

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 131 of 2020

STATE

V

1. EMOSI TABUASEI

2. LR

Counsel : Ms. Bhavna Kantharia for the State
Mr. Jalesi Korotini for the 1st Accused

Sentence Hearing : 22 October 2020

Sentence : 27 November 2020

The name of the Juvenile has been suppressed. Accordingly, he will be referred to as LR.

SENTENCE

[1] Emosi Tabuasei, as per the Consolidated Information filed by the Director of Public Prosecutions (DPP), you were charged, along with LR, with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

EMOSI TABUASEI AND LR with others, on the 7th day of April 2020, at Raiwaqa, in the Central Division, entered into the property of **DATELINE CAVA** as trespassers, with the intention to commit theft therein.

COUNT 2

Statement of Offence

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

Particulars of Offence

EMOSI TABUASEI AND LR with others, on the 7th day of April 2020, at Raiwaqa, in the Central Division, in the company of each other, dishonestly appropriated 3 x 50 kg of pounded grog (kava), the property of **DATELINE KAVA** with the intention of permanently depriving **DATELINE KAVA** of its properties.

- [2] This matter has been consolidated with High Court Criminal Case No. HAC 135 of 2020. Accordingly on 14 July 2020, the DPP filed the Consolidated Information; while on 20 July 2020, the Consolidated Disclosures relevant to the case were filed.
- [3] Emosi on 12 August 2020, you were ready to take your plea. On that day you pleaded not guilty to both counts in the Consolidated Information. However, on the 26 August 2020, your plea was taken once again and you pleaded guilty to both counts in the Consolidated Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charges against you and the consequences of your guilty plea.
- [4] Thereafter, the State filed the Summary of Facts. On 8 October 2020, 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 two counts in the Consolidated Information, and found the two counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the two counts as charged.
- [5] I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:
1. *The accused is Emosi Tabuasei, (hereinafter known as 'A1'), is 20 years old [02/03/2000] of Jittu Estate, Raiwaqa, unemployed.*
 2. *The complainant is Nisaar Alam (hereinafter known as PW1) is 32 years old, Manager of Dateline Kava, situated at 14 Auto Cit Road, Raiwaqa.*
 3. *On 8/4/20, PW1, Manager of Dateline Kava received a call from the security officer – Josefa Bui (hereinafter known as 'PW2') that the shutters of the shop's main door was open.*

4. *PW1 immediately went to check same out and he saw that the shutters of the shop's main door was open.*
5. *PW1 entered the shop through the back door and saw that 3 x 50 kg of pounded grog (kava) was missing from inside the shop. PW1 then checked the CCTV footages inside the shop and found that a group of boys were circling the shop between 5.00 pm to 7.00 pm on 7/4/20.*
6. *He then went to Grantham Road Police Post and reported the matter.*
7. *The security – Joseva Biu – PW2 stated that on 7/4/2020 between 5.00 pm to 6.00 pm was told by some i-Taukei men at Sabuk Island Fresh that some i-Taukei youths went down the road.*
8. *PW2 went down to the site at Dateline Kava and noticed some youths sitting on the bench beside the restaurant situated beside Dateline.*
9. *PW2 saw 5 youths of whom he could recognize one of them who stays at the same settlement as him and whose father he knows very well (Seuta). When PW2 came towards the youth they asked him if they could sleep there and he told them that is not allowed.*
10. *PW2 stated that he then went to the washroom at the back of the building and when he returned they were gone.*
11. *Early in the morning then he noticed the shutters were open when he called Alam the Operation Manager and informed him of the same.*
12. *The Investigation Officer – DC 3641 – Taniela Tubuna (hereinafter known as 'PW3') attended to the scene and was shown the CCTV footage whereby he identified A1, the one climbing up the main entrance and wearing a black round neck and a ¾ pants and cap.*
13. *PW3 later interviewed A1 on 24/4/20 in which he co-operated with PW3.*
14. *Following statements of person whose name came to light during police investigation who were linked to either selling or buying of the stolen kava from the accused's:-*
 - (a) *Lagilagi Talemaitoga (hereinafter known as 'PW4' – states that on 9/4/2020 at about 7.30 pm a person named Sikeli from Jittu Estate came home with ½ bag full pounded grog and insisted for him to buy same saying he uprooted*

grog from his village and was desperate and his wife and kids are home without cash and needed money to survive.

He wanted to sell for \$400.00 but PW4 told him that he only \$200.00 and he agreed to give same to him. The same night- PW4 mixed the grog and drunk it. And some of it he also sold it and left over grog was handed to police.

- (b) Atelini Lewasau (hereinafter known as PW5) does not recall the exact date but states that its after 2 to 3 weeks after TC Harold and she was home resting with her husband and grandson when someone called from outside.*

She went to check and saw Jahmos (Taitusi's son) whose real name she does not know and whose father is related to her husband. He was there with 2 other i-Taukei boys. Jahmos was holding a brown paper bag filled with pounded grog – 3 kg which he handed over to me and she asked him where he bought the same and he stated that he bought the same from the village and selling it for \$50.00. After discussing with her husband - PW5 gave \$50.00 to Jahmos and he left. On 26/4/20 police came with Jahmos then only PW5 knew that the grog was stolen.

- (c) Temalesi Lewabau – PW6 – on 8/4/20 at about 3pm was at home standing by the doorway when saw 4 i-Taukei youths whom she did not know approach her and asked if she wanted to buy grog and she said no. They told her that they brought from village and were selling for \$50.00, she then gave the \$50.00 and they gave pounded grog in brown paper bag and left. She had already drank the grog with her neighbours.*

- (d) Isikeli Koroi (hereinafter known as 'PW7') – on 8/4/20 whilst Fiji was experiencing TC Harold and he was home and at the night at about 8.30 pm to 9.00 pm was working on a vehicle at their garage when one Emosi A1 also known as 'Moss' of Jittu Estate came and told him that he was selling some grog. A1 asked him if he could assist them by selling a bag of grog. PW7 checked the grog and it was inside a crest chicken (white) bag already pounded, he lifted the bag and estimated it to be 10 kg or more. He was still thinking where to sell when one of the boy told him to sell it to Tex (Lagilagi Talemaitoga) and he agreed because he used to work with Tex before in a garage since he is also a mechanic. They drove to Talemaitoga's house to sell the grog and he agreed to buy the grog for \$200.00 and PW7 gave the cash to A1 and his group of boys who were inside the car. They all returned to Jittu Estate and the boys paid him \$20.00 for the fuel money.*

Record of Interview of A1

15. *A1 admitted to committing the offence and stated that he together with others was smoking near the Dateline Kava when they tried to tamper with the main entrance door – the tin material that rolls up when opened which they managed to lift it open but the security came and they stopped (Q & A 19 & 20 of the ROI).*
16. *The security chased them and they left the place and however they all came and attempted the second time on 7/4/2020 and were able to manage to pull up the rolled tin that was closing the shop and he entered the shop while others were outside. He started to carry the 3 x bag white in colour that contained grog which was pounded and he passed it to the boys who were waiting outside. He stole 3 x 50kg of pounded grog but one according to him was half bag full only (Q & A 26 & 27 of the ROI).*
17. *A1 stated that they then went and sold the grog to one Tex of Wailea for \$200.00 whilst the 2 other bags were kept at one of the accomplice's friend's house (Q & A 28 of the ROI).*
18. *The grog that was stolen was then shared amongst themselves i.e. him and the others who committed the offence with him (Q & A 37 of the ROI).*
19. *A1 stated that his share of grog he sold at Jittu and he does not know about his friends (Q & A 38 & 39 of the ROI).*
20. *CCTV footage shown to A1 and he informed the police who were the others in the footage (Q & A 47 of the ROI).*
21. *He stated that he climbed up the entrance wall of the shop to check inside and to disturb the CCTV camera that was pointing down at the entrance. And then came down and asked the colleagues to assist him to lever the rolled tin at the front entrance and were successful as it opened (Q & A 48 – 50 of the ROI).*
22. *A1 then got inside the shop and informed others to wait outside while he carried the 3 x white bags containing pounded grog (Q & A 51 of the ROI).*
23. *A1 admitted to stealing 3 bags of grog from inside Dateline Kava Shop (Q & A 52 of the ROI).*
24. *He stated that the bags were all stacked together near a post inside the Dateline Kava Shop (Q & A 53 of the ROI).*

25. *A1 further stated that he sold one bag to Lagilagi known as Tex in Wailea. He stated that Tex is Sikeli's friend who sold the grog to Tex (Q & A 55 & 56 of the ROI).*
 26. *A1 then stated that the other 2 bags was kept at an accomplice's friend's house and then shared on the next day (Q & A 57 of the ROI).*
 27. *A1 said from the first sale of the grog he got \$200.00 (Q & A 58 of the ROI).*
 28. *A1 stated that his share of grog (the remaining share) he sold to one Etalini Lenasau for \$50.00 and he does not know about the others (Q & A 59 & 60 of the ROI).*
 29. *A1 is charged with another and has pleaded guilty to the charges against him for Count 1 – Aggravated Burglary and Count 2 – Theft respectively.*
 30. *Annexed herewith is the copy of the Record of Interview of A1 marked 'A'.*
 31. *Only part of the stolen item (grog) was recovered during investigation alleged to have been sold by A1.*
- [7] Emosi, you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [8] Section 4(1) 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. The factors are 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 dehonour the commission of such offences; or*
 - (f) *any combination of these purposes.*

- [9] I have duly considered the above factors in determining the sentence to be imposed on you.
- [10] In terms of Section 313 (1) of the Crimes Act, “A person commits an indictable offence (of Aggravated Burglary) if he or she-
- (a) Commits a burglary in company with one or more other persons; or
- (b).....”

The offence of ‘Burglary’ is defined at Section 312 (1) of the Crimes Act as follows: “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 Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

- [11] The 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).
- [12] The Court of Appeal in *Leqavuni v. State* [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary is between 18 months to 3 years.
- [13] This Court has been consistently following the tariff of 18 months to 3 years imprisonment for Aggravated Burglary: Vide *State v. (Venasio) Cawi & 2 others* [2018] FJHC 444; HAC 155.2018 (1 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 536; HAC 92.2018 (20 June 2018); *State v. Pita Tukele & 2 others* [2018] FJHC 558; HAC 179.2018 (28 June 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 995; HAC 92.2018 (17 October 2018); *State v. (Maika) Raisilisili* [2018] FJHC 1190; HAC 355.2018 (13 December 2018); *State v. (Taione) Waqa & 2 others* [2018] FJHC 1209; HAC 92.2018 (18 December 2018); *State v. Michael Bhan* [2019] FJHC 661; HAC 44.2019 (4 July 2019); *State v. Etika Toka* HAC 138.2019 (1 November 2019); *State v. Vakacavuti* HAC337.2018 (7 November 2019); *State v. Vakacavuti* [2019] FJHC 1088; HAC338.2018 (7 November 2019); *State v. Peniasi Ciri and Another* [2020] FJHC 63; HAC14.2019 (6 February 2020); *State v. Maikeli Turagakula and Another* [2020] FJHC 101; HAC416.2018 (19 February 2020); *State v. (Sachindra Sumeet) Lal & Another* [2020] FJHC 147; HAC71.2019 (26 February 2020); *State v. (Rupeni) Lilo* [2020] FJHC 401; HAC225.2018 (9 June 2020); *State v. (Taniela) Tabuakula* [2020] FJHC 464;

HAC106.2020 (23 June 2020); *State v. (Eric Male) Robarobalevu* [2020] FJHC 630; HAC102.2020 (6 August 2020); *State v. (Usaia) Delai* [2020] FJHC 631; HAC7.2020 (6 August 2020); *State v Vakawaletabua* [2020] FJHC 645; HAC441.2018 (11 August 2020); *State v. (Sakeasi) Seru and Another* [2020] FJHC 770; HAC136.2020 (18 September 2020) and *State v. (Kunal Edwin) Prasad* [2020] FJHC 785; HAC115.2020 (23 September 2020).

[14] 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.

[15] 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.”*

[16] Since the theft in this case involved property of high value, and was consequent to you entering the commercial premises of the complainant as a trespasser, this cannot be considered as theft simpliciter. Therefore, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment for the offence of Theft.

[17] 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."

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

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

[20] The aggravating factors are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) You and your accomplices trespassed into the commercial premises of the complainant thereby paying scant regard to the privacy of the complainant.
- (iii) I find that there was some amount of pre-planning or pre-meditation on your part in committing these offences. You and your accomplices were said to have been chased away by the security a few minutes prior to the incident. However, you together with your accomplices had returned to the alleged place of offending to commit the Aggravated Burglary and Theft.
- (iv) You are now convicted of multiple offending.
- (v) You have also pleaded guilty and been convicted in HAC 133 of 2020, which is also a similar case of Aggravated Burglary and Theft, and includes charges of Failure To Comply With Orders (breaching the curfew hours) and Resisting Arrest, committed barely two weeks after this incident.

[21] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
- (ii) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend.
- (iv) It is submitted that you are seeking forgiveness from the complainant for your actions and that you are also seeking forgiveness from this Court.

- (v) A part of the stolen property was recovered with your assistance.
- (vi) That you entered a guilty plea at an early stage of these proceedings.

[22] Considering the aforementioned aggravating factors, I increase your sentence by a further 4 years and 6 months. Now your sentence for count one would be 6 years imprisonment. Your sentence for count two would be 5 years imprisonment.

[23] I accept that you are a person of previous good character and that you have fully cooperated with the Police in this matter. I also accept your remorse as genuine and also the fact that part of the stolen property was recovered with your assistance. Accordingly, considering the mitigating factors, I deduct 2 years and 6 months from your sentences. Now your sentence for count one would be 3 years and 6 months imprisonment. Your sentence for count two would be 2 years and 6 months imprisonment.

[24] 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 a further discount of 12 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.

[25] In the circumstances, your sentences are as follows:

Count 1- Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act- 2 and 6 months years imprisonment.

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

I order that both sentences of imprisonment to run concurrently. Therefore, your final total term will be 2 years and 6 months imprisonment.

[26] The next issue for consideration is whether your sentences should be suspended.

[27] 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.

- [28] Emosi you are now 20 years of age [Date of birth 2 March 2000]. At the time of offending you would have just turned 20. You are said to be single and a student.
- [29] You have submitted in mitigation that on the date of the incident you were in need of some cash and took the opportunity to commit the offence. You have also submitted that you were influenced by peer pressure, which is common when living in an area that is populated with many unemployed youth.
- [30] You were arrested for this case around the 22 April 2020 and have been remanded in custody since that day. That is a period of 7 months.
- [31] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"....However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

- [32] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

- [33] I have considered the following circumstances:

- You are young offender;
- You have been of previous good character;
- You have fully cooperated with the Police;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have sought forgiveness from the complainant and from this Court;
- You have assured Court that you will not re-offend;
- Part of the stolen property was recovered;

- You entered a guilty plea at an early stage of these proceedings;
- You have already spent 7 months in remand custody for this case.

Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentence.

- [34] However, as mentioned before, today I will be sentencing you for this case and for the connected matter that you have been convicted, HAC 133 of 2020, which is also a similar case of Aggravated Burglary and Theft, and includes charges of Failure To Comply With Orders (breaching the curfew hours) and Resisting Arrest, committed a few days apart. Therefore, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentence for a period of 7 years.
- [35] In the result, your final sentence of 2 years and 6 months imprisonment, is suspended for a period of 7 years. You are advised of the effect of breaching a suspended sentence.
- [36] For the purpose of clarity, in the event you are found guilty and convicted for any offence, which is punishable by imprisonment, committed in the next 7 years, the operational period, the suspended sentence of 2 years and 6 months imprisonment imposed in this case will have to be served consecutive to the suspended sentence of 2 years and 6 months imprisonment I am imposing in HAC 133 of 2020.
- [37] You have 30 days to appeal to the Court of Appeal if you so wish.



Riyaz Hamza
 Riyaz Hamza
 JUDGE
 HIGH COURT OF FIJI

AT SUVA

Dated this 27th Day of November 2020

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