

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 295 of 2020
[CRIMINAL JURISDICTION]

STATE

V

1. KELEMEDI BOLA

2. SULIASI MACEDRU

Counsel : Mr. N. Sharma for the State
Mr. K. Chang for the 1st Accused
Ms. S. Daunivesi for the 2nd Accused

Date of Sentence : 11 March, 2021

SENTENCE

1. Kelemedi Bola and Suliasi Macedru you have pleaded guilty to the charges produced below and were convicted as charged accordingly on 04/03/21;

FIRST COUNT

Statement of Offence

Aggravated Burglary: Contrary Section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence (a)

KELEMEDI BOLA and SULIASI MACEDRU, on the 16th day of September, 2020 at Laucala Bay, Suva in the Central Division in the company of each other, entered into the premises of **WEI-WEI**, as trespassers, with intent to commit theft therein.

SECOND COUNT

Statement of Offence

Attempted Theft: Contrary Section 44 (1) and Section 291 (1) of the Crimes Act 2009.

Particulars of Offence (b)

KELEMEDI BOLA and SULIASI MACEDRU, on the 16th day of September, 2020 at Laucala Bay, Suva in the Central Division, in the company of each

other, attempted to dishonestly appropriate (steal) 1x black Lenovo Thinkpad laptop the property of WEI-WEI with the intention of permanently depriving WEI-WEI of the said property.

THIRD COUNT

Statement of Offence

Resisting Arrest: Contrary Section 277 (b) of the Crimes Act 2009.

Particulars of Offence (b)

SULIASI MACEDRU, on the 08th day of October, 2020 at Raiwaqa, Suva in the Central Division, resisted arrest from **POLICE CONSTABLE 5694 VANAIISA** in the due execution of his duty.

2. You have admitted the following summary of facts;

***Prosecution Witness 1 (complainant)** in this matter is one, **Wei-Wei**, aged 28, domestic duties, of Lot 17, Iloilovatu Street, Vatuwaqa ("PW1").*

***Prosecution Witness 2** in this matter is one, **D/SGT 3670 Laisa**, aged 45, Police Officer of Raiwaqa Police Station ("PW2").*

***Prosecution Witness 3** in this matter is one, **DC 5053 Aceni Toga**, aged 31, Police Officer of Raiwaqa Police Station ("PW3").*

***Prosecution Witness 4** in this matter is one, **PC 5694 Vanaisa**, aged 28, Police Officer of Raiwaqa Police Station ("PW4").*

***Prosecution Witness 5** in this matter is one, **DC 3518 Sevanaia Sedra**, aged 33, Police Officer of Raiwaqa Police Station ("PW5").*

***Prosecution Witness 6** in this matter is one, **DC 5190 Viliame**, aged 28, Police Officer of Raiwaqa Police Station ("PW6").*

- 1. On 16th September 2020 at about 12:00 pm, A1 and A2 unlawfully entered PW1's building by opening the unlocked gate and closed door situated on the ground floor.*
- 2. PW1 was in town at this point when she was immediately notified via the CCTV Footage Application installed on her phone whereby she could clearly see that **2 young iTaukei males entered her office situated on the ground floor of her building and both of them were looking around for items everywhere, especially within the office drawers and cupboards.** She also saw from the CCTV Footage Application that **one of the iTaukei boys had even held onto her black Lenovo Thinkpad laptop, but then left it on the office table as soon as they noticed the CCTV camera, and thereafter left without stealing anything.** The entire incident was caught on camera and was handed over to Raiwaqa Police Station (the said CCTV footage is disclosed under Tab 14 of the Consolidated Disclosure).*
- 3. When the matter was reported at Raiwaqa Police Station, **PW2 immediately recognized A1 and A2 from the CCTV Footage.** According to PW2, he has*

known A1 and A2 for 15 years, he is well acquainted with both of their parents and he knows where both of them reside.

4. On 4th October 2020, upon receiving information, PW3 arrested A1.
 5. On 8th October 2020, PW4 and PW5 went to Eagles Court in Raiwai upon receiving information that A2 was seen watching a volleyball game at that location. According to PW4, he approached A2 after identifying him and held his hand and advised A2 that he is under arrest, however just as PW4 was about to caution A2 of his rights, A2 pulled his hands from PW4 and ran up towards Milverton Road. PW4 immediately have chase to A2 whilst PW5 decided to pursue A2 from the opposite direction. A2 then jumped onto the main road along Narai Lane whereby PW4 and PW5 continued to chase him down. As PW4 and PW5 were close to approaching A2, A2 suddenly tripped on the pothole and fell on the main road. PW4 and PW5 then immediately held A2 and had him sit on the footpath. According to PW4 and PW5, A2 kept on resisting by pushing them away as PW4 kept trying to put the handcuffs on A2. Eventually, PW4 overpowered A2 and managed to put handcuffs on him.
 6. A1 was interviewed under caution by PW6, however he denied all allegations. On the other hand, A2 was interviewed under caution by PW3 whereby he has made partial admissions as follows (annexed hereto is the **typed and handwritten Caution Interview of A2** dated 9th October 2020 marked as “Annexure A”):
 - (a) That he entered the office located along Ratu Iloiloatu Road on the day of the incident (Q&A 29):
 - (b) That he ransacked the entire office and picked up a laptop and hid it underneath his t-shirt after discovering that the office was empty (Q&A 31); and
 - (c) That he placed the laptop back on top of the table as soon as he noticed a camera inside the office (Q&A 32).
 7. Both A1 and A2 had unequivocally pleaded guilty to all the respective counts before this Honourable Court in the presence of their counsels.
3. The tariff for the offence of aggravated burglary which carries a maximum penalty of 17 years imprisonment should be an imprisonment term within the range of 6 years to 14 years. [Vide *State v Prasad* [2017] FJHC 761; HAC254.2016 (12 October 2017), *State v Naulu* [2018] FJHC 548 (25 June 2018) and *State v Nanovu* [2020] FJHC 985; HAC121.2020 (25 November 2020)]
 4. However, the learned State Counsel has insisted that the sentencing tariff that should be applied in this case should be a range between 18 months to 03 years imprisonment.

5. I am conscious of the fact that sentencing is a matter for the court and not for the prosecution. Nevertheless, this submission made by the prosecution in relation to the sentencing range serves as a plea to be lenient in sentencing the accused. Taking everything into consideration, especially the fact that this assertion in fact works in favour of the accused, I have decided to regard the said assertion as a concession made by the prosecution in this case. I am mindful of the fact that this sentencing range advocated by the learned State Counsel does not facilitate the achieving of the purposes of sentencing stipulated under sections 4(1)(a), 4(1)(b), 4(1)(c) and 4(1)(e) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"). Applying the said sentencing range also requires the maximum penalty prescribed by the Crimes Act for the offence to be overlooked when sentencing the accused.
6. On the second count you are charged with the offence of attempted theft. In terms of section 44(1) of the Crimes Act, a person who is found guilty of attempting to commit an offence is punishable as if the offence attempted has been committed. The offence of theft contrary to section 291 of the Crimes Act carries a maximum sentence of 10 years. In the case of *Waqa v State* [HAA 17 of 2015], this court held that the tariff for the offence of theft should be 4 months to 3 years imprisonment.
7. The first two offences are founded on the same facts. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment on the first two offences.

Sentence of Kelemedi Bola

8. Kelemedi Bola, you are 19 years old and you live with your parents. It is submitted that you completed Form 5 in 2019.
9. I am mindful of the fact that no property was stolen in this case as the two of you had left the items you attempted to steal after you saw the CCTV camera.

10. The learned State Counsel submitted that you have been convicted of the offence of theft and serious assault on 02/02/21 by the Magistrate Court at Suva and subsequently the said counsel took steps to provide a copy of the relevant sentencing decision which was in relation to Criminal Case No.2008/2020 dated 02/02/21. According to the said decision, you had been convicted of the offence of theft under section 291 of the Crimes Act and of serious assault under section 277(b) of the Crimes Act upon you pleading guilty to the said charges. The date of the offence of the said theft charge was 29/09/20 and resisting arrest, 04/10/20. A term of 04 months imprisonment was imposed on you, on each count and the two sentences were ordered to run concurrently. However, having considered the time you were in custody from 07/10/20 to the date of the sentence (02/02/21), it was deemed that you had served the said term of imprisonment.
11. Hence the question now is, should you be considered as a first offender in relation to this case? Your conviction in the aforesaid case before the Magistrate Court was in relation to an offence that was committed after you committed the two offences relevant to this case. Thus, even if you have currently a conviction recorded against you, the offending relevant to that conviction was committed by you after you committed the two offences relevant to this case. You have therefore committed the offences relevant to this case as a first offender and for that reason I find it appropriate to consider you as a first offender in determining your sentence in this case.
12. Accordingly, in addition to the fact that you have entered a guilty plea on the first day your plea was taken, there are two factors that could be regarded as mitigating factors. They are;
 - a) you are a young first offender; and
 - b) nothing was stolen from the relevant premises.
13. I would select 18 months as the starting point of your aggregate sentence.
14. I do not find any aggravating factors in this case. I would deduct 09 months from the sentence in view of the above mitigating factors (except for the guilty plea).

Now the sentence is 09 months imprisonment. In view of the early guilty plea, I would grant you a discount of one-third. Accordingly, the final sentence is a term of 06 months imprisonment (after deducting 03 months).

15. It is submitted that you were arrested on 04/10/20. However, in MC Case No. 2008/2020, the time you spent in custody from 07/10/20 to 02/02/21 has been regarded as time served in terms of section 24 of the Sentencing and Penalties Act. I note that the learned Magistrate has overlooked the 03 days from 04/10/20 to 07/10/20. However, even though the period from 07/10/20 to 02/02/21 is 4 days less than four months, the learned Magistrate has regarded the said period as 04 months. Therefore, no prejudice has been caused to you due to the fact that 03 days were overlooked as pointed out before. For the reason that the time you were in custody until 02/02/21 was counted against your sentence in Case No. 2008/2020, the same period cannot be taken into account in this matter. In *Emmins on Sentencing* (Fourth Edition (2001)) published by the Oxford University Press, at page 150 it is stated thus;

"In Governor of Brockhill Prisons, ex parte Evans [1997] 1 Cr App R (S) 282, the Divisional Court held that where concurrent or consecutive sentences are imposed on a defendant in respect of offences for which he has spent separate periods on remand in custody, the term which he is required to serve will be reduced by the remand time relating to the first offence plus the remand time relating to the second offence, provided that these remand periods do not overlap. An overlapping period would count once, not twice."

16. Accordingly, the time in custody that could be regarded as time served in this case would be the period from 02/02/21 to date, which is a period of 01 month and 10 days.
17. In the result, you are sentenced to an imprisonment term of 06 months. In view of the time spent in custody, time remaining to be served is 04 months and 20 days.

Sentence of Suliasi Macedru

18. Suliasi Macedru, you are 23 years old. You are said to be in a de facto relationship and you have two children. It is submitted that you were engaged in farming.

19. I would select 18 months as the starting point of your aggregate sentence for the first two counts.
20. I do not find any aggravating factor in this case as stated above. In addition to the fact that you have pleaded guilty to the charges on the first day your plea was taken, your mitigating factors are as follows;
 - a) You are a first offender; and
 - b) No property was stolen.
21. I would deduct 06 months from the sentence in view of the above mitigating factors (except for the guilty plea). I would not regard you as a young offender. Hence the reason for the difference in the discount awarded in view of the mitigating factors compared to that of Kelemedi Bola. Now the sentence is 12 months imprisonment. In view of the early guilty plea, I would grant you, a discount of one-third. Accordingly, the final aggregate sentence for the first two counts is a term of 08 months imprisonment (after deducting 04 months).
22. You are also charged with the offence of serious assault under section 277(b) of the Crimes Act. In view of the subsequent amendment, the penalty for committing the offence under the said section 277(b) is a term of 05 years imprisonment or term of 10 years imprisonment if the person assaults, resists or wilfully obstructs a police officer in any of the following circumstances;
 - a) he or she bites, spits on or throws at the police officer, or otherwise applies to the police officer a bodily fluid or human or animal faeces;
 - b) he or she is, or pretends to be, armed with a dangerous or offensive weapon or instrument; or
 - c) he or she causes bodily harm to the police officer.
23. In this case the learned State Counsel agrees that none of the circumstances above had existed in resisting the relevant police officer. Therefore, the maximum penalty the third count attracts would be 05 years imprisonment. There is no sentencing tariff identified in relation to this particular maximum penalty. It is pertinent to note that the Sentencing and Penalties Act does not require to always follow a tariff when sentencing an offender.


24. In this case, you had used unlawful force on a police officer. Assaulting or resisting a police officer while that police officer was executing his duties is a blatant affront on the law and order of the country and should be taken very seriously. In my view, given the objective seriousness of this offence under section 277(b) of the Crimes Act (as amended) which does not fall within the special circumstances stipulated therein, the appropriate starting point should be a term of 02 years imprisonment. Hence I would select 02 years as the starting point of the sentence for the third count.
25. Given the manner the offence was committed, there are no factors that could be identified as aggravating factors. The only relevant mitigating factor is that you are a first offender. However, you used force on a police officer who was in the process of arresting you and ran away. Subsequently when you were caught you kept on using force on police officers until they managed to overpower you. You behaved in this manner knowing very well that you have committed an offence. Therefore you being a first offender does not carry much weight in relation to the offence relevant to the third count.
26. I would accordingly deduct 03 months from the sentence. Now the sentence is 21 months imprisonment. In view of the early guilty plea, I would grant you a discount of one-third. Accordingly, the final sentence for the third count is a term of 14 months imprisonment (after deducting 07 months).
27. I would order the two sentences to run concurrently. Accordingly, your final sentence is a term of 14 months imprisonment.
28. It was submitted that you were arrested on 08/10/20, granted bail on 23/11/20 and then the said bail was revoked on 04/03/21. Accordingly you have spent a period 01 month and 22 days in custody in relation to this matter, which shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act.

29. In the result, you are sentenced to an imprisonment term of 14 months. In view of the time spent in custody, time remaining to be served is 12 months and 08 days.
30. It is pertinent to note that, logically, the final sentence should fall below the lower end of the relevant sentencing range when the mitigating factors outweighs the aggravating factors in a particular offending as in this case.
31. On the other hand, in relation to the offence of aggravated burglary, in view of the fact that aggravated burglary is a prevalent offence if not the most prevalent offence in Fiji and the apprehension of fear this offence has instilled in the minds of the members of the public, on the face of it, a terms of 06 months and 08 months imprisonment (respectively) do not reflect the denunciation this offending deserves and would not serve as a deterrent to those who with similar impulses to commit this prevalent offence. However, this is the outcome of granting the concession as pleaded by the prosecution.
32. The final sentences imposed in this case are as follows;
- Kelemedi Bola - an imprisonment term of 06 months. Time remaining to be served is 04 months and 20 days.
- Suliasi Macedru - an imprisonment term of 14 months. Time remaining to be served is 12 months and 08 days.
33. Kelemedi Bola you are a young first offender. Nothing was stolen in this case and your final sentence is a relatively short sentence. You are deemed to have served 01 month and 10 days of that short sentence. In view of these circumstances, I consider it appropriate to suspend the remaining term of your sentence for a period of 03 years.
34. Suliasi Macedru, given the fact that you are a first offender and you are 23 years old, I am inclined to partially suspend your final sentence of 14 months imprisonment, but after you serve the first seven months of that sentence (50%). This is to give you and the others out there with similar impulses, a message that

the assaulting, resisting or willfully obstructing police officers who maintain law and order in this country will not be taken lightly. Considering the period that is regarded as time served, the time remaining to be served before your sentence is suspended would be 05 months and 08 days. The remaining 07 months of your sentence is suspended for 03 years.

35. The court clerk will explain you the effects of a suspended sentence.
36. Accordingly, Kelemedi Bola you will be released today and Suliasi Macedru, in 05 months and 08 days. You are thoroughly warned and advised to hereafter abide by the laws of this country and to lead a good life.
37. Thirty (30) days to appeal to the Court of Appeal.




Vinsent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for both Accused