

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 115 of 2020

STATE

V

1. KUNAL EDWIN PRASAD

2. ASHWIN CHANDRA LAL

Counsel: Ms. Shirley Tivao with Ms. Wakesa Elo for the State
1st Accused Appears in Person

Sentence Hearing: 2 September 2020

Sentence: 23 September 2020

SENTENCE

[1] Kunal Edwin Prasad, as per the Amended Information filed by the Director of Public Prosecutions (DPP), you, together with Ashwin Chandra Lal, were charged with the following offences:

[COUNT 1]

Statement of Offence

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

Particulars of Offence

KUNAL EDWIN PRASAD & ASHWIN CHANDRA LAL alias ("ashwin chand"), on the 25th day of March 2020, at Samabula, in the Central Division, in the company of another, entered into the premises of **FIJI TYRELINE LIMITED**, as trespassers, with intent to commit theft therein.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

KUNAL EDWIN PRASAD & ASHWIN CHANDRA LAL alias (“ashwin chand”), on the 25th day of March 2020, at Samabula, in the Central Division, in the company of another, dishonestly appropriated (stole) 26 THUNDERER Brand Tyres, the properties of **FIJI TYRELINE LIMITED** with intention of permanently depriving **FIJI TYRELINE LIMITED** of the said properties.

- [2] This matter was first called before the High Court on 5 May 2020. On the same day, the DPP filed the Disclosures relevant to the case, while the Information was filed on 29 May 2020. The plea was taken on the same day, and you pleaded guilty to the two charges in the Information (the 2nd Accused pleaded not guilty to both charges).
- [3] On 29 June 2020, the DPP filed an Amended Information. On 13 July 2020, both you and the 2nd Accused took your pleas again and pleaded not guilty to the two charges. However, on 4 August 2020, you informed Court that you wish to change your plea. Accordingly, on 19 August 2020 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] On the same day 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:

“The Complainant is Sachin Roy Prasad (“PW1”) 47 years, Assistant Manager, Tyreline Fiji. The Accused is:-

1. *Kunal Edwin Prasad (“A1”) 34 years, Farmer of Baulevu, Nausori.*

On 25/03/20, PW1 was informed that two men had entered into the Tyreline Fiji bulk store and were seen to be removing tyres from the said bulk store. Upon hearing this, PW1 rushed to the said bulk store and found that the door of the Tyreline Bulk Store had been forcefully opened. PW1 then made a stock-take and noted 26 THUNDERER brand tyres missing which were between the sizes, 175/70 R14 (16) and 165/R13C (10) [“Copy of Stock Count Sheet attached”].

The matter was reported to the police and an investigation was carried out. During this investigation all the stolen tyres from Tyreline Fiji were recovered from some of A1's acquaintances and including A1 himself ("Searchlists pertaining to their recoveries are attached herewith").

Later, A1 was arrested and caution interviewed where he admitted to the allegations (A1 Q/A 29 – 45, 52 – 55 – copy of Caution Interview attached). Consequently, the Accused is charged with a Count of Aggravated Burglary contrary to section 313 (1) of the Crimes Act 2009 and one Count of Theft contrary to section 291 of the Crimes Act 2009.

A1 is not a first offender and has 2 Active Previous Convictions ("PCs is attached herewith")."

[7] Kunal Edwin Prasad, 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. (Eric Male) Robarobalevu* [2020] FJHC 630; HAC102.2020 (6 August 2020); *State v. (Usaia) Delai* [2020] FJHC 631; HAC7.2020 (6 August 2020); *State v. Vakawaletabua* [2020] FJHC 645; HAC441.2018 (11 August 2020) and *State v. Sakeasi Seru and Josevata Yaqona* HAC 136 of 2020 (18 September 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 commercial premises as trespassers, this cannot be considered as theft simpliciter. 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 Kunal Edwin Prasad, 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, Kunal Edwin Prasad, 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 commercial premises thereby paying scant regard to the property rights and privacy of the owners of the said property.
- (iii) 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) All the stolen items were recovered.
- (iv) That you entered a guilty plea at a relatively early stage during these proceedings.

[22] Kunal Edwin Prasad, 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. I also accept the fact that all the stolen items (the 26 tyres) were recovered. You have stated that you helped the Police in the recovery of the missing items. Accordingly, considering these 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 at a relatively early stage during the course of these proceedings, although it cannot be said that you entered the plea at the earliest opportunity. In fact, on 29 May 2020, when your plea was first taken you had pleaded guilty to the two charges. However, when the Amended Information was filed and your plea was again taken on 13 July 2020, you pleaded not guilty to the two charges. About one month later you changed your plea. In your submissions in mitigation you have explained that the reason you pleaded not guilty was that you were not in a correct state of mind at the time due to certain marital issues. However, I accept that in pleading guilty to the charges you have saved time and resources of this Court instead of 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:

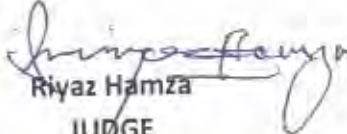
Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act-2 years imprisonment.

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] Kunal Edwin Prasad, you are now 33 years of age [Your Date of birth is 30 August 1987]. You are said to be married with 4 children. You submit that prior to being arrested for this matter, you were employed as a Professional Joiner and worked for Mahogany Industries Fiji Limited. You are said to be the sole bread winner of your family.
- [27] Kunal Edwin Prasad, you have admitted to the Summary of Facts and taken full responsibility for your actions. You submit that you are truly remorseful of your actions and for your involvement in the offence.
- [28] Kunal Edwin Prasad, you are not a first offender. As per the Antecedent Report filed, 4 previous convictions have been recorded against your name, out of which 2 can be considered as active previous convictions. You have admitted that you are currently serving a sentence of 8 months and 3 weeks imprisonment, which was imposed by the Magistrate's Court of Suva, on 11 May 2020, for the offence of Theft.
- [29] Kunal Edwin Prasad, you were arrested for this case on 29 March 2020 and was in remand custody until you were sentenced for the above-mentioned case by the Magistrate's Court of Suva on 11 May 2020. Thus, I consider that you have been in remand custody for this case for a period of over 1 month.
- [30] Considering all the above, I am of the opinion that you have to serve in custody 9 months of the 2 year term of imprisonment that I am imposing on you, with effect from today. This term of imprisonment would be concurrent to the prison sentence you are currently serving. The balance 1 year and 3 months term of imprisonment would be suspended for a period of 5 years, to take effect from the day your custodial sentence of 9 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 23rd Day of September 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : 1st Accused Appears in Person.