

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 277 of 2020

STATE

V

1. LEONE NABOU JUNIOR

2. AT

Counsel : Mr. Sahil Shiraz for the State
Ms. Sokoveti Daunivesi for the 1st Accused
Ms. Manisha Singh for the 2nd named Juvenile

Punishment Hearing : 20 January 2021

Punishment : 22 March 2021

The name of the Juvenile is suppressed. Accordingly, the Juvenile will be referred to as "AT".

PUNISHMENT

[1] AT, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged, along with Leone Nabou Junior, 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

LEONE NABOU JUNIOR and AT, in the company of other, on the 25th day of August 2020, at Qiolevu Road, Navuso, in the Central Division, entered the

house of NIUMAI ROGOROGO as trespassers, with intent to commit theft from that property.

COUNT 2

Statement of Offence

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

Particulars of Offence

LEONE NABOU JUNIOR and AT, on the 25th day of August 2020, at Qiolevu Road, Navuso, in the Central Division, dishonestly appropriated 1 x Nokia Mobile Phone, 1 x White Toshiba USB, 1 x Black Under Armor Pants and Cash of \$120.00, the property of **NIUMAI ROGOROGO** with the intention of permanently depriving **NIUMAI ROGOROGO** of the said property.

- [2] On 5 November 2020, the DPP filed the Information and Disclosures relevant to the case, and the matter was fixed for plea.
- [3] On 20 November 2020, you were ready to take your plea. On that day you pleaded guilty to the two counts against you 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 guilty plea.
- [4] Thereafter, the State filed the Summary of Facts. On 9 December 2020, the Summary of Facts were read out and explained to you and you understood and agreed to the same, subject to the fact that you denied taking the \$ 120.00 cash. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the respective 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 in respect of the two counts as charged.
- [5] I now proceed to impose the punishment against you.
- [6] The Summary of Facts filed by the State was as follows:

"The first accused is Leone Nabou Junior (DOB 17/12/2001), 18 year old, unemployed, of Qiolevu Road, Navuso Village, Naitasiri.

The Juvenile is AT (DOB 09/09/2005), 15 year old, unemployed, of Navuso Village, Naitasiri.

The complainant is Niumai Rogorogo, 37 years of age, sales girl of Qiolevu Road, Navuso Village, Naitasiri.

The complainant and her husband reside at Qiolevu Road in Navuso Village at Naitasiri. On 25 August 2020, the complainant and her husband had securely locked up their house and had left for work in the morning. At or about 12.07 p.m., the complainant had received a missed call from her husband's Digicel mobile number which is usually left by her husband at home. The complainant called her husband on the same Digicel number, but it got diverted. Hence she called on his Vodafone number and found out that the Digicel phone was kept at home. The complainant had suspected that someone broke into their house and she immediately went to her husband and then left for home to check. Upon reaching their home, the complainant and her husband found all doors to be locked. After entering into the house, they then discovered that the louver was removed to enter through the window and the following items were missing:-

- 1. 1 x Nokia Mobile phone worth \$69.00;*
- 2. Cash of \$120.00;*
- 3. Toshiba USB worth \$40.00; and*
- 4. Under Armor shorts worth \$78.00.*

The total value of the items is \$307.00.

Upon enquiry from the neighbours, it was told to them that both the Accused and the Juvenile were seen outside the complainant's house when they were not at home.

The Accused and the Juvenile were then arrested and taken in by the Police at the Nausori Police Station. They were both interviewed under caution whereby they had admitted to the offence of Aggravated Burglary and Theft.

According to the Accused (Leone Nabou Junior):-

- He had met the Juvenile and had planned to go steal from the complainant's house (Q/A 34, 35, 36, 37, 38).*
- He had removed the louvers in order to enter into the complainant's house (Q/A 39).*
- He then stole the 1 x Nokia Mobile Phone, \$120.00, Toshiba USB and the Under Armor shorts (Q/A 40).*
- The Accused and Juvenile then went back to the Accused's house after stealing (Q/A 47).*

According to the Juvenile (AT):-

- *He was with the Accused when the louver had been taken out to enter into the house of the complainant (Q/A 39).*
- *Both the Accused and the Juvenile had entered through the window (Q/A 40).*
- *He admits to stealing the 1 x Nokia Mobile phone and the 1 x Toshiba USB (Q/A 45, 46)).*

The 1 x Nokia Mobile phone worth \$69.00, 1 x Toshiba USB worth \$40.00 and Under Armor shorts worth \$78.00 was recovered during the caution interview.

The Accused has admitted to the offence in his caution interview that had been conducted on 9 September 2020 from Q&A 37-43 (Marked as annexure "A" is the copy of Record of Interview for the Accused).

The Juvenile has admitted to the offence in his caution interview that had been conducted on 9 September 2020 from Q&A 39-49 (Marked as annexure "B" is the copy of Record of Interview for the Juvenile).

Both the Accused and the Juvenile were subsequently charged with one count each of Aggravated Burglary and Theft. The Accused and the Juvenile have nil previous convictions (Marked as Annexure "C" is the Criminal Record History by the Criminal Records & Fingerprint Office)."

- [7] AT, 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 punishment 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); *State v. (Sakeasi) Seru and Another* [2020] FJHC 770; HAC136.2020 (18 September 2020); *State v. (Kunal Edwin) Prasad* [2020] FJHC 785; HAC115.2020 (23 September 2020); *State v. (Emosi) Tabuasei* [2020] FJHC 994; HAC131.2020 (27 November 2020); *State v. LR and Others* [2020] FJHC 993; HAC133.2020 (27 November 2020); *State v. Lal and Another* [2020] FJHC 1024; HAC337.2019 (3 December 2020); *State v. Koroitawamudu and Another* [2020] FJHC 1055; HAC127.2020 (8 December 2020); *State v. Koroï and Another* [2020] FJHC 1065; HAC270.2020 (10 December 2020); and *State v. (Joji) Kotobalavu* [2021] FJHC 101; HAC234.2020 (17 February 2021).

[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 in this case involved property of a reasonably high value, and was consequent to you and your accomplice (Leone Nabou Junior) entering the residential premises of the complainant 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 terms of the Juveniles Act (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

- [19] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

"(1) No child shall be ordered to be imprisoned for any offence.

(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.

(3) A young person shall not be ordered to be imprisoned for more than two years for any offence."

Emphasis is mine.

- [20] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You and your accomplice (Leone Nabou Junior) trespassed into the residential premises of the complainant thereby paying complete disregard to the property rights of the said complainant and have thereby disturbed the peace of the community.
- (iii) I find that there was some degree of pre-planning or pre-meditation on your part in committing these offences, together with the accomplice.

You were with the accomplice when he had removed the louvers in order for the two of you to enter into the complainant's house.

(iv) You are now convicted of multiple offending.

[21] 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 no previous convictions recorded against you.

(ii) 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.

(iii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.

(iv) It is submitted that you are humbly apologizing for your actions and you say you are willing to reform.

(v) A substantial portion of the stolen items had been recovered. Out of the 4 items taken, it was only the cash amounting to \$120.00 that was not recovered.

(vi) That you entered a guilty plea at the first available opportunity.

[22] Considering all the aforementioned factors, and the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, AT I impose on you a punishment of 2 years imprisonment for count one; and 12 months imprisonment for count two.

[23] In the circumstances, AT your punishments 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 -12 months Imprisonment.

I order that the aforesaid punishments to run concurrently. Therefore, your final total term will be 2 years imprisonment.

[24] The next issue for consideration is whether your punishments should be suspended.

[25] 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.

[26] AT you are now 15 years and 6 months of age [Your date of birth being 9 September 2005]. You are said to be coming from a broken family, whereby both your parents have now re-married. You were staying with your aunt in Rakiraki and had come to Suva on a visit when the offending took place. After you were granted bail for this case you were being looked after by your aunt (your mother's cousin).

[27] Prior to the offending, it is said that you were attending Form 4 at Saint Frances Secondary School in Rakiraki and that you are aspiring to go back to school to complete your studies once this matter is concluded.

[28] You have submitted that you were socialising with a wrong group of friends, and at the time of offending you had succumbed to peer pressure and committed the offences. You have further submitted that you committed these offences without comprehending the gravity of your actions, for which you deeply regret.

[29] AT you were arrested for this matter on 9 September 2020 and produced in Court. You were granted bail by the Magistrate's Court of Nausori, on 11 September 2020. Therefore, you have been in remand custody for this matter for 2 days.

[30] 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."

[31] 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."

[32] I have considered the following circumstances:

- You are a juvenile offender;
- You have been of previous good character;
- You have fully cooperated with the Police in this matter;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have humbly apologized for same;
- You have assured Court that you will not re-offend and are willing to reform;
- A substantial portion of the stolen items had been recovered.
- You entered a guilty plea at the first given opportunity during these proceedings;
- You were in remand custody for this case for 2 days.

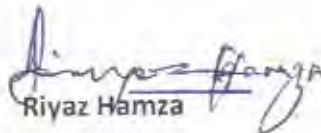
Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishment.

[33] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your punishment for a period of 5 years.

[34] In the result, your final punishment of 2 years imprisonment, is suspended for a period of 5 years. You are advised of the effect of breaching a suspended punishment.

[35] 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 22nd Day of March 2021

Solicitors for the State:

Office of the Director of Public Prosecutions, Suva.

Solicitors for the 1st Accused & Juvenile: Office of the Legal Aid Commission, Suva.