

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 356 of 2022

STATE

vs.

EPELI QALO

Counsel: Ms. M. Naidu for the State
Ms. M. Singh for the Accused

Date of Sentence/Mitigation Submission: 28th April 2023

Date of Judgment: 02nd May 2023

SENTENCE

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 29th November, 2022:

COUNT ONE

Statement of Offence

ATTEMPTED AGGRAVATED BURGLARY: Contrary to Section 44 (1) and 313 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

EPELI QALO with another on the 1st October, 2022 at Suva, in the Central Division, in the company of each other attempted to enter into the property of **COURTS FIJI LIMITED STORE**, as trespassers with intent to commit theft.

COUNT TWO

Statement of Offence

DAMAGING PROPERTY: Contrary to Section 369 (1) of the Crimes Act, 2009.

Particulars of Offence

EPELI QALO with **another** on the 1st October, 2022 at Suva, in the Central Division, in the company of each other willfully and unlawfully damaged the glass door, the property of **COURTS FIJI LIMITED STORE**.

2. Summary of Facts

1. ***The accused:** Epeli Qalo, 26 years old, Casual Worker, of Nadawa (hereinafter known as **A1**). A1 has been charged for **one count of Attempted Aggravated Burglary** contrary to Section 44(1) and 313 (1) (a) of the Crimes Act 2009 and **one count of Damaging Property** contrary to Section 369 (1) of the Crimes Act 2009.*
2. ***The complainant:** Benjamin Mohammed, 46 years old, Manager at Courts Fiji Limited, Rodwell Road Branch of Narere, (hereinafter known as **PW1**).*
3. *On 2nd October, 2022 at around 7am, PW1 received a call from the Property Manager of FNPF informing him that their Court Rodwell shop was broken into by an unknown person the previous night.*
4. *PW1 reported the matter at market Police Post and upon investigation; PC 5857 Sevanaia Lesivou uplifted the CCTV footage from the Courts building.*
5. *DC 4977 Samisoni Ralulu viewed the CCTV footage and identified A1 as the persons who was attempting to break-in into the Court building.*
6. *A1 was also throwing stones at the door of the Courts building and as a result the glass door was damaged as well.*
7. *PW1 confirmed that nothing was stolen from the Courts store.*
8. *Matter was later reported at the Totogo Police Station and A1 was interviewed under caution whereby A1 voluntarily admitted to committing the alleged offence.*

9. *A1 was interviewed by DC Asaeli Tuivuaka on 6th October, 2022, A1 made full admissions in his Record of Interview from Q & A 19 – 39.*

Caution Interview Statement of A1

- i. *A1 admitted that he was with another on the night of the alleged incident.*
- ii. *He admitted that his accomplice gave him the stone and asked him to throw at the back door glass of Court building so that they could steal from the shop.*
- iii. *He admitted that he made more than 10 attempts to break the glass door.*
- iv. *He admitted that the security called out and that is when he fled the scene and went towards the bus stand.*
- v. *He was also shown the CCTV footage whereby he admitted being in the footage and being the same person who was attempting to burgle into the Courts building.*

The Record of Interview of A1 is attached as PE1.

10. *The accused was charged and has pleaded guilty to the first count of Attempted Aggravated Burglary contrary to Section 44 (1) 313 (1) (a) of the Crimes Act, 2009 and the second count of Damaging Property contrary to Section 369 (1) of the Crimes Act 2009.*
11. *The accused has six previous convictions and is not a first time offender.*

3. As per the Information filed by the Director of Public Prosecutions dated 28th November 2022, you Mr. Epili Qalo charged with 2 counts for committing the offences of Attempted Aggravated Burglary contrary to Section 44(1) and 313 (1) (a) of the Crimes Act, 2009 and Damaging Property contrary to Section 369 (1) of the Crimes Act, 2009 with another.
4. You being aware and well advised and appraised of the legal effects, did plead guilty to both the above counts, in the presence of your Counsel. This Court is satisfied that you fully comprehended the legal effects and that your pleas were voluntary and free from influence. You did so plead guilty at the first available opportunity. When the State presented the summary of facts, you accepted and admitted committing the said acts of Attempted Aggravated Burglary and Damaging Property in the company of another.
5. I am satisfied that the summary of facts read over and admitted by you cover and satisfy all the ingredients of both the said charges. Accordingly on your own pleas of guilt, I hereby **convict** you separately for count 1 of Attempted Aggravated

Burglary and count 2 of Damaging Property.

Sentencing Regime

6. The offence of attempted burglary involves an attempt to enter a premises as a trespasser with the intention to commit theft of anything in the premises. To be guilty of the offence, it is sufficient to attempt to enter the premises with the relevant intention. The offence of Attempted Aggravated Burglary has a maximum penalty of 17 years and the offence of Damaging Property has a maximum penalty of 2 years imprisonment.
7. Both parties in their written submissions on have referred to the tariff as determined by the guideline judgement of **Kumar and Wakatawa v State AAU33.18 and AAU117.19** (24th November 2022). The tariff applicable to the offence of Aggravated Burglary and attempt thereof was revisited and new sentencing guidelines were determined by the Court of Appeal in the said Judgement. When this matter was called on 28th April 2023 for the ruling on sentencing, the Learned Counsel for the defence Ms. M. Singh informed that the new tariff and guidelines as determined in **Kumar and Wakatawa v State** are applicable and that previous convictions may be considered as an aggravating factor.

Applicability of New Tariff as Determined

8. The date of offending is 1st of October 2022 and the said decision had been pronounced there after on 24th November 2022. Thus it is prudent to consider the retrospectivity of the new guidelines and if it would apply to this matter. Justice Prematilaka JA., has considered the issue of retrospectivity in **Davendra Narayan Chand v The State** [AAU 0033 of 2015 (03 October 2019)] and at paragraphs 72 and 73 opined as follows;

“[72] **R v H (J)** [2012] 1 WLR 1416 provided useful guidance in sentencing and an authority to state that the sentencing judge should apply the legislative provisions, and have regard to any relevant guidelines, applicable as at the date of sentencing, while bearing in mind that the sentence is limited to the maximum sentence available at the time that the offence was committed. The Court of Appeal remarked that

‘In the result therefore in historic cases, provided sentences fall within or do not exceed the maximum sentence which could lawfully have been imposed at the date

when the offence was committed, neither the retrospectivity principle nor article 7 of the Convention are contravened.'

[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable." (emphasis added).

9. Thus, it is apparent that offenders must be sentenced in accordance with the sentencing regime prevalent and applicable as at the date of sentencing. Accordingly the new tariff as formulated and set out in **Kumar and Wakatawa v State** (supra) will apply retrospectively to all matters and cases that will come up for sentencing henceforth regardless of the date of the offending.

Aggregate Sentence

10. 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."

11. The counts of Attempted Aggravated Burglary and Damaging Property 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 Attempted Aggravated Burglary count as the base sentence as it is the more serious of the offences.
12. Applying the new tariff as determined by **Kumar and Wakatawa v State**, for the offence of Attempted Aggravated Burglary in the present offending, I will consider the level of harm to be medium as there is damage caused to a glass door and with another but

unarmed that will a sentencing range of 3-8 years with a starting point of 5 years. I will pick 5 years to start with.

Aggravating Factors

13. As for aggravating factors this involves pre-planning and attempt to enter the business premises with absolute disregard of the property rights of the owner. You are unable to achieve your object as the security guard was alerted thus you were prevented from continuing.

Mitigating Facts

14. You are 26 years of age in a *de-facto* relationship with a child of about 1 month. These are personal grounds. However, I am unable to consider you as a person of previous good character as you are recorded with 6 previous convictions between 2018 and 2022 for escape from lawful custody, theft (3), criminal trespass and unlawful position of illicit drugs. However, you exhibited some remorse by your early guilty plea and you have cooperated with the police.

Early Plea of Guilt

15. No doubt you did plead guilty at the very outset. It is settled law that an early guilty plea will be considered favorably in determining the sentence. Courts have long accepted that discounts on sentences are appropriate. However determining the discount (quantifying) depends upon the circumstances of each case. The accepted reduction considered is a maximum of one third but quantifying within that 1/3rd is for the sentencing judge to determine.
16. There are two possible factors to be considered in determining the appropriate discount to the sentence for a plea of guilt. Firstly, it is now well settled that, if the Accused indicated his intention to plead guilty to that charge at the earliest opportunity then he is entitled to the full benefit of the 1/3rd discount and may be on a reducing scale any time thereafter corresponding to the stage of so pleading. Secondly, if the offender was caught red-handed so to say, and is arrested in such circumstances in which he cannot hope to put forward a

viable defence of not guilty, then he cannot expect much by way of discount even if he pleads guilty at the earliest. This second aspect was considered in *R v Hollington and Emmens* (1986) 82 Cr App R 281 where it was opined thus;

“This court has long said that discounts on sentences are appropriate, but everything depends upon the circumstances of each case. If a man is arrested and at once tells the police that he is guilty and co-operates with them in the recovery of property and the identification of others concerned in the offence, he can expect to get a substantial discount. But if a man is arrested in circumstances in which he cannot hope to put forward a defence of not guilty, he cannot expect much by way of discount.”

17. Though Attempted Aggravated Burglary is a preparatory offence, in view of the maximum penalty it is considered a serious offence in Fiji and the gravity will depend on the manner and the nature of entering the premises. The prevalence of burglaries of home-invasion-style breaking into shops as in the present case will certainly cause great anxiety and disquiet in the community whilst undermining the sense of security that people feel in respect of their business premises will certainly bring about a sense of insecurity and inhibition to close up their business premises to get about their daily errands and work freely. I find this is a very serious offence. The attempt too is equally serious.
18. Wherefore, it is my opinion that such offenders must be endowed with severe and harsh punishments. Thus, in sentencing for attempts to commit offences of this nature it is necessary to convey a message to offenders and also 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. I am mindful of the principle of rehabilitation nonetheless the seriousness of these offences outweighs the principle of rehabilitation.

Sentence

19. Upon considering the gravity and the objective seriousness of the offence of Attempted Aggravated Burglary, applying the new tariff I have picked 05 years' imprisonment as the starting point of the aggregate sentence. I am inclined to add 01 year to the starting point

for the above-mentioned aggravating factors. For all these grounds in mitigation, you should receive a considerable discount in the sentence. In this regard, I will consider a reduction of 24 months for the early guilty pleas and another 6 months for the other mitigating factors which brings your aggregate sentence down to three (3) years and six (6) months' imprisonment.

Non-parole period

20. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand, this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation.
21. Considering the above, I impose 2 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances of this case.

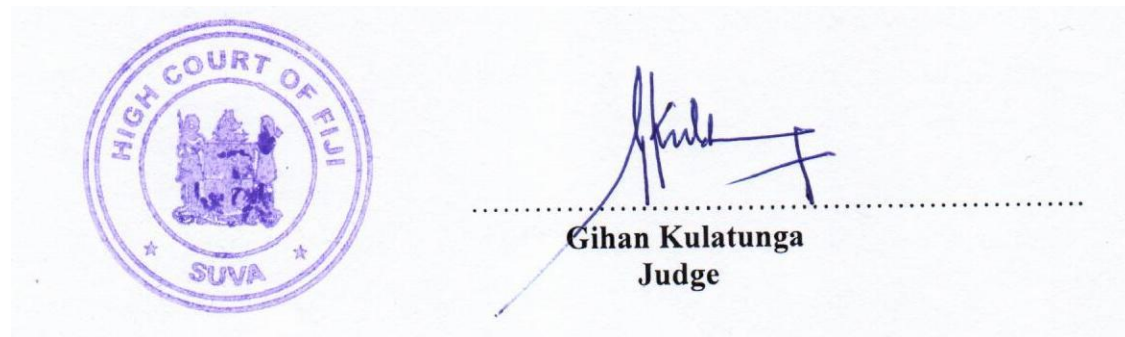
Head Sentence

22. Accordingly, I sentence you for an aggregate period of three (3) years and six (6) months' imprisonment as an aggregate sentence for the offences of Attempted Aggravated Burglary and the Damaging Property as charged in the information. However, you are not entitled to parole for 2 years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of the Sentence

23. I also observe from the Court record and the submissions that you have been in remand since 06th October 2022 up to date for 6 months and 26 days. In the exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced by 06 months upon it being considered as a period of imprisonment already served. In view of the above, the final sentence will be 3 years imprisonment.

24. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed compels me to consider the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
25. Accordingly, the actual total period of the aggregate sentence imposed is three (03) years imprisonment with a non-parole period of one (01) year and six (06) months.
26. You have 30 days to appeal to the Court of Appeal if you so desire.



At Suva
02nd May 2023

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