

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 49 of 2019

STATE

V

SEREVI VASUCA AND ANOTHER

Counsel : Mr. T. Tuenuku for the State.
: Ms. V. Diroiroidi [LAC] for the Accused.

Date of Hearing : 31 July, 2019
Date of Sentence : 12 August, 2019

SENTENCE

1. The accused Serevi Vasuca was charged in the Magistrate's Court at Ba for one count of Aggravated Burglary and one count of Theft. After the matter was transferred to the High Court, the charge of Aggravated Burglary was reduced to a count of Burglary with the count of Theft being retained by the Director of Public Prosecution.
2. The accused now faces a count of Burglary and a count of Theft by virtue of the amended information filed by the Director of Public Prosecutions dated 29th May, 2019.

FIRST COUNT

Statement of Offence

BURGLARY: Contrary to section 312 (1) of the Crimes Act 2009.

Particulars of Offence

SEREVI VASUCA between the 22nd day of February and the 23rd day of February 2019 at Ba Town, in the Western Division, entered the **BOMBAY PIZZA PALACE** restaurant owned by **TAPAN KUMAR DASS**, as a trespasser with the intention to steal from therein.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SEREVI VASUCA between the 22nd day of February and the 23rd day of February 2019 at Ba Town, in the Western Division, dishonestly appropriated (stole) the following items:

- a) 5 x 40 oz liquor;
- b) 3 ½ bottles Regal Gin;
- c) 1 ½ bottle Bounty Rum;
- d) Cash worth \$52.00;

all to the total value of \$1,448.00 the property of TAPAN KUMAR DASS, with the intention of permanently depriving the said TAPAN KUMAR DASS of the said properties.

3. On 6th June, 2019 the accused who was represented by counsel pleaded guilty to the above two counts. Thereafter on 20th June, 2019 the accused understood and admitted the summary of facts read by the State Counsel as follows:

“ The accused is Serevi Vasuca, 25 years old, Unemployed and resides at Sorokoba, Ba.

The complainant is Tapan Kumar Dass (PW1), 57 years old, Businessman of Kula Street, Varadoli, Ba. The complainant is the owner of Bombay Pizza Palace, located at Ba Town.

On 22nd of February 2019 at about 9.30pm, the complainant locked and closed his restaurant before going home. At about 8am the next morning, 23rd of February 2019, the complainant’s wife and another staff went to open the restaurant, they noticed that the kitchen window were broken; someone had broken into the restaurant with the following items missing:

- a) 5 x 40 oz liquor;*
- b) 3 ½ bottles Regal Gin;*
- c) 1 ½ bottle Bounty Rum;*
- d) Cash worth \$52.00.*

A total of \$1,448.00 worth of items was stolen.

The complainant then reported the matter to Ba Police Station. Upon investigation the Accused was arrested on the 26th of February, 2019 and interviewed by WDC 3795 Virisila Rakadi (PW2), he confessed breaking into the complainant shop and stealing from therein alone (q & a 31 – 55). Further the accused claimed that he only stole the 5 x 40 oz liquor, 3 x bottle of Gin; 1 x ½ bottle of Rum and \$52.00 worth of cash from the till and did not steal any carton of beer (q & a 96). (Copy record of interview is attached). There were no recoveries. The accused cooperated with Police Investigation.

4. After considering the summary of facts read out by the State Counsel which was admitted by the accused and upon reading his caution interview dated 26th February, 2019 this court is satisfied that the accused has entered an unequivocal plea of guilty on his freewill. This

court is also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts also satisfies all the elements of both the offences.

5. In view of the above, this court finds the accused guilty as charged and he is convicted of one count of burglary and one count of theft.

6. The two offences for which the accused has been convicted are founded on the same facts hence it is only proper that an aggregate sentence is imposed.

7. Section 17 of the Sentencing and Penalties Act states:

“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.”

8. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the two offences.

9. Both counsel filed helpful sentence and mitigation submissions for which this court is grateful.

10. The counsel for the accused presented the following personal details and mitigation on behalf of the accused:

- a) The accused is 24 years of age;
- b) Single;

- c) Educated up to form 6, was enrolled for a Diploma in Forestry but could not complete the remainder of six months due to financial constraints;
- d) Was a trainee Miner at the Vatukoula Gold Mine;
- e) Successfully completed his fitness test to become a Fireman;
- f) Helps his father in the farm;
- g) He has learnt his lesson, promises not to reoffend;
- h) Regrets what he has done and is remorseful;
- i) Apologies to the victim and seeks the court's forgiveness;
- j) Has pleaded guilty at the earliest opportunity;
- k) Takes responsibility for his actions;
- l) Co-operated with the police.

TARIFF

11. The maximum penalty for the offence of burglary is 13 years imprisonment. The accepted tariff for this offence is a sentence between 1 year and 3 years imprisonment (*see Viliame Waqavanua vs. State, Criminal Appeal No. HAA 013 of 2011, 6th May, 2011*), *Penaia Ratu vs. State, Criminal Case No. HAA 95 of 2017*).
12. For the offence of the theft the maximum penalty is 10 years imprisonment.
13. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:
 - “(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.”*

AGGRAVATING FEATURES

14. The following aggravating features are obvious:

a) Early Morning Invasion

The accused entered the shop early in the morning at about 5am. There is some degree of planning involved considering the circumstances and the manner of the offending. He was bold and undeterred when he entered the shop and then to avoid detection he turned the face of the surveillance camera to the wall.

b) Shop was targeted

A shop was targeted in the central business area of Ba Town and also such offences are becoming very prevalent in the community.

c) New offence was committed during the operational period of the suspended sentence

The accused was sentenced for the offence of theft on 24th April, 2017 for 6 months imprisonment which was suspended for 24 months. The accused reoffended on 22nd February, 2019 which

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was within the operational period of 24 months. The prosecution did not charge the accused with the offence of breaching the suspended sentence contrary to section 28 of the Sentencing and Penalties Act therefore this court cannot activate the imprisonment of 6 months.

In view of the above, this court takes this new offending which was within the operational period of the suspended sentence as an aggravating factor.

15. Considering the objective seriousness of the offending, I select 18 months imprisonment as the aggregate sentence for both the offences (lower range of the tariff). For the aggravating factors I increase the sentence by 3 years. The interim sentence of imprisonment now stands at 4 and half years imprisonment, for the early guilty plea and genuine remorse I reduce the sentence by 1½ years bringing the term of imprisonment to 3 years. The accused has a previous conviction for the offence of theft as recent as 2017 therefore he does not receive any discount for good character but for the other mitigation factors, the sentence is reduced by 6 months. The aggregate sentence is now 2½ years. The sentence is further reduced by 5 months and 7 days for the period the accused has been in remand.
16. The final aggregate sentence for the two offences is 2 years and 23 days imprisonment. Under section 26 (2) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.
17. In *State vs. Alipate Sorovanalagi and others, Revisional Case No. HAR 006 of 2012 (31 May 2012)*, Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraphs 22 and 23:

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[22] I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case.

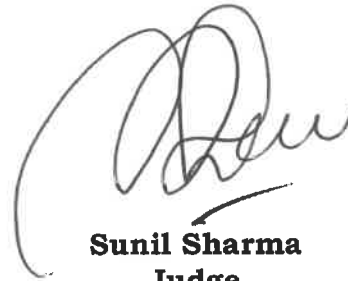
[23] In **DPP v Jolame Pita** (1974) 20 FLR 5, Grant Actg CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg CJ laid down guidelines for imposing suspended sentence at p.7:

"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."

18. The following circumstances or reasons for the offending needs to be weighed in choosing an immediate imprisonment or a suspended sentence.
19. The accused person is in his early twenties, pleaded guilty at the earliest opportunity, and he cooperated with police during investigations. On the other hand the offences committed are serious which was committed after some planning on a shop situated in the central business division during the early hours of the morning.
20. In view of the above, I consider there are no special reasons which would convince this court to impose a wholly suspended sentence. The offences committed are very much prevalent nowadays instead of doing something more meaningful in life the accused has chosen to take a short cut which is unacceptable and must be denounced in every sense of the word.
21. Although the accused person is a young offender this court has to balance rehabilitation with retribution, specific and general deterrence. In considering a partial suspended sentence this court has taken into account rehabilitation over and above retribution and deterrence.
22. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a partial suspended sentence is just in all the circumstances of the offending.
23. In summary the accused person is sentenced to 2 years 23 days imprisonment as an aggregate sentence for both the offences. The term of imprisonment is partially suspended after the accused serves 1 year imprisonment. The balance term of imprisonment of 1 year and 23 days is suspended for 2 ½ years which will become effective from

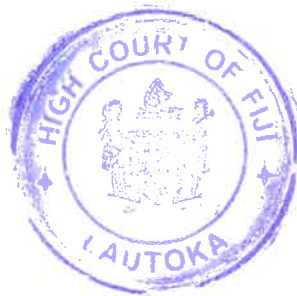
the time the accused is released from the Corrections Center. The effect of suspended sentence is explained to the accused.

24. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
12 August, 2019



Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.