have been in remand custody for this case for a total period of about 3 months.
- [30] Considering all the above, I am of the opinion that you have to serve in custody 6 months of the 2 year term of imprisonment that I am imposing on you, with effect from today. The balance 1 year and 6 months term of imprisonment would be suspended for a period of 5 years, to take effect from the day your custodial sentence of 6 months imprisonment is completed. You are advised of the effect of breaching a suspended sentence.
- [31] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 11th Day of August 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.