

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 228 OF 2019

STATE

-v-

1. ATUNAISA KOROI JUNIOR
2. ANANAIASA VEISERE KOROI

Counsel: Ms. S. Lodhia for State
Mr. K. Prasad for 1st Accused Mr. K. Chang for 2nd Accused

Date of Sentence: 30 July 2020

SENTENCE

1. Mr. Atunaisa Koroi Junior and Mr. Ananaiasa Veisere Junior, you on the following information were jointly charged with one count of Aggravated Burglary and one count of Theft:

Count 1

Statement of offence

AGGRAVATED ROBBERY: contrary to Section 313 (1)(A) OF THE Crimes Act 2009.

Particulars of offence

ATUNAISA KOROI JUNIOR & ANANAIASA VEISERE KOROI on the 12th day of June 2019 at Suva in the Central Division in the company of

each other entered into the recording studio of **RATU JOSEFA TABAKAUCORO** as trespassers, 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

ATUNAISA KOROI JUNIOR AND ANANAIASA VEISERE KOROI on the 12th day of June 2019 at Suva in the Central Division in the company of each other dishonestly appropriated the 1 x squier Stratocaster electric guitar with case, 1 x case containing connecting cables, 1 x GT100 effects processor with case, 1 x yellow level, 1 x black bag containing GT 100 effects with cables and guitar straps, 1 x drumstick bag with accessories, 1 x blue HP laptop with charger, 4 x packets of grog, 1 x black Tuscan TH02 Headphone, 2 x amour black hand gloves, 1 x orange multimeter, 2 x soldering iron, assorted screw drivers and pliers, 2 x multi tools, 1 x multi bright light, 4 x cables, 2 x cutters, 3 x long nose pliers, 1 x clamp pliers, 1 x 32 inches grundig TV screen and 1 x gretsch acoustic electric guitar, the properties of **RATU JOSEFA TABAKAUCORO** with the intention of permanently depriving **RATU JOSEFA TABAKAUCORO** of his properties.

2. You pleaded 'not guilty' to the above charges. At the ensuing trial, you were found guilty on each count and convicted accordingly. You now come before this court for sentence.
3. The facts of the case are that the complainant, who is a businessman and a leader of a music band, was running his recording studio at No.131 Domain Road. On 12 June 2019, the complainant found his studio broken into and the musical instruments and some other items stolen. He informed the police about the break-in. On the same evening, both of you were arrested on suspicion by a team of police officers at the Suva Carrier Stand. At the time of the arrest, you were found in possession of some bags, a search upon which, the police officers found some musical instruments, accessories and tools matching the description of the goods stolen from the complainant's studio.
4. The complainant came to the police station and identified the goods found in your possession to be the stolen goods from his studio. The police seized from your possession all the stolen items except the television and a guitar. You failed to account for the possession of the stolen goods found in your possession.

5. The maximum punishment for Aggravated Burglary under Section 313 (1) (a) of the Crimes Act is an imprisonment term of 17 years and the maximum punishment for Theft is an imprisonment term of 10 years imprisonment.
6. The sentencing tariff for the offence of Aggravated Burglary is between 18 months to 3 years imprisonment. This tariff has been adopted in several decided cases: *State v. Mikaele Buliruarua*[2010] FJHC 384; HAC 157.2010 (6 September 2010); *State v. Nasara*[2011] FJHC 677; HAC 143.2010 (31 October 2011); *State v. Tavualevu*[2013] FJHC 246; HAC 43.2013 (16 May 2013); *State v. Seninawanawa*[2015] FJHC 261; HAC 138.2012 (22 April 2015); *State v. Seru*[2015] FJHC 528; HAC 426.2012 (6 July 2015); *State v. Drose*[2017] FJHC 205; HAC 325.2015 (28 February 2017); and *State v. Rasegadi & Another* [2018] FJHC 364; HAC 101.2018 (7 May 2018) and in *State v Tukele -* [2018] FJHC 558; HAC179.2018 (28 June 2018) and endorsed by the Court of Appeal in *Legavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016).
7. The sentencing tariff for Theft ranges from 4 months to 3 years' imprisonment: *Waqa v State* [HAA 17 of 2015].
8. You were convicted on each count based on the same facts. Therefore, I would impose an aggregate sentence for each of you in terms of section 17 of the Sentencing and Penalties Act (SPA).
9. You have committed serious offences. These offences are most frequent in Fiji and they threaten the property rights of innocent people. In assessing the objective seriousness of your offending, I take into consideration the degree of culpability in your offending and the loss caused to the complainant. Both of you are on an equal footing as far as the culpability level is concerned. Most of the stolen items were recovered and handed back to the complainant. Having considered all these factors, I start the sentence with a starting point of 30 months.
10. The value of property stolen is considerably high. Although joint enterprise in the offending is subsumed in the offence, it involves a degree of pre-planning. The door of the studio was forced open. I add 12 months for the aggravating features to reach 42 months.
11. I would consider the mitigating circumstances filed by your counsel separately.

Atunaisa Koroi Junior

12. Atunaisa Koroi Junior, your counsel has informed the court that you are 38 years of age, a taxi driver, and a father of two children. You seek mercy of this court and another chance to rehabilitate. Most of the stolen items have been recovered. You have been in remand for 13 months and 6 days. I have considered all these factors in discounting your sentence.
13. Since you have one active previous conviction, you will not get any discount on account of good character. I deduct 5 months for mitigation and 13 months for the remand period to arrive at a sentence of 24 months.
14. The active previous conviction and the recidivist tendency indicate that you have not learnt a lesson and not serious about rehabilitation. Therefore, an immediate custodial sentence is warranted to you.
15. The State Counsel has submitted that you should be declared a habitual offender under Section 11 of the Sentencing and Penalties Act and that your sentence be enhanced to protect the community in view that you have 10 previous convictions. The State Counsel takes up the position that your previous convictions can be taken into account as an aggravating factor to enhance the sentence once you have been declared a habitual offender. The State Counsel has cited *Suguturaga v State* [2014] FJCA 206; AAU0084.2010 (5 December 2014) to support her position.
16. The State concedes that, except for one, other previous convictions are not referable to the past 10 year period and hence not active. The Counsel for Atunaisa has objected to the previous convictions being taken into account as an aggravating factor as such a course of action would violate the principle of 'double jeopardy'. He also submits that Atunaisa has only one active previous conviction and therefore he does not pose a threat to the community. I will now briefly examine the legal position in this regard before making a ruling on that.
17. Sections 10, 11 and 12 of the Sentencing and Penalties Act deal with the notion of 'habitual offender'. Section 11 states:

"(1) A judge may determine that an offender is a habitual offender for the purposes of this Part –

(a) When sentencing the offender for an offence or offences of the nature described in section 10;

(b) Having regard to the offender's previous convictions for offences of a like nature committed inside or outside Fiji; and

(c) If the court is satisfied that the offender constitutes a threat to the community.

(2) The powers under this Part may be exercised by the Court of Appeal and the Supreme Court when hearing an appeal against sentence. "

18. Section 10 of the Sentencing and Penalties Act states:

"This Part applies to a court when sentencing a person determined under section 11 to be a habitual offender for –

(a) a sexual offence;

(b) offences involving violence;

(c) offences involving robbery or housebreaking;

(d) a serious drug offence; or

(e) an arson offence."

19. Section 12 of the Sentencing and Penalties Act states:

"Where any court is proposing to impose a sentence of imprisonment on a person who has been determined to be a habitual offender under section 11 for an offence of a nature stated in section 10, the court, in determining the length of the sentence-

(a) shall regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and

(b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence."

20. In *Suguturaga*, Goundar JA observed:

[14] In my judgment, there are two prerequisites for an exercise of discretion to declare an offender a habitual offender under section 11(1) of the Sentencing and Penalties Decree. The first prerequisite is that the offender is convicted of an offence of a nature that is prescribed under section 10. If the first prerequisite is met, then the second prerequisite is that the sentencing court having regard to the offender's previous convictions for offences

of similar nature must be satisfied that the offender constitutes a threat to the community. If the sentencing court is so satisfied, then a sentence that is longer than that which is proportionate to the gravity of the offence can be imposed under section 12 for the purpose of protecting the community. Section 12 has clearly created an exception to the proportionality principle in sentence. The exception allows for the use of previous convictions as an aggravating factor to enhance the offender's sentence in order to protect the community. The constitutionality of section 12 is open for arguments. I express no opinion on that issue in this appeal.

[15] As far as this case is concerned, the learned High Court made two errors. Firstly, the appellant's declaration as a habitual offender was unlawful because he was not convicted of offences that the Sentencing and Penalties Decree prescribed as habitual offences under section 10. Secondly, the learned High Court judge made impermissible use of the appellant's previous convictions as an aggravating factor to increase the sentence. The use of the appellant's previous convictions as an aggravating factor was an error of law (*Tevita Tuisavusavu & Jone Savou v State*, unreported Criminal Appeal No. AAU0064 of 2004S; 3 April 2009 at para [17])

21. In respect of the case of *Atunaisa*, the first prerequisite is met as he is convicted of an offence of a nature that is prescribed under section 10 of the SPA. Although he has committed only one offence of similar nature during the past 10 years, it appears that he has resumed his habit and, having regard to the offender's long string of previous convictions for offences of similar nature, I am satisfied that *Atunaisa* constitutes a threat to the community. Therefore, I declare *Atunaisa* to be a habitual offender.
22. However, I do not agree with the State that the court in *Suguturaga*, held that Section 12 of SPA has created an exception to using an offender's previous convictions as an aggravating factor. Although it was observed at paragraph 14 of the Judgment that Section 12 has clearly created an exception to the proportionality principle in sentence, and that the exception allows for the use of previous convictions as an aggravating factor to enhance the offender's sentence in order to protect the community, His Lordship, at paragraph 15, has clearly stated that the learned High Court judge made impermissible use of the appellant's previous convictions as an aggravating factor to increase the sentence.
23. I have discussed this issue extensively in *Tabekusi v State* [2018] FJHC 840; HAA132.2017 (6 September 2018). I do agree that the previous convictions of the offender cannot be taken as an aggravating factor to increase the sentence to protect the community. The question is

whether, by virtue of Section 12 of the SPA, previous convictions of an offender can be taken into consideration as an aggravating factor when he has been declared a habitual offender.

24. I do not believe with all respect that Section 12 of the SPA can created an exception to the proportionality principle (in sentencing) entrenched in the Constitution and that exception allows for the use of previous convictions as an aggravating factor to enhance the offender's sentence disproportionately in order to protect the community.
25. In my opinion, an act of Parliament cannot override the supreme law of the land which is the Constitution. The proportionality principle of sentencing constitutes an integral and basic structure of the Constitution which the judiciary is bound to follow in sentencing. An act of Parliament simply cannot create an exception to this basic principle. Equally important is the principle that a prisoner is not to be sentenced for the offence he has committed in the past and for which he has already been punished. These principles are deeply ingrained in our criminal justice system.
26. In *Singh v State Criminal Appeal No. AAU0004/97S* [1998] FJCA 6 (12 February 1998); the Court of Appeal stated:

“It is now well settled that a prisoner is not to be sentenced for the offence he has committed in the past and for which he has already been punished. In other words his sentence is not to be increased because of his earlier offending - see *O'Donnel v Perkins* 1908 VLR 537. As was said by the English Court of Appeal in *R v Queen* [1982] Crim. L.R. 56 the proper way to look at the matter is to decide a sentence which is appropriate to the offence for which the prisoner is before the Court and then to consider whether the Court can extend some leniency to the offender having regard among other things to his record of previous convictions.”

27. For these reasons, although I have declared Atunaisa Koroi to be a habitual offender, I would not enhance his sentence on that account.

Ananaiaisa Koroi

28. **Ananaiaisa Koroi**, you are a carpenter, 35 years of age, a bachelor, looking after your elderly parents. Your counsel informs Court that you are a first offender. You have cooperated with police and you seek another chance to rehabilitate. You were in remand for 40 days. I have

considered all these factors in discounting your sentence. To reflect the remand period I reduce your sentence by 18 months to reach 24 months' imprisonment.

29. I accept that you, as a first time offender, deserve another chance to rehabilitate. However, you have committed serious offences most prevalent in Fiji. A fully suspended sentence will send a wrong message to the society and to would-be-offenders. A right balance should be struck between denunciation, and deterrence on one hand and rehabilitation on the other. To facilitate your reintegration to the society, a partial suspended sentence will meet the interests of justice. I suspend 18 months of your sentence for a period of two years. You are to serve only 6 months in the correction centre and the rest of the sentence is suspended for a period of 2 years.

Summary

30. Mr. Atunaisa Koroi Junior, you are sentenced to 24 months' imprisonment with a non-parole period of 18 months.

Mr. Ananaiaisa Koroi, you are sentenced to 24 months' imprisonment. You are to serve only 6 months in the correction centre and the rest of the sentence (18 months) is suspended for a period of 2 years. If you are convicted of any offence in the next two years, the suspended sentence may be activated.

31. You have 30 days to appeal to the Court of Appeal.



Aruna Muthge

Judge

At Suva

On 30 July 2020

Counsel: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence