

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 148 OF 2017S

STATE

Vs

1. JONE VONU
2. ASAELI BULITAUTINI
3. WAISAKE LOABURE
4. IOSEFO LOMACA
5. ROVERETO TAMANIVALU

Counsel : Ms. L. Bogitini and Ms. S. Tivao for State
Ms. L. Ratidara for Accused No. 1
Mr. S. Valenitabua for Accused No. 2
Ms. S. Daunivesi for Accused No. 3
Ms. S. Hazelman for Accused No. 4
Ms. A. Prakash for Accused No. 5

Hearings : 13, 14, 15, 16, 17, 20, 21 and 22 August, 2018

Summing Up : 23 August, 2018

Judgment : 23 August, 2018

Sentence : 24 August, 2018

SENTENCE

1. On 13 August 2018, Accused no. 2 and 4, in the presence of their counsels, pleaded guilty and were convicted of the following counts in the following information:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

JONE VONU, ASAELI BULITAUTINI, WAISAKE LOABURE, IOSEFO LOMACA and ROVERETO TAMANIVALU, in company of each other, between the 1st of May, 2017 and the 2nd of May, 2017 at Raiwaqa in the Central Division, broke into the property of **TARUSILA BULAI LADINIWASA** with the intention to commit theft.

COUNT TWO

Statement of Offence

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

Particulars of Offence

JONE VONU, ASAELI BULITAUTINI, WAISAKE LOABURE, IOSEFO LOMACA and ROVERETO TAMANIVALU in company of each other between the 1st of May, 2017 and the 2nd of May, 2017 at Raiwaqa in the Central Division, dishonestly appropriated assorted properties, as particularized in the attached Annexure A (not included), to the approximate value of FJ \$20,212.00 the property of **TARUSILA BULAI LADINIWASA** with the intention to permanently deprive the said **TARUSILA BULAI LADINIWASA** of her property.

2. Accused no. 1, 3 and 5, through their counsels, indicated they wanted a trial. On 14 August 2018, in the presence of their counsels and three assessors, they pleaded not guilty to the counts in the abovementioned information. The matter then proceeded to trial for 7 days before myself and the three assessors. I summed up the case yesterday and the three assessors retired to deliberate. After 45 minutes, the assessors returned with a unanimous opinion finding accused no. 1, 3 and 5 guilty as charged on count no. 1 and 2. In a judgment delivered yesterday, I agreed with the three assessors, found accused no. 1, 3 and 5 guilty as charged on both counts, and convicted them accordingly on the same.
3. The brief facts of the case were as follows. After serving in the British Army as a soldier for 12 years, Mr. Metuisela Ladiniwasa returned to Fiji and married Ms Tarusila Bulai (PW1). They had a young daughter. The couple decided to buy a flat at Lagilagi Housing, at Gaji Road, Samabula. Residing in their neighbourhood in the Jittu Estate area and nearby areas were the five accuseds' families. On 1 May 2017 (Monday) at 5.30 am, PW1 left their house locked and went to Cunningham Road, Tamavua to spend time with their extended families. Her daughter was also there. The couples' house was empty when she went.

4. On 2 May 2017, after 2 am in the morning, all the accuseds broke into the couples' flat and stole \$20,212 worth of properties. The details of the properties were itemized in the information in count no. 2. The accuseds then carried the properties to the house of Accused no. 2's wife, a so called Di Ana. The house was located nearby at Jittu Estate. Part of the property was taken by Acused No. 4 on the same night to be disposed off somewhere. At Di Ana's house, the accuseds discussed how the stolen properties were to be sold. From midday 2 May 2017 to the evening, the accuseds began consuming alcohol at Di Ana's house.
5. The matter was reported to police. An investigation was carried out. \$9,000 worth of properties were recovered, largely from Di Ana's house, by the police. All the accuseds were later arrested by police. They were processed in the courts. They were later found guilty as charged and convicted on both counts on 13 and 23 August 2018.
6. "Aggravated burglary", is an indictable offence, and viewed seriously by the Parliament of Fiji. It carried a maximum penalty of 17 years imprisonment. After the coming into force of the Crimes Act 2009 on 1 February 2010, the courts had often used the tariff applicable under the repealed Penal Code, as the tariff for "aggravated burglary". The tariff used was 2 to 3 years imprisonment: see **Viliame Gukisuva v The State**, Criminal Appeal No. HAA 117 of 2007, High Court, Suva; **State v Lesumailodoni and Others**, Criminal Case No. HAC 094 of 2013S, High Court, Suva; and **State v Kelepi Ledua**, Criminal Case No. HAC 302 of 2016S, High Court, Suva. It must be noted that under the repealed Penal Code, the maximum penalty was life imprisonment (section 299 of the Penal Code). From 2010 to 2018, "aggravated burglaries" and "burglary" cases had mushroomed in the courts, leading to some questioning whether or not the 2 to 3 years tariff was working, given that the maximum penalty prescribed by Parliament, for the protection of society, was 17 years imprisonment.
7. In **State v Shavneel Prasad**, Criminal Case No. HAC 254 of 2016, High Court, Suva, His Lordship Justice Vinsent S. Perera reviewed the current sentencing tariff for burglary, aggravated burglary, theft, robbery and aggravated robbery. His Lordship was of the view that the current sentencing tariff used were inadequate to tackle the mushrooming of burglary/aggravated burglaries cases. In paragraph 16 of **State v Shavneel Prasad**, (supra), His lordship said the following:

“...In view of the tariff of 2 years to 7 years for the offence of robbery which carries a maximum penalty of 15 years, in my view the tariff for burglary which carries a maximum penalty of 13 years should be an imprisonment term within the range of 20 months to 6 years. Further, based on the tariff established by the Supreme Court for the offence of aggravated robbery, the tariff for the offence of aggravated burglary which carries a maximum sentence of 17 years should be an imprisonment term within the range of 6 years to 14 years...”

8. The tariff for burglary and aggravated burglaries is now in a state of uncertainty. How should the courts react to the above? We must look at what Parliament is telling the courts through its legislation. We must implement the intention and will of Parliament as expressed in the words of the Statutes.
9. Section 4(1) of the Sentencing and Penalties Act 2009 reads 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...”**
10. It could be seen from section 4(1)(a), (b) and (c) of the Sentencing and Penalties Act 2009 that, in terms of priority, Parliament puts “the punishing of offenders in a manner which is just” as top priority, followed by the “protection of the community from offenders” as the next priority and “deterrence”, as the third priority. “Rehabilitation” is the fourth priority. In section 4(2)(a) of the Sentencing and Penalties Act 2009, the courts are required to take note of the maximum penalty prescribed for the offence. Given Parliament’s intention as expressed in section 4(1) of the Sentencing and Penalties Act 2009, and the need to protect the community from offenders, I am persuaded to accept the tariff set by State v Shavneel Prasad (supra) in paragraph 7 hereof. However, the final sentence will depend on the aggravating and mitigating factors.

11. The maximum penalty for "theft", contrary to section 291(1) of the Crimes Act 2009 is 10 years imprisonment.

12. The aggravating factors were as follows:

- (i) **Breach of Neighbourly Trust;** All accuseds are neighbours of the complainants. As such they should look after each other. This is essential to promote peace in the community. However, each of you breached the complainant's right by breaking into their house and stealing their properties.
- (ii) **Pre-Planning of a Raid.** It is obvious that all of you planned this operation against the complainants. You had no regard for their rights as a family to enjoy the comforts of their house. You planned and raided their house with no regard to their property rights. Obviously you wouldn't like the same thing to be done to your family. For terrorising this family, you will have to serve a custodial sentence, as a lesson to respect other people's rights, and you should not complain of the same.
- (iii) By offending against this family, each of you had caused sadness and heartache to this family, and you will have to pay with a prison sentence.

13. The mitigating factors were as follows:

- (i) All of you are first offenders;
- (ii) For accused no. 2 and 4, you both pleaded guilty at the date of trial. This was not an early guilty plea, but certain deduction will be made because you save some court's time.
- (iii) Accused no. 1, 2 and 3, you have each been remanded in custody for approximately 1 year 4 months. Accused no. 4, you had been remanded in custody for approximately 1 year; and accused no. 5, you had been remanded in custody for approximately 10 months.

14. On count no. 1 (aggravated burglary), for each accused, I start with 7 years imprisonment. I add 3 years for the aggravating factors, making a total of 10 years imprisonment.

15. For accused no. 1, 2 and 3, for time already served while remanded in custody, I deduct 1 year 4 months from the 10 years, leaving a balance, for each of you, 8 years 8 months imprisonment.
16. For accused no. 4 and 5, for time already served while remanded in custody, I deduct 1 year from the 10 years, leaving a balance of 9 years imprisonment, for each of you.
17. For being first offenders, I deduct 3 years from the balance of your sentences. That means, Accused no. 1, 2 and 3, have a balance of 5 years 8 months imprisonment; and Accused no. 4 and 5, a balance of 6 years imprisonment each. For pleading guilty at the start of the trial, I deduct 2 months from Accused no. 2 and 4's sentences
18. On count 2 (theft), I sentence each of you to 3 years imprisonment.
19. The summary of your sentences are as follows:

- (i) Count No. 1: Aggravated Burglary : Accused No. 1 – 5 years 8 months imprisonment
Accused No. 2 – 5 ½ years imprisonment
Accused No. 3 – 5 years 8 months imprisonment
Accused No. 4 – 5 year 10 months imprisonment
Accused No. 5 – 6 years imprisonment

- (ii) Count No. 2 : Theft : Accused No. 1 – 3 years imprisonment
Accused No. 2 – 3 years imprisonment
Accused No. 3 – 3 years imprisonment
Accused No. 4 – 3 years imprisonment
Accused No. 5 – 3 years imprisonment

20. Because of the totality principle of sentencing, I direct that all the above sentences be made concurrent to each other, making a total sentence as follows:

- (i) Accused no. 1 - 5 years 8 months imprisonment
(ii) Accused no. 2 - 5 years 6 months imprisonment
(iii) Accused no. 3 - 5 years 8 months imprisonment
(iv) Accused no. 4 - 5 years 10 months imprisonment
(v) Accused no. 5 - 6 years imprisonment

21. The above sentences are to take effect forthwith, and I will not fix a non-parole period.
22. Pursuant to section 4(1) of the Sentencing and Penalties Act 2009, the above sentences are designed to punish each of you in a manner that is just in all the circumstances, to protect the community from young misguided and idle youths like you; to deter other like-minded youths like you and to signify that the court and the community denounce what you did to the complainants in this case.
23. You are given 30 days to appeal to the Court of Appeal.




Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused No. 1 : **Legal Aid Commission, Suva**
Solicitor for Accused No. 2 : **S. Valenitabua, Barrister and Solicitor, Suva**
Solicitor for Accused No. 3 : **Legal Aid Commission, Suva**
Solicitor for Accused No. 4 : **Legal Aid Commission, Suva.**
Solicitor for Accused No. 5 : **Legal Aid Commission, Suva**