

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. IIAC 56 of 2021

BETWEEN : **THE STATE**

AND : **SITIVENI McCOMBER**
: **VILIAME GAUNAVINAKA**

Counsel : Ms. Vavadakua, A for the State
: Ms. Raj, R for both Accused

Date of Sentence : 17 July 2023

SENTENCE

1. The accused persons are charged with the following offences:

[COUNT 1]

Statement of Offence

ATTEMPTED ARSON: Contrary to section 363 (a) of the Crimes Act 2009.

Particulars of Offence

SITIVENI MCCOMBER & VILIAME GAUNAVINAKA, on the 25th day of July 2021, at Naqara, in Taveuni, in Northern Division, willfully and unlawfully, attempted to set fire to **MACUATA MUSLIM LEAGUE MOSQUE**.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

SITIVENI MCCOMBER & VILIAME GAUNAVINAKA, on the 25th day of July 2021, at Naqara, in Taveuni, in Northern Division, willfully and unlawfully, set fire to **ALI'S FASHION STORE**.

[COUNT 3]

Statement of Offence

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

Particulars of Offence

SITIVENI MCCOMBER & VILIAME GAUNAVINAKA, on the 25th day of July 2021, at Naqara, in Taveuni, in Northern Division, in company of each other, entered into **COURTS (FIJI) LIMITED** as trespassers with intent to commit theft.

[COUNT 4]

Statement of Offence

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

Particulars of Offence

SITIVENI MCCOMBER & VILIAME GAUNAVINAKA, on the 25th day of July 2021, at Naqara, in Taveuni, in Northern Division, stole 1 x Kambrook hair trimmer set, 1 x Samsung A21S phone, 1 x Samsung S20FE phone, 1 x Samsung S21 phone, 1 x Vivo Y11S phone, 1 x Xiaomi Redmi 20000MAH 18w Powerbank, 1x Ziomi MI 10000 MAH wireless Powerbank, 1 x Xiaomi MI 20w wireless car charger, 1 x Zebronics USB Optical Mouse, 3 x Scagate 1 TB expansion portable Hard drive, 1 Apple 20w USB charge head, 9 x Smartphone tempered glass, which all belonged to **COURTS (FIJI) LIMITED**

2. They initially pleaded not guilty to the charges and on the day fixed for trial, changed their pleas to guilty for all the four counts in the information. They confirmed the pleas of guilty were made of their own accord, having received legal advice from their counsel.
3. They agreed with the summary of facts read by the Prosecution. The facts sustain the charge.
4. I am satisfied the guilty pleas were voluntary and informed. I am further satisfied they understand and accept as true the Prosecution's summary of facts.
5. I find both accused guilty and convict them accordingly.

6. The facts are that on the days leading up to the 25th July 2021, the two accused had been following developments on "Bill 17" with proposed amendments to legislation dealing with iTaukei land. From information received over the radio and from social media, they formed the view that the bill would adversely affect the land rights of the iTaukei community and therefore themselves. They thought the Muslim community was responsible for the changes in the law and as a result, shared a hatred of the Muslims owing to this.
7. Led by Accused 2, they planned to burn the mosque, Ali's Fashion Store which is owned by a Muslim, and also Courts Fiji Ltd since its manager was a Muslim.
8. Thus at about 2:30am on 25 July 2021, they met at Accused 1's home and headed into Taveuni town. They were both armed and carried a bottle each of fire accelerants, namely, kerosene and pre-mixed fuel. Accused 1 also had a pinch bar and a bag to carry the goods they would steal.
9. At the mosque, they sprayed petrol on the floor, lit the pieces of paper they had taken with them as well as pieces of cardboard boxes they found at the place, and set alight the places in the mosque where they had put benzene and kerosene. They fled the scene as soon as they saw the building start to catch fire. The mosque did not burn down however, owing to the quick action of people who doused the fire in time.
10. Next, the accused went to Ali's Fashion Store, a shop owned by a Muslim. They came from the back of the shop, poured kerosene and benzene around the door and the verandah and then lit pieces of paper and ignited the places where they had poured kerosene and benzene. As a result, the shop burnt to the ground.
11. After setting the store alight, they ran towards the Courts Fiji Limited store, broke down the glass door with the pinch bar, and forced themselves into the shop. Once inside, they stole a number of electronic items including mobile phones, power banks, hard drives, wireless car charger, and optical mouse before fleeing the scene.
12. With the help of Vodafone personnel, investigations led to one of the stolen phones being used by Accused 1's sister. The accused were charged following Police investigations.

Mitigating factors

13. Common mitigating factors are the cooperation with the Police, guilty pleas and substantial recovery of stolen items. Both are first time offenders. The guilty pleas were not made early and an indication that there would be a change of plea was made only on the eve of the trial, after the State had summoned its witnesses.
14. Credit for initial cooperation with the Police must be taken in context of the subsequent challenge to the voluntariness of the admissions in the cautioned interview statements and the delay in proceedings on account of this. Notwithstanding the lateness, the guilty pleas have nevertheless saved time and resources. Both accused say they are remorseful, seek the leniency of the Court and apologise to the victims and the community as a whole. Both say they realize they made a mistake.
15. They say they committed these offences as a result of the things they had heard on the radio and social media. They heard oppositions to the Bill and formed the view that the bill was designed to deprive the Ii Taukei people of their land rights. They felt that the Muslim community was responsible and to protect their land rights, Accused 2 asked Accused 1 to be part of his plan and Accused 2 agreed.
16. Accused 1 is 21 years old. He is single and was 19 years old at the time of offending. He resides with his parents and assists with work on the farm. He admitted the offence when interviewed by the Police during investigations. He volunteered information that other stolen items were with him.
17. Accused 2 is 27 years old and single. Prior to being charged with these offences, he was a carpenter earning \$250 per week and helped support his siblings who are still schooling. He has lived with a maternal uncle since birth.
18. Both of them produced letters from the village headman and a pastor, vouching for their good character and behavior in the village. This is of limited value in mitigation.

Aggravating factors

19. The element of planning and pre-meditation involved, the shared intention to encourage others around the country to engage in similar types of offending, and the intention to

target unsuspecting members of a particular community on the basis of rumours, are serious aggravating factors. The accused persons had no regard for the rights of and loss to the owners of the properties affected by fire and by the aggravated burglary and theft. With the shop burnt to the ground, the loss of about \$150,000 to the owner is substantial. The burning of a shop in a small town would have also been to the disadvantage of the buying public.

20. Though the damage and financial loss to the mosque was minimum, the victim impact statement shows that the fire caused fear amongst Muslims who worship there. A person has had to be assigned to look after the mosque following the attempted arson. That the target of the attempted arson is a place of worship, is an aggravating factor.
21. Going armed to commit these offences is also an aggravating factor.

Sentencing principles

22. The maximum penalty for attempted arson is 14 years imprisonment. In *State v Seru* [2016] FJHC 841, the accused persons had murdered the victim and tried to conceal the evidence by attempting to burn down his house. Said Madigan J at [15]-[16]:

There is no predetermined tariff for the crime of attempted arson **but the accepted sentences for arson itself range from 2 years to 10 years.** Two years has been held to be appropriate where there is no danger to human life and 4 years where there is such a danger. These are sentences passed for a crime with the maximum penalty of life imprisonment, and there is no reason why a tariff for attempted arson should be more.

If then there is an attempt to burn down a building then an appropriate sentence would start from a term of two years. If the attempt is to harm persons inside the building or is reckless as to whether there would be harm to inhabitants then the sentence should be one of at least 4 years. If the attempt is an attempt to effect large scale arson, for example on a large scale shopping area or a sensitive Government building then the sentence could be in the range to 7 to 10 years. (See *Damodar Naidu & Anor v R.* C.A. (1978) FLR93).

23. Sentences for attempted arson have been suspended where offenders had pleaded guilty early and expressed remorse. (*State v Chand*, Criminal Case No. HAC 250 of 2020, at [4]; see also *State v Bolaciri* - Sentence [2019] FJHC 1184; HAC79.2019 (20 December 2019), and; *State v Nuku* - Sentence [2020] FJHC 1060; HAC372.2018 (9 December 2020))
24. The seriousness of the offence of arson is perhaps best reflected in the maximum penalty of life imprisonment for it.
25. In *Naidu v Reginam* [1978] FijiLawRp 23; [1978] 24 FLR 93 (3 August 1978), the appellants were **convicted for arson following a trial** in the High Court, for setting alight four sets of premises in a block of shops with domestic premises at the rear. At first instance, accused 1 was sentenced to seven years imprisonment and accused 2, to ten years imprisonment. On appeal against sentence, the Court of Appeal was referred to *R v. Shah* (S.C. 10/1957) where the offender was sentenced to four years imprisonment for burning his own premises. The Court of Appeal was of the view that *Shah* (supra) did not compare to the more serious circumstances of the case before it in light of the magnitude of property loss in which innocent neighbours were involved, and the risk to persons sleeping in the said premises. These reasons led the trial judge to pass the heavy sentences of seven and ten years respectively and the Court of Appeal found the sentences neither manifestly excessive nor wrong in principle.
26. The tariff for arson ranges from 5 – 12 years imprisonment on conviction after trial. (*Nakato v State* [2018] FJCA 129; AAU74.2014 (24 August 2018))
27. In *State v Nair* - Sentence [2019] FJHC 744; HAC173.2019 (29 July 2019), Aluthge J stated:

It appears that the tariff ranging from 5 to 12 years is applicable only when a conviction is recorded after trial. You have pleaded guilty at the first available opportunity so your sentence will not attract the new tariff set by the Court of Appeal.

Until the said tariff for Arson was prescribed in *Nakato v State* (supra), the courts in Fiji applied the tariff set between 2 and 4 years imprisonment (See ; *Kelemedi Lagi and Others v State (H.A. 0004 of 2004S)*, *Niko Lesu and Sunia Vosataki v State (Criminal*

Appeal No. AAU 058 of 2011). It can be assumed that the old tariff between 2-4 years imprisonment remains in force and still applicable when it comes to sentencing an offender who, as a mark of genuine remorse, has pleaded guilty at the first available opportunity.

28. In State v Raicebe [2011] FJHC 729; HAC208.2011 (17 November 2011), the three accused were charged with four counts of sedition, five counts of arson, and four counts of arson of crops. The five counts of arson were in respect of burning of bures at two different Police posts, two bus shelters and a beach bure. The three counts of arson of crops were for setting fire to three cane farms.
29. They were sentenced to 4 years 6 months imprisonment for the sedition counts. For the two Police bure arsons, the accused were sentenced to 4 years 6 months imprisonment. For burning bus shelters and a beach bure, they were sentenced to 4 years imprisonment. For arson of crops, they were sentenced to 2 years imprisonment.
30. All sentences were to be served concurrently. After a further deduction of 18 months for the guilty pleas, accused 1 was sentenced to 3 years imprisonment. Accused 2 and 3 were sentenced to 2 years imprisonment following a further discount of 1 year for their lesser roles in the offending.
31. The maximum penalty for aggravated burglary is 17 years imprisonment. In Kumar & Vakatawa v The State AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022), the Court of Appeal issued a guideline judgment in respect of sentencing for aggravated burglary cases.
32. According to Vakatawa (supra), to decide the level of harm in the offending, a sentencing Court must first determine the harm caused or intended. Harm may be physical and/or psychological. Thus the lesser the harm, the lower the starting point. In the same way, cases with more serious harm will attract higher starting points.
33. I use the guidelines in Vakatawa (supra) in sentencing for the aggravated burglary charge.
34. The offenders were in each other's company and were armed. A pinch bar was used to break the glass to the main door and to the display case where the electronic items were

kept in the shop. A number of electronic items of value were stolen. Except for a few items, most were recovered.

35. I consider the offending falls within the medium category, between the greater and lesser harm as categorized in Vakatawa (supra). The starting point is 7 years imprisonment, with a sentencing range of 5 to 10 years imprisonment.

36. The maximum penalty for theft is 10 years imprisonment. The tariff for a first theft offending which this is, is 2-9 months imprisonment. (Ratusili v State Criminal Appeal No. IIAA 011 of 2012, decision of 1 August 2012)

37. In sentencing the accused, the Court expresses no political view and makes no comment as to the correctness or otherwise of the Bill which the accused say caused them to commit these offences. They are sentenced only on the law in respect of the charges they have pleaded guilty to, and on the facts which they have admitted.

38. For arson, I take a starting point of 4 years imprisonment, add 6 years for the serious aggravating features, and deduct 3 years for the cooperation with Police, ^{and} previous good character ~~and previous good character~~. For Accused 1, I would deduct a further 1 year for his young age at the time of offending.

39. For the guilty pleas entered belatedly in the proceedings, I would deduct a further 2 years, leaving now an interim total of 4 years imprisonment for Accused 1, and 5 years for Accused 2.

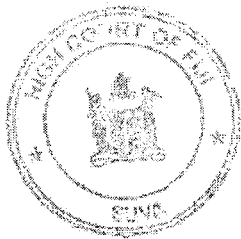
40. For attempted arson, I sentence both accused to 2 years imprisonment.

41. For aggravated burglary, I sentence both accused to 4 years imprisonment and for theft, 8 months imprisonment.

42. The sentences are to be served concurrently to each other, which means that the total sentences to be served is:

1. For Accused 1: 4 years imprisonment
2. For Accused 2: 5 years imprisonment

43. Suspension is inappropriate. A custodial sentence is inevitable in all the circumstances of this case. I consider specific and general deterrence and denunciation as the primary purposes of sentencing in this case. A clear message ought to be sent out that wilfully and unlawfully setting fire to property will not be tolerated by the Courts.
44. Accused 1 will serve 4 years imprisonment, with a non-parole period of 3 years.
45. Accused 2 is sentenced to 5 years imprisonment, with a non-parole period of 3 years, 6 months.




Sivainu E. Bull
JUDGE

Solicitors:

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