

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 67 of 2022

STATE

vs.

- 1. JONE BOLA**
- 2. MANOA TOGAMALO**

Counsel: Ms. B. Kantharia for the State
Ms. L. Filipe for 1st & 2nd Accused

Submissions on sentencing : 23rd May 2022

Date of Sentence : 25th May 2022

SENTENCE

1. Your charge reads thus;

COUNT ONE

Statement of Offence

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

Particulars of Offence

JONE BOLA and **MANOA TOGAMALO** on the 21st day of March, 2021 at Tamavua, in the Central Division, entered into the property of **RAJENDRA PRASAD** as trespassers, with the intention to commit theft therein.

COUNT TWO

Statement of Offence

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

Particulars of Offence

JONE BOLA and **MANOA TOGAMALO** on the 21st day of July, 2021 at Tamavua, in the Central Division, in the company of each other, dishonestly appropriated 1 x Skyworth branded T.V. screen – 32 inches, 2 x Red Label Liquor 750ml, 4 x 750ml Black Label Liquor, 1 x Sony branded radio and 1 x Seiko gold wrist watch the property of **RAJENDRA PRASAD** with the intention of permanently depriving **RAJENDRA PRASAD of his properties.**

2. On 25th of April 2022, you Manoa Togamalo the 2nd Accused being aware and well advised of the legal effects, did plead guilty to both the above counts in the presence of your Counsel. This Court was satisfied that you fully comprehended the legal effects and that your pleas were voluntary and free from influence.
3. The summary of facts read and explained on 11th of May, 2022 reveals that the offence of 'Aggravated Burglary' and 'theft' were committed and you admitted the following summary of facts;

1. **Background**

1.1 *The accused in this matter is Manoa Togamalo (hereinafter known as A2), 21 years of age, Delivery boy at Cocoa Cola of Sukanivalu Road, Nabua.*

1.2 *The complainants are:-*

- (i) *One Deo Chand (hereinafter known as PW1), 43 years of age, Supervisor at Rajendra's of 297 Omkar Road, Narere who is the caretaker of the property of*

Rajendra Prasad whose house the alleged incident of the Aggravated Burglary and Theft took place.

- (ii) *The neighbor of Rajendra Prasad, David Natula (hereinafter known as PW2), 45 years old of 374 Princess Road, Tamavua, Dentist.*

2. Incident

- 2.1 *On 21st July, 2021, at around 12.38am, PW2 was in his sitting room when he heard some noises coming in from the next door property at 372 Princess Road, Tamavua which is situated next to his house and is about 10 meters apart from where he stays.*
- 2.2 *PW2 went outside and saw the lights of the front porch of the property next door were switched on and heard noises coming from the top floor of the house and PW2 could make out that that people making noises were drunk and that the voice were that of men and woman inside.*
- 2.3 *PW2 knew the property belongs to Rajendra Prasad and that his daughter was staying there; PW2 than called the police.*
- 2.4 *At around 0055hrs the police arrived at the property situated at 372 Princess Road. Upon arrival, SC 5252 Aminio, PC Krishneel, PC Praneel and PC Eparama entered the front gate and looked up the stairs from the main door and could see a young boy drunk and swearing at them from the steps inside the house covered in blood on his chest and was threatening to throw bottles at them.*
- 2.5 *PC Pranil and PC Eparama then opened the front of the house and entered the house with caution. They both came across the kitchen first and saw that the whole house was scattered with the kitchen covered with blood and empty broken liquor bottles. Both the officers searched all the rooms for the boy they saw but they could not find him.*
- 2.6 *PC Pranil checked all the exit points of the house and noted that same was locked which meant that the suspect was still inside the house. The officers then turned off the torch they had and they could hear someone swearing in low voice saying 'magaitinamu' meaning "mothers vagina". The officers then surrounded the dining room table in the living room and saw the suspect lying down hiding there.*
- 2.7 *PC Eparama then tried to arrest the accused but he fought with him and PC Eparama had to apply reasonable force to manage to arrest the suspect in the presence of PC Pranil; rights to remain silent was given to the suspect and the officers noticed that the suspect had blood shot eyes and smelt of liquor and was badly staggering. The suspect together with another suspect who was arrested from behind the house were both escorted to Samabula Police Station and handed over to the charge room and the only name the suspect who was arrested from inside the house gave was "Paula" in his state of drunkenness.*
- 2.8 *The property at 372 Princess Road, Tamavua belongs to Rajendra Prasad who at the time of the alleged offending was in Lautoka and his caretaker Deo Chand – PW1 checked the premises and discovered the following items missing:-*
- (i) *1 x Skyworth brand T.V. screen 32 inches valued at \$650.00;*
 - (ii) *2 x red label liquor 750ml valued at \$178.00 (\$89.00 each);*
 - (iii) *4 x 750ml black label valued at \$356.00 (\$89.00 each);*
 - (iv) *1 x blue Sony brand radio valued at \$350.00*

And later the police had recovered 1 x Seiko gold wrist watch from one of the suspects they arrested from the alleged crime scene and PW2 confirmed that same belonged to the owner of the house – Mr. Rajendra Prasad.

- 2.9 *A2 was interviewed at the Samabula Police Station on 21/07/21 wherein he gave his name as Manoa Togamoto and he admitted to being at the property at 372 Princess Road. A2 stated that his accomplice had entered the house by climbing the pipe leading to the kitchen and then opened the front door for him to enter. A2 entered that he then cooked the eggs and prepared dinner with tin fish tuna in the kitchen and he and the accomplice had dinner there. (Q & A 60 to 65 of the record of interview).*
- 3.0 *A2 stated that they then sat down at the settee and started to drink liquor (Red Label, wine and Fiji Bitter beer). He stated that they had 3 x bottles of wine, 1 x bottle of red label and that there was no female with them. He further stated that the blood there was from the cut sustained by his accomplice from the broken bottles (Q & A 66 to 78 of the record of interview).*
- 3.1 *A2 denied taking any of the other items from the house but admitted that he stole 1 x gold watch from one of the bedrooms and gave it to his accomplice and the liquor 2 x red label and 2 x black label they drank it all inside the kitchen (Q & A 101 and 102 of the record of interview).*
- 3.2 *A2 was taken by the police for scene reconstruction and he showed the police how he and the accomplice had entered the property and what they did and stole from there. He admitted that the Fila brand bag belonged to him and the 1 x red label inside it was stolen by him and this bag was still there with stolen items when police had arrived at the scene. A2 further agreed that he entered the property at 372 Princess Road with the intention to steal items from there and upon arrival of the police he was still at the property with part of the stolen items in the bag belonging (Q & A 114 to 142 of the record of interview).*
- 3.3 *the accused is charged and has pleaded guilty to one count of Aggravated Burglary and one count of Theft contrary to section 313 (1) (a) and section 291 (1) of the Crimes Act, 2009 respectively.*

4. This Court is satisfied that, you did fully understand the nature of the charges and the consequences of pleading guilty and the summary of facts covers and satisfies all the elements of the offence of Aggravated Burglary count No. 1. However as regards and charge of theft out of the several items stated therein the 2nd Accused does not admit the theft of 1 x Skyworth brand T.V. screen 32 inches valued at \$650.00 and 1 x blue Sony brand radio valued at \$350.00. Thus the admitted facts satisfy the charge of theft in respect 2 x red label liquor 750ml valued at \$178.00 (\$89.00 each), 4 x 750ml black label valued at \$356.00 (\$89.00 each) and 1 x Seiko gold.

5. Accordingly, this Court finds you the 2nd Accused guilty of Count 1 for Aggravated Burglary and of Count 2 for theft of 2 x red label liquor 750ml valued at \$178.00 (\$89.00 each), 4 x 750ml black label valued at \$356.00 (\$89.00 each) and 1 x Seiko gold as charged and convict you separately for the said offences.
6. The submissions on sentence and mitigation tendered by your Counsel and the State Counsel are comprehensive and certainly helpful.

Sentencing the 2nd Accused

7. It is admitted that you the 2nd Accused, together with another, entered the property of *Rajendra Prasad* at 372 Princess Road, Tamavua on 21st July, 2021, at around 12.30 a.m., the house of the complainants when the inmates were out and stolen 2 x red label liquor 750ml valued at \$178.00 (\$89.00 each), 4 x 750ml black label valued at \$356.00 (\$89.00 each) and 1 x Seiko gold referred to in the particulars of count No. 2 of the information.
8. The offence of burglary involves entering or remaining in a premises as a trespasser with the intention to commit theft of anything in the premises. Thus to be guilty of the offence of burglary, it is sufficient to enter the premises with the relevant intention. The offence is committed even if, once inside the premises, the person does not actually carry out the additional intended offence involving theft, The offence of Aggravated burglary for which the Accused was convicted occurs if, at the time of the burglary, the offender is in the company of one or more other persons. The offence of Aggravated burglary has a maximum penalty of 17 years and the offence of theft has a maximum penalty of 10 years imprisonment.
9. Aggravated burglary is a preparatory offence, because it involves an act of entering a property with the intention to commit a further offence. If, once the person has entered the premises, he or she actually commits the intended offence involving theft, he or she would be charged and sentenced separately for both the offence of burglary and the offence of theft. Though aggravated burglary is a preparatory offence, in view of the maximum penalty

prescribed, it certainly is considered a serious offence in Fiji the gravity of aggravated burglary will depend on the manner and the nature of entering the premises.

10. The prevalence of burglary and this type of home-invasion-style offences as in the present case will certainly cause great anxiety and disquiet in any community whilst undermining the sense of security that people feel in their own homes and will also bring about a sense of insecurity and inhibition to close up their houses and go about their daily errands, other business and work freely. I find this is a very serious offence. Wherefore, it is my opinion that such offenders must be imposed with severe and harsh punishments. Thus, in sentencing for offences of this nature it is necessary to convey a message to offenders and to those who intend to offend that these crimes will not be tolerated and will entail stiff sentences. Therefore, the purpose of this sentence is founded on the principle of deterrence and the protection of the community. Similarly I have to be mindful of the principle of rehabilitation too.
11. The tariff as determined by **State v Seru**, Sentence [2015] FJHC 528 HAC 426.2012 (6 July 2015) and also reiterated by the Court of Appeal in **Daunivalu v State** [2020 FJCA 127; AAU138.2018 (10 August 2020) for the offence of Aggravated Burglary is 18 months to 3 years which carries a maximum penalty of 17 years imprisonment.
12. The tariff as determined by **Waqā v State**, Sentence [2015] FJHC 72 HAA017.2015 (5 October 2015) for the offence of Theft is 4 months to 3 years which carries a maximum penalty of 10 years imprisonment. In **Mikaele Ratusili v. State**, Criminal Appeal No. HAA 011 of 2012 (1 August, 2012) Madigan J. set out the tariff for theft considering various factors in the following form:
 - “(i) *For the 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.”*

Aggregate sentence

13. Section 17 of the Sentencing and Penalties Act 2009 (“Sentencing and Penalties Act”), reads thus;

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

14. The count of aggravated burglary and the count of theft for which you have been convicted are offences founded on the same facts and are of similar character. In accordance with section 17 of the Sentencing and Penalties Act, I consider it just and appropriate to impose an aggregate sentence for both offences having the Aggravated Burglary count as the base sentence as it is the serious of the two offences.
15. Home invasion in the present case certainly would have required some knowledge that the inmates of the house were not in. Thus though this appears to be an opportunistic offending considering that some surveillance was required and the manner of gaining entry climbing a gutter, remaining in the house with impunity, I find that the level of culpability in this crime is high.
16. In selecting a starting point, this Courts is required to have regard to the objective seriousness of the offence. I have considered the culpability and the harm factors of your offending. You have entered the residential house of the Complainant and acted in utter disregard of his property rights. Then you have committed serious offences against property under Part 16 of the Crimes Act, and this type of offences are prevalent in the country and the number of young offenders brought before the courts for committing such offences appear to be quite

alarming and significant. Upon considering the gravity and objective seriousness of the offences, to my mind it is reasonable and just to pick 18 months' imprisonment as the starting point of the aggregate sentence of the 2nd Accused. However, the final sentence will depend on the mitigating and aggravating factors which I will consider next.

17. First, I will consider the aggravating factors. I observe the following aggravating circumstances of your offending:
 - a) Around 7.00 p.m. you with the 1st Accused have entered the property of the complainant and you were bold and undeterred.
 - b) This is an opportunistic theft. You went into the house of the victim upon realising that there was no one inside entered the house stole the items in count No. 2 and was eating and drinking liquor when a neighbor alerted the police and you could not get away.
 - c) It was committed against the property rights of the complainant.
 - d) You acted with impunity.

18. I am inclined to add 1 year and 6 months to the starting point for the above-mentioned aggravating factors bringing the interim sentence to 3 years' imprisonment

19. Now as for the mitigating factors the following circumstances were submitted, that you;
 - a) are truly remorseful and seeks forgiveness,
 - b) co-operated with the police,
 - c) were 21 years of age at the time of the offending,
 - d) are a first offender,
 - e) pleaded guilty at the outset on the first opportunity,
 - f) You have no previous convictions.

20. I think it to be just to deduct 1 year and 6 months which includes 1 year for the early guilty plea for the said mitigating factors and the aggregate sentence will thus be 1 year and 6 months' imprisonment.

21. Manoa Togamalo your counsel submitted that you are in relationship with a partner who is 6 months pregnant and you are now engaged in fishing from which you earn about \$ 180 per week. You are the sole breadwinner of your family. This shows that you are just trying to begin a family life. Further, that you are a first offender and due to a lapse of judgment you may have joined the 1st Accused in this offending. It is submitted that now you sincerely regret your actions and you are willing and promise to reform and not to re-offend. You have accepted responsibility for your actions and did save the court's time by pleading guilty at the earliest opportunity. That you have cooperated with the police too.

Suspending the punishment

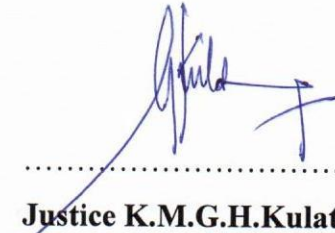
22. Your Counsel submitted that this is a fit matter for this Court to consider acting under section 26(2) of the Sentencing and Penalties Act especially as you are a young offender. The prosecution had no serious objection to this submission. I am of the view that the firm undertaking and promise made to this court that you will rehabilitate and reform and you will lead a good life and not re-offend are sufficient grounds to consider suspending your punishment in terms of the provisions of section 26(1) of the Sentencing and Penalties Act.
23. As per Section 26(2) of the Sentencing and Penalties Act, the discretion to suspend a sentence should only be exercised by a High Court where the custodial sentence does not exceed 3 years and as opined in the Sentence Ruling in State v Aiding Zhang [2017] HAC 061 if there be circumstance which are exceptional.
24. In **DPP v Jolame Pita** (1974) 20 FLR 5 at p.7:, Grant Acting CJ (as he was then) explained what special circumstances that warrant and justify the suspension of a sentence thus;

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and

the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

25. The final punishment does not exceed 3 years and in the circumstances of this case especially considering the youth or age of the 2nd Accused who is a first-time offender with no previous convictions or pending similar matters and who appears to be just trying to start a family life, I am of view that it is better and is a fit case to suspended the punishment of this young offender instead of just throwing him into jail in the first instance.
26. Thus, upon duly considering the material before me, I sentence you the 2nd Accused to an aggregate sentence of 1 year and 6 months' imprisonment and suspend the same for a period of 7 years.
27. The consequences of the suspended sentence are explained.
28. You have thirty days (30) to appeal to the Fiji Court of Appeal if you so desire.




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Justice K.M.G.H.Kulatunga

At Suva
25th May 2022

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