

IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 73 - 2019

STATE

-v-

PENI WAQANIBAU

For Prosecution : WPC Chand A. [Police Prosecution]
Accused : In person, waived right to counsel
Date of Sentence: 30th April 2019

SENTENCE

1. **PENI WAQANIBAU**, you have pleaded guilty to the following charge:

Statement of Offence

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

Particulars of Offence

PENI WAQANIBAU on the 05th day of March, 2019 at Tavua Town in the Western Division dishonestly appropriated a \$500.00 cash, the property of **Amelia Nakama**, with the intention of permanently depriving the said **Amelia Nakama** of the said property.

2. You have pleaded guilty to the charge and I am satisfied that your guilty plea is supported by the evidence tendered in support of that and your admission in court. I am also satisfied that you understand the consequences of your plea.
3. I convict you of the charge accordingly.
4. The 59 year old victim was withdrawing \$500 cash from an ATM to help her buy some groceries. It was around 3pm. You came and told the victim that her card was still inside the ATM machine. You pressed some buttons and the victim's card was emitted by the ATM machine. The victim went inside the bank to check her balance.

Meanwhile, you were outside at the ATM and you took her \$500 which was secreted by the ATM.

5. You were arrested by police. \$171.65 was recovered from you. In your interview with police you admitted being in town. You went to check your balance and you saw a lady at the ATM. You said that the lady's money was taking some time to be provided by the machine. The lady then took her card inside the bank. You said that you tried your card but it did not work and you were surprised that money came out from the machine. You pocketed the money. It was \$500. You knew the money belonged to the lady. You said that did not call her to tell her about the money. You were walking around in town and the lady saw you and asked you about the money and you ran away from her. You went and hid near a school. You caught a taxi and went to Ba. That is when police arrived. You admitted that \$161.75 was recovered from you. It belongs to the lady. You said that you have used the rest of the money for your taxi fare, buying juice and biscuit.
6. The amount you admitted in your police caution interview that was found on you is less than the amount prosecution assert is in police custody. The difference is about \$10. The court has ordered the return of all the recovered money to the victim and this was done on the 7th of March 2019 pursuant to section 155 (1) (c) of the **Criminal Procedure Act 2009**.
7. You have been in remand for 54 days which I would equate to 2 months.
8. You have no previous conviction.
9. In your mitigation, you seek forgiveness. You are 33 years old. You are married with 3 children. Your wife gave birth recently. You say that you have learnt a lot while in remand. You are the sole breadwinner. You say if given time, you can pay back the whole amount.

MAXIMUM SENTENCE

10. The maximum punishment for theft is 10 years imprisonment.

SENTENCING RANGE or SENTENCING TARIFF

11. The sentencing tariff for theft is as follows [**Ratusili v State** [2012] FJHC 1249; HAA011.2012 (1 August 2012)] :

(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.

STARTING POINT

12. Based on the circumstance of your case, I select a starting point of 3 months imprisonment.

AGGRAVATING FEATURES

13. This was done in a public place in broad daylight.
14. I don't accept that this was an opportunistic theft that you by chance came to the ATM machine and the money was emitted by the machine. As you have admitted the facts, you suggested to the victim that the money will not come, making her take her card inside the bank to check. That is when you took the money from ATM machine. You stole from a vulnerable victim who was ignorant about how the machine worked.
15. Your sentence is increased to 9 months imprisonment.

MITIGATION

16. I accept that you are remorseful.
17. You have a family to look after.

18. You cooperated with police but only in part. You suggested in your caution interview that it was by chance that you came to the ATM machine and the money was emitted. This was false. You had some interaction with the victim first and gave her the suggestion that the money will not come out from the machine. How else would she have recognised you later in town and asked you for the money after which you ran away from her?
19. You have no prior conviction.
20. Some of the money has been recovered. You have not taken any concrete steps to compensate the victim although you promise to pay back the full amount.
21. Your sentence is reduced to 4 months and 2 weeks imprisonment.

GUILTY EARLY

22. I accept that your guilty plea is early and I reduce your sentence to 2 months and 3 weeks imprisonment.

FINAL SENTENCE

23. Your sentence is 2 months and 3 weeks imprisonment.
24. You have spent 2 months in remand. I will not consider this as time served in this case. You have had the benefit of this time being deducted in another of your theft case CF 72 – 19. You will not get a double benefit.
25. You still have 2 months and 3 weeks imprisonment remaining.
26. I can suspend your sentence whether in whole or in part pursuant to section 26 (1) and (2) (b) of the **Sentencing and Penalties Act 2009** as long as your sentence is below 2 years imprisonment.
27. I am persuaded to suspend your sentence but only part.
28. Your sentence will be aimed at deterrence and to punish you adequately.
29. You will serve 1 month and 3 weeks imprisonment term, immediately.
30. The remaining 1 month will be suspended for the next 1 year, you commit any other offence within the next 1 year, this 1 month imprisonment may be activated.

31. You have 2 weeks imprisonment left to serve in your other theft case CF 72 – 19.
32. I don't think that ordering a consecutive sentence will infringe the totality principle or will make you serve an excessive sentence.
33. Your 1 month and 3 weeks imprisonment term in this case will be served consecutive to the sentence imposed on you earlier today in your other theft case CF 72 – 19.
34. 28 days to appeal.



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Lisiate T.V. Fotofili

Resident Magistrate

Dated at Tavua this 30th day of April 2019.