

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 44 of 2020

STATE

V

ILISONI CABEALAWA

Counsel : Mr. Eoghn Samisoni for the State  
Ms. Anisha Singh for the Accused

Sentence Hearing : 24 June 2020

Date of Sentence : 13 August 2020

### SENTENCE

[1] Ilisoni Cabealawa, you are charged with the following offence:

#### COUNT 1

*Statement of Offence (a)*

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

*Particulars of Offence (b)*

**ILISONI CABEALAWA**, on the 24<sup>th</sup> day of November 2019, at Veisari, Lami, in the Central Division, wilfully and unlawfully set fire to the dwelling house of **ARIETA FINAU**.

- [2] This matter was first called before the High Court on 3 February 2020 and the Director of Public Prosecutions (DPP) was granted time to file Information and Disclosures.
- [3] On 25 March 2020, the State filed and served the Information relevant to the case; while the Disclosures were filed on the next day.

- [4] When the matter came up before me on 13 May 2020, you were ready to take your plea. You pleaded guilty to the charge 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 charge against you and the consequences of your plea.
- [5] Thereafter, on 27 May 2020, the Summary of Facts were filed in Court by the State. On 17 June 2020, the Summary of Facts were read out and explained to you and 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 single count in the information, and found the charge proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the charge.
- [6] I now proceed to pass sentence on you.
- [7] The Summary of Facts filed by the State was as follows:

***Accused [A1]:** Ilisoni Cabealawa, 30 years old, machine operator of Veisari, Lami.*

***Complainant [PW1]:** Mere Lewatu, 31 years old of Veisari, Lami.*

***Prosecution Witness [PW2]:** Arieta Finau, 40 years old, of Nasinu.*

***PW2 AND A1 had a landlord – tenant relationship with A1 being the tenant.***

***PW1 is the sister of PW2 and neighbour of A1.***

*On 24 November 2019, at around 6.00 p.m. at Veisari in Lami, PW1 was at her home which is about 8 metres away from where A1 lived in a lean-to corrugated iron house which he was renting, when she heard A1 swearing at her and punching the walls and windows of the house. PW1 then sent her brother to tell A1 to vacate the house as that was not the first time that he had acted in that manner. After swearing at PW1, PW1 said she then saw A1 pouring either kerosene or benzene around the interior of the house. Later on, PW1 heard the windows shattering and the neighbours shouting fire! fire! PW2 and her family then attempted to put out the fire however the interior of the house was completely destroyed. PW2 was informed that her house had been burnt down sometime after.*

*After investigations were carried out, the Police arrested A1 and interviewed him under caution on 28 November 2019, where he made full admissions from Q&A 22 to 27. A1 admitted to pouring a gallon of kerosene inside the house which he had gotten from the kitchen. A1 went on to state that he had set the house on fire and got out of the house and the reason he had set the house on fire was because of an earlier disagreement he had with the brother of PW1 and PW2. A1 also admitted that he knew what he did was wrong. **[Copies of the English and iTaukei versions of the Record of Interview for A1 are attached as PE 1].***

*A report was compiled by the National Fire Authority (NFA) whereby it was stated that the point of origin was on multiple areas of the house. The interior of the house was completely destroyed by the fire with the timber structures holding up the house being partly burned. The suspected cause of the fire was the incendiary in nature or deliberately lit. [A copy of the NFA Report is annexed as PE 2].*

*The accused was charged on 30 November 2019 for one count of Arson.*

*On 13 May 2020, in the presence of his counsel, the accused pleaded guilty as charged of his own free will.*

*The accused is a first offender."*

- [8] Illisoni you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [9] 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.*

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

- [11] The offence of Arson is defined in Section 362 of the Crimes Act No. 44 of 2009 (Crimes Act), in the following manner:

*"A person commits an indictable offence if he or she wilfully and unlawfully sets fire to —*

- (a) any building or structure (whether completed or not); or
- (b) any vessel (whether completed or not); or
- (c) any commercial plantation of trees;
- (d) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or
- (e) a mine, or the workings, fittings or appliances of a mine."

The offence carries a maximum penalty of Imprisonment for life.

[12] His Lordship Justice Rajasinghe in **State v. Naivalu** [2018] FJHC 510; HAC141.2018 (18 June 2018); held as follows:

- "4. Arson is a serious offence, which carries a maximum penalty of life imprisonment. Burning down of any dwelling house or commercial property could adversely affect the occupants or the owners of those properties.
- 5. The Fiji Court of Appeal in **Damodar Naidu and Others (1978 FLR 93)**, has imposed sentences of seven (7) and ten (10) years for burning down of a number of shops.
- 6. Justice Shameem in **Laqi v The State [2004] FJHC 69; HAA0004J.2004S (12 March 2004)** found that the tariff for the offence of arson is between 2 - 4 years, where her Ladyship held that:

"In this case the Respondent appears to have ensured that the house was empty when he lit the fire. However the fact that he accompanied a group of men who threatened the occupants, the fact that the arson was motivated by revenge and the serious consequences of the arson on the victims who were forced to leave the village they called home, called for a sentence within the 2-4 year range. With a starting point of 3 years imprisonment, reduction for the previous good character and other mitigation, and increase for the aggravating factors I have outlined, I see nothing wrong in principle, with a 3 year term. Arson is a most serious offence with a maximum sentence of life imprisonment. A family's home and belongings were destroyed in the fire. The children of the family may never recover for the trauma of what they saw on the night of the 19th of January 1999."

- 7. The Fiji Court of Appeal in **Lesu v State [2014] FJCA 214; AAU58.2011 (5 December 2014)** held that:

"Arson is an extremely serious offence and the maximum penalty is life imprisonment. Despite the serious penalty, as mentioned earlier, the Courts in Fiji for considered reasons have placed the tariff for arson between 2 years and 4 years imprisonment."

8. Justice Temo in State v Raralevu - Sentence [2015] FJHC 374; HAC026.2013S (22 May 2015) has sentenced the accused for a period of four (4) years for burning down the house of his wife, where his Lordship observed that:

*"Arson", as an offence, is viewed seriously by the law makers of this country. It carried a maximum penalty of life imprisonment. Previous case laws had set a tariff between 2 to 4 years imprisonment (see Kelemedi Laqi & Others v State, Criminal Appeal Case No. HAA 0004 of 20045, High Court, Suva, which was endorsed by the Fiji Court of Appeal in Niko Lesu and Sunia Vosataki v State, Criminal Appeal No. AAU 058 of 2011). However, the Fiji Court of Appeal, in Damodar Naidu & Another v Reginam, Fiji Law Report, Vol 24, 1978, pages 93 to 106, approved a sentence of 7 years imprisonment for accused no. 1 and 10 years imprisonment for accused no. 2, for burning down a number of shops in Rakiraki Town, in May 1977. Of course, the final sentence will depend on the mitigation and aggravating factors."*

- [13] However, the tariff for the offence of Arson has now been settled to be a term of between 5 to 12 years imprisonment. In Isikeli Nakato & Another v. State [2018] FJCA 129; AAU74.2014 (24 August 2018); the Fiji Court of Appeal held (Per Justice Vincent Perera):

*"Having considered the views expressed by the courts in the decisions cited above and the aforementioned tariffs, it is my considered view that the tariff for the offence of arson under section 362(a) of the Crimes Decree should be an imprisonment term between 5 to 12 years. In selecting the lower end of 5 years imprisonment, I have taken into account inter alia the nature of the offence under section 362(a) which is unlawfully setting fire to a building or a structure, the natural implications of that offence and the maximum penalty which is life imprisonment. Further, this tariff should be regarded as the range of the sentence on conviction after trial. A sentencer may inevitably arrive at a final sentence which is below 5 years imprisonment in applying the two-tier approach unless the aggravating circumstances are quite substantial. If the final sentence reached is one that is below 3 years imprisonment, then it would be at the discretion of the sentencer to opt for any sentencing option as provided under the Sentencing and Penalties Act."*

- [14] 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."*

[15] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 5 years imprisonment for this offence.

[16] The aggravating factors are as follows:

- (i) You were occupying the dwelling house as a tenant of the complainant. There was a landlord-tenant relationship between the complainant and you. You should have protected the premises rather than wilfully and unlawfully setting it on fire. Thus there has been a breach of trust.
- (ii) You paid utter disregard to the property rights of the complainant and the sanctity of a dwelling house.
- (iii) The estimated value of the dwelling house is said to be approximately \$18000.00.

[17] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are nil previous convictions recorded against you.
- (ii) That you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have sought forgiveness from this court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions.
- (iv) That you entered a guilty plea at the first available opportunity in these proceedings.

[18] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence would be 8 years imprisonment.

[19] I accept that you are a person of previous good character and that you have fully cooperated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 3 years from your sentence. Now your sentence would be 5 years imprisonment.

[20] I accept that you entered a guilty plea at the first available opportunity during these proceedings. In doing so, you saved precious time and resources of this Court. For your

early guilty plea I grant you a generous discount of 2 years. Now your final sentence would be 3 years imprisonment.

[21] The next issue for consideration is whether your sentence should be suspended.

[22] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

*(a) does not exceed 3 years in the case of the High Court; or*

*(b) does not exceed 2 years in the case of the Magistrate's Court.*

[23] Ilisoni, you are now 31 years of age. Your date of birth is 15 December 1988. You are said to be married and your usual place of residence is Qauia Settlement, Lami. You are said to be a casual labourer (carpenter) earning approximately \$80.00 per week.

[24] You have admitted that what you did was wrong, and taken full responsibility for your actions. You have submitted that you acted spontaneously out of frustration as you had an argument with the complainant prior to committing this offence. You say that you were drunk at the time of committing of the offence and that there was a lapse of judgment on your part. You also submit that there was no pre-planning to commit the offence.

[25] Consequent to your arrest you were granted police bail at the first instance. Thus you have not been in remand custody for this case for even a single day.

[26] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

*"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."*

[27] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

*"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."*

[28] Illisoni, as held in the above judgments, I am conscious of the fact that first offenders, young offenders (although at 31 years you cannot be considered as entirely young) and offenders who have pleaded guilty and expressed remorse, would usually be granted a non-custodial sentence.

[29] However, the offence of Arson or setting on fire any building or structure has been considered as a serious offence, which carries a maximum penalty of Imprisonment for life.

[30] In the recent case of **State v. Tubuna** [2020] FJHC 389; HAC017.2020 (5 June 2020); His Lordship Justice Goundar in imposing a custodial sentence of 3 years imprisonment, with a non-parole period of 18 months, on a 34 year old offender, who had set fire to the dwelling house of a farmer from the same village held:

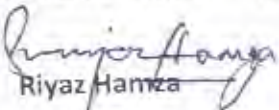
*"..... But the gravity of the offence is measured by the actual conduct of the offender. Burning down someone's home is a serious offence. The courts' duty is to denounce such conduct and pass a sentence that has an effect of deterrence, both personal and general, after balancing the aggravating and mitigating factors."*

[31] Considering all the facts and circumstances of this case, including the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, I am not inclined to suspend your sentence in its entirety.

[32] Accordingly, I am of the opinion that you have to serve in custody 1 year and 6 months of the 3 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 1 year and 6 months imprisonment is completed. You are advised of the effect of breaching a suspended sentence.

[33] 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 13<sup>th</sup> 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.