

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 92 of 2018

STATE

V

1. TAIONE WAQA

2. LEDUA TIKOTANI

3. SAIRUSI NAIROSO

Counsel : Ms. Sujata Lodhia for the State
Mr. Anil Chand for the 1st Accused

Sentence Hearing : 3 October 2018

Sentence : 17 October 2018

SENTENCE

[1] **Taione Waqa**, you were charged along with Ledua Tikotani and Sairusi Nairoso on the following Consolidated Information:

COUNT 1

Statement of Offence

BURGLARY: contrary to Section 312(1) of the Crimes Act 2009.

Particulars of Offence

TAIONE WAQA on the 23rd day of January 2018 at Nabua in the Central Division, entered into **SUBRAIL'S FURNITURE SHOP** as a trespasser, with intent to commit theft therein.

COUNT 2

Statement of Offence

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

Particulars of Offence

TAIONE WAQA on the 23rd day of January 2018 at Nabua in the Central Division, dishonestly appropriated 1 x money safe box approximately valued at \$1,000, the property of **SUBRAIL'S FURNITURE SHOP** with intention of permanently depriving **SUBRAIL'S FURNITURE SHOP** of its property.

COUNT 3

Statement of Offence

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

Particulars of Offence

LEDUA TIKOTANI & SAIRUSI NAIROSO with another on the 23rd day of January 2018 at Nabua in the Central Division, entered into **SUBRAIL'S FURNITURE SHOP** as trespassers, with intent to commit theft therein.

COUNT 4

Statement of Offence

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

Particulars of Offence

LEDUA TIKOTANI & SAIRUSI NAIROSO with another on the 23rd day of January 2018 at Nabua in the Central Division, dishonestly appropriated 1 x Genpower brand generator approximately valued at \$499; 1 x TCL brand 32 inch LED television approximately valued at \$849 and 1 x TCL brand 40 inch LED television approximately valued at \$1,299; all to the total value of \$2,647; the properties of **SUBRAIL'S FURNITURE SHOP** with intention of permanently depriving **SUBRAIL'S FURNITURE SHOP** of its properties.

- [2] From the record I find that the State filed Consolidated Information in Court on 2 May 2018. As per the Consolidated Information filed only counts 1 and 2 are in respect of you.
- [3] When this matter was called next, before His Lordship Justice Daniel Goundar, on 15 May 2018, your plea was taken. Accordingly, you pleaded not guilty to both counts 1 and 2 in the Consolidated Information.
- [4] When the matter came up before me on 11 September 2018, your plea was taken once again. You pleaded guilty to both counts 1 and 2 in the Consolidated Information. Court was satisfied that you fully understood the nature of the charges against you and the consequences of your pleas. Court found that you pleaded guilty on your own free will and free from any influence.
- [5] Thereafter, the State filed the Summary of Facts against you. On 18 September 2018, the Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the counts 1 and 2 in the Consolidated Information, and found both counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of both counts 1 and 2 as charged.
- [6] I now proceed to sentence you.
- [7] The Summary of Facts filed by the State was that:
 1. *The complainant (PW1) in the matter is Avinesh Anand Chandra, 37 years old, Manager at Subrail's Furniture Shop, Nabua, resides at Lot 37, Stage 3 Balolo, Narere.*
 2. *The accused is Talone Waqa, 26 years old, waiter, resides at Wailea Settlement, Raiwaqa.*

3. *The accused is charged and has voluntarily pleaded guilty to 1 count of burglary and theft contrary to Section 312(1) and 291 (1) of the Crimes Act 2009.*
4. *On 22nd January 2018, at about 5.45 p.m., the complainant after work, securely locked up Subrail's Furniture Shop at Nabua.*
5. *On 23rd January 2018, at about 7.50 a.m., the complainant went to work. When he tried to open the main door he noted that it was already opened. The complainant then went to the top floor to get money. When the complainant went to the office area, he saw that items were scattered and a money safe box valued at \$1,000 was missing. There was no cash inside it.*
6. *The complainant further noted that 1 x TCL brand 40 inch LED TV valued at \$1,299; 1 x TCL brand 32 inch LED TV valued at \$849 and 1 x Genpower brand generator valued at \$499 were also missing from the display areas.*
7. *Matter was reported to Nabua Police Station and investigations led to the accused being arrested on 25th January 2018.*
8. *The accused was interviewed under caution on 26th January 2018.*
9. *In his interview, the accused states that on 23rd January 2018 at about 3.00 a.m., he was drinking spirit in Nabua at the corner shop with his friend namely Lavenia.*
10. *He then went into Subrail's furniture shop. He saw that the padlock was opened so he removed the chain. The accused states that he went along to get some water since he has always been using the tap inside.*
11. *The accused further states that when he went inside the yard, he saw that the window was opened. He then entered the shop through the window. At that particular time, the accused was wearing a green hood, blue shorts and no shoes.*
12. *After he entered the shop, he went into the office, took the money safe box and came outside. He then hid it at the vacant land which was behind Extreme Rentals. After he hid the box, he went to drink again with his friend Lavenia.*
13. *When he finished drinking, he went to check the money safe box and saw that it was missing. He states that he does not know who took the money safe box.*

14. *He states that he does not know anything about the 2 TV's and 1 generator that were also stolen from the shop.*
15. *There is a CCTV footage that was shown to the accused and he identifies himself in the footage at **3.05 a.m.** because of the clothes he was wearing, the gestures and the fact that he was carrying the money safe box.*
16. *The accused later explains in his interview that he was the one who opened the window in the shop. He was inside the shop in the afternoon before it closed and this is when he opened the sliding window. A copy of the caution interview is attached herewith as Annexure 1."*

- [8] Taione you have admitted to the above Summary of Facts and taken full responsibility for your actions.

You have submitted that at the time of offending you were drunk. You saw the shop window broken and entered to steal. You stole a safe box from the shop and hid it at the vacant land and then went to drink again. However, later on when you came to check on the safe box at the same place where you had hidden it, to your surprise you found it missing.

- [9] Section 4 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. I have duly considered these factors in determining the sentence to be imposed on you.

- [10] In terms of Section 312 (1) of the Crimes Act No. 44 of 2009 ("Crimes Act"):

"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 Burglary in terms of Section 312 (1) of the Crimes Act carries a maximum penalty of 13 years imprisonment.

- [11] The tariff for the offence of Burglary has varied between 12 months to 3 years imprisonment and 18 months to 3 years imprisonment. This tariff has been adopted in several decided cases: **Waqavanua v. State** [2011] FJHC 247; HAA 13.2011 (6 May 2011); **Gonerogo v. State** [2013] FJHC 163; HAA 22.2012 (5 April 2013); **State v. Seninawanawa** [2015] FJHC 261; HAC 138.2012 (22 April 2015); **Talakuba v. State** [2016] FJHC 1121; HAA 37.2016 (13 December 2016); **Vuli v. State** [2017] FJHC 17; HAA 53.2016 (23 January 2017); and **State v. Mate** [2018] FJHC 249; HAC 76.2018 (3 April 2018).

[12] 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.

[13] 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."

[14] Considering the fact that the theft in this case involved property to the total value of \$1,000, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment.

[15] 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."

[16] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Taione, I commence your sentence at 18 months for the first count of Burglary.

[17] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Taione, I commence your sentence at 6 months for the second count of Theft.

[18] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You paid no regard to the privacy of a shop owner. This was a crime targeted at a commercial property. By your act, you have disturbed the peace of the community and have contributed to the issue of safety of other similar commercial property owners.
- (iii) There was pre-meditation on your part in committing these offences. You were inside the shop in the afternoon the day prior to the incident. You used that opportunity to leave the sliding window of the shop opened. You later returned to the building to commit the offence knowing very well that the furniture shop was not occupied or operational at that time.
- (iv) The money safe box valued at \$1,000.00 was not recovered.
- (v) You are now convicted of multiple offending.

[19] In mitigation you have submitted as follows:

- (i) That you fully cooperated with the Police when you were taken in for questioning and admitted to the offending in your caution interview statement instead of trying to circumvent the course of justice.
- (ii) You have sought forgiveness from this court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions.
- (iii) That you entered a guilty plea at an early stage of these proceedings.

[20] You are not a first offender. In terms of the previous convictions report filed by the State, there are several active previous convictions in your name, including a property offence as well.

[21] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence for count one is 4 years and six months. Your sentence for count two is 3 years and six months.

[22] I accept that you that you have co-operated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 2 years from your sentence. Now your sentence for count one is 2 years and six months. Your sentence for count two is 1 year and six months.

[23] I accept that you entered a guilty plea at an early stage of these proceedings. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you further discount of 6 months for count one. Since I propose to make your sentences concurrent I do not deem it necessary to grant you any further discount for count two in lieu of this factor.

[24] In the circumstances, your sentence is as follows:

Count 1 - Burglary contrary to Section 312 (1) (a) of the Crimes Act – 2 years' imprisonment.

Count 2 - Theft contrary to Section 291 (1) of the Crimes Act – 1 year and 6 months' imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term of imprisonment will be: 2 years' imprisonment.

[25] The next issue for consideration is whether your sentence should be suspended.

[26] 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.

[27] Taione you are now said to be 30 years of age. You are married with 3 children. You were employed as a waiter at Bar 88 and was a sole income earner of your family.

[28] You have admitted that what you did was wrong, and taken full responsibility for your actions. You have also promised that you would lead a crime free life if you are granted a non-custodial sentence.

[29] It cannot be denied that the two offences you have committed are serious offences, and the prevalence of these offences are rapidly increasing in our society today. As a result, the safety and security of every law abiding citizen is at peril. You have

perpetrated these offences at a reputed business establishment. Such business establishments are also at peril.

[30] Furthermore, you are not a first offender, since there are several active previous convictions against you, which includes a property offence as well.

[31] Section 4 (1) of the Sentencing and Penalties Act provides:

“(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”.

[32] Taking all these factors into consideration, I am not inclined to grant you a suspended sentence.

[33] However, I will refrain from imposing a non-parole period against you in terms of Section 18 of the Sentencing and Penalties Act.

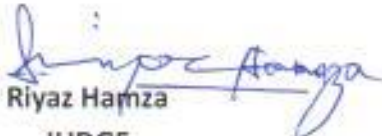
[34] Section 24 of the Sentencing and Penalties Act reads thus:

“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”

[35] You were remanded for this case after you were arrested on 25 January 2018. On 30 January 2018, you have escaped from custody after appearing for another matter before the Suva Magistrate’s Court. You were rearrested on 26 February 2018. On 19 March you were sentenced by the Suva Magistrate’s Court for 5 months and 11 days imprisonment for escaping from lawful custody. You completed serving that sentence on 30 August 2018. You have been in remand custody for this case since that day.

- [36] The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.
- [37] In the result, your final sentence will be 2 years' imprisonment. Considering the time you have spent in remand, the time remaining to be served would be 1 year and 9 months imprisonment.
- [38] 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 17th Day of October 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the 1st Accused : Office of the Legal Aid Commission, Suva.