

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 375 of 2018

[CRIMINAL JURISDICTION]

STATE

V

1. LIVINAI KITIONE
2. IFEREMI SERU UKAMEA

Counsel : Ms. L. Bogitini for the State
Ms. S. Hazelman for the 1st Accused
Ms. S. Kumar for the 2nd Accused

Hearing on : 26 November 2018

Sentenced on : 04 December 2018

SENTENCE

1. Livinai Kitione and Iferemi Seru Ukamea, you have pleaded guilty to the charges produced below and were convicted as charged accordingly;

COUNT ONE

Statement of Offence

Aggravated Burglary: contrary to section 313(1)(a) of the Crimes Act of 2009.

Particulars of Offence

LIVINAI KITIONE and **IFEREMI SERU UKAMEA**, in the company of

another, on the 27th day of September 2018, at Nasinu in the Central Division, remained and entered into the property of Moizal Ali as a trespasser, with intent to commit theft.

COUNT TWO

Statement of Offence

Theft: contrary to section 291(1) of the Crimes Act of 2009.

Particulars of Offence

LIVINAI KITIONE and **IFEREMI SERU UKAMEA**, in the company of another, on the 27th day of September 2018, at Nasinu in the Central Division, dishonestly appropriated fish, the property of Moizal Ali with the intention to permanently deprive Moizal Ali of the said property.

2. You have admitted the following summary of facts;
- **The Complainant is Moizal Ali**, 27 years of Nairai road, Raiwai. The complainant owns a fish shop located at Rambo road, Nasinu named Finhatch Seafood.
 - **Accused 1 is one Livinai Kitione**, 19 years of Nasole Hart.
 - **Accused 2 is one Ifereimi Seru Ukamea**.
 - **Virendra Nishal Prasad**, 23 years of Rambo road, Nasinu operates a shop beside the complainant's shop. Their shops are separated by a partition but there is a gap at the top of the partition wall which allows him to see into the complainant's shop.
 - **Alvesh Prasad**, 31 years of Nairai road, Raiwaqa is an employee of the complainant who attends to the complainant's shop, Finhatch Seafood.

Incident:

1. On the 27th of September, 2018 at around 8.30am on the above date, Alvesh Prasad opened the shop. Sometime before 10.30am, Accused 1 entered the Finhatch Seafood shop, after which he went into the toilet and stayed there for 15 minutes.
2. At around 10.30am Alvesh Prasad was called by the complainant to take the fish out of the fridge and lock up the shop. Alvesh Prasad complied with these directions. When he locked the shop, Accused 1 was in the toilet of the shop.
3. Once the shop was locked, Accused 1 then walked out of the toilet. He then opened the backdoor of the shop. Their accomplice then called Accused 1 and Accused 2 to take the fish out of the shop. They then filled a sack full of fish

- and carried the stolen fish out of the shop to be sold.
4. At around 10.30am on the said date, Virendra Nishal Prasad was in his shop. He was aware that the Finhatch Seafood shop was locked. He then heard a noise and looked into the complainant's shop. At one point in time, he noticed an itaukei male in the shop with the freezers open. He then called the complainant to inform him of his suspicions
 5. Accused 1 whilst on the complainant's property as a trespasser packed some fish into a sack and took it out of the Finhatch Seafood shop. He then sold two of six bundles of stolen fish to some construction workers and an owner of a newly constructed house around that area. He then used the money from the sales.
 6. Accused 2 whilst on the complainant's property as a trespasser, helped Accused 1 pack some fish into a sack and carried the stolen fish out of the Finhatch Seafood shop. He then sold one of the six stolen bundles of stolen fish to a Fijian man for \$20.00. He then used the money from the sales on snacks and cigarettes.
 7. Upon receiving a call from Virendra Nishal Prasad, the complainant reported the matter to the police.

Investigation and Caution Interview:

8. Following an investigation, both of the accused persons were arrested on the 27th of September, 2018 by the Police from the Valelevu Police station. The accused persons were then interviewed under caution.
9. The caution interview of Accused 1 was conducted at Valelevu Police Station on 29th September 2018 by DC 3853 Wili Naqura where he voluntarily admitted to the allegation that he and his accomplice had entered into the complainant's property (Finhatch Seafood) as trespassers. After they entered into the complainant's property, he had packed the sack full of fish and sold the stolen fish. He then used the money from the sales.
 - A copy of the Accused's 1 ROI is attached as Annexure 1
10. The caution interview of Accused 2 was conducted at Valelevu Police Station on 29th September 2018 by DC 4548 Jiutasa Veremalua, where he voluntarily admitted to the allegation that he and his accomplice had entered into the complainant's property, (Finhatch Seafood) as trespassers. After they entered into the complainant's property he had packed the sack full of fish and sold the stolen fish. He then used the money from the sales.
 - A copy of the Accused's 2 ROI is attached as Annexure 2
11. The complainant was assisted by Valelevu Police officers to recover some of

the fish which were sold by the accused persons and the accomplice. According to the complainant the value of the fish that was stolen was about \$800.00 and about \$300.00 worth of fish was recovered.

3. As I have explained in *State v Prasad* [2017] FJHC 761; HAC254.2016 (12 October 2017) and *State v Naulu* [2018] FJHC 548 (25 June 2018), based on the tariff endorsed by the Supreme Court for the offence of aggravated robbery in the case of *Wise v State* [2015] FJSC 7, 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.
4. 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.
5. The written submission filed on behalf of the prosecution includes a comprehensive submission regarding the tariff for the offence of aggravated burglary. It is submitted that the prosecution is doubtful whether the aforementioned tariff discussed in *Prasad* (supra) and *Naulu* (supra) is the appropriate range because the final sentence arrived at in most of the cases using the said tariff does not fall within the tariff.
6. A sentencing tariff for a particular offence specifies the range of the sentence applicable to the relevant offence. However, the tariffs presently formulated in this jurisdiction provide the range of the sentence that is applicable in sentencing an offender, after trial. Given the manner the present sentencing tariffs are formulated, sentences imposed upon an early guilty plea cannot always fall within the relevant tariff.

7. For an example, let's take the sentencing tariff for the offence of aggravated robbery which is pronounced by the Supreme Court in the case of *Wise* (supra) where the lower end is 8 years and the higher end is 16 years.
8. In a case where an offender had committed the offence of aggravated robbery and where there are no aggravating or mitigating circumstances, it is understood that, after trial, the offender should receive a sentence of 8 years imprisonment.
9. If the same offender enters an early guilty plea and if the sentencing court decides to give a discount of one-third, and if the sentencing court endeavours to impose a sentence that is just, fair and consistent; the sentence that offender should receive is an imprisonment term of 05 years and 04 months (one-third of 08 years is 02 years and 08 months). Unless the interim sentence is artificially enhanced by citing some (irrelevant) factors as aggravating circumstances (note that this example is about a case without any aggravating circumstances) or a higher starting point is selected without any justification, it is impossible in such a case to reach a sentence of 8 years after giving a discount upon a guilty plea.
10. On the other hand, it is to be noted that in order for an offender to receive a sentence of 8 years upon entering an early guilty plea, the relevant offending should be of such a degree that would require a sentence of 12 years to be imposed after trial.
11. It is pertinent to note that in the case of *Koroivuki v State* [2013] FJCA 15; AAU0018.2010 (5 March 2013) the court of appeal did not hold that a sentence should never fall below the applicable tariff. In fact the court had acknowledged the fact that the final sentence may not always fall within the tariff by saying that;
"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."

12. In my view, if the sentence imposed against an offender based on a plea of guilty is below the tariff, the discounts given for mitigating factors in that case especially for the early guilty plea would explain why the sentence is outside the tariff. The mere fact that a particular sentence is below the applicable tariff especially where the sentence is imposed after an early guilty plea should not be taken to conclude that the relevant sentencing court has disregarded the sentencing principles pronounced in *Koroivuki* (supra).
13. Now let us take the tariff of 18 months to 03 years. As I have pointed out earlier, if the established sentencing principles are correctly applied, a sentencing court cannot reach a sentence of 18 months or above when sentencing a first offender who had entered an early guilty plea where there are no substantial aggravating circumstances. In order to arrive at a sentence of 02 years imprisonment applying the aforementioned tariff after an early guilty plea where a discount of one-third is given, the offence committed by the offender should warrant an imprisonment term of 03 years after trial. Applying the tariff of 18 months to 03 years, an imprisonment term of 3 years could only be imposed (after trial) if the circumstances under which the offence is committed are very serious.
14. Therefore, in my considered view, a sentencer who properly applies the established sentencing principals without distortion cannot reach an imprisonment term of 02 years when applying the tariff of 18 months to 03 years unless the offending involves very serious aggravating factors.
15. The prosecution has cited the case of *State v Matairavula* [2018] FJHC 1079; HAC120.2018 (13 November 2018) where His Lordship Madigan J. had stated at paragraph 12, thus;

"12.] Recently Perera J. observed in Metui Naula & anor HAC 136 of 2018 (25 June 2018) that the tariff in his view is out of proportion to the tariff for aggravated robbery and should be increased to a term of between 6 to 12 years. He (sic) then proceeded to sentence the accused in that case to a partially suspended sentence, thereby totally distorting the tariff that he (sic) purported to have just altered."

16. For the purpose of clarifying the miscomprehension noted in the case of *Matairavula* (supra) I am reluctantly compelled to express my views regarding the approach taken in the said case in arriving at the final sentence.
17. In the said case the Learned Judge arrived at the sentence of 02 years imprisonment upon a conviction entered on an early guilty plea, applying the sentencing tariff of 18 months to 03 years.
18. In sentencing the accused, the Learned Judge had selected 03 years which is the highest end of the tariff, as the starting point. No justification is provided for selecting that extremely high starting point. Again, 12 months were added in view of the aggravating factors that were identified and then 12 months were deducted in view of the mitigating factors. Thereafter a 12 month discount (equivalent to one-third of the interim sentence) was given to arrive at 02 years imprisonment.
19. On the face of it, given that the Learned Judge had increased the sentence by one year in view of the aggravating factors and then had reduced the sentence by one year in view of the mitigating factors; if the relevant sentencing principles were not overlooked, the interim sentence that the court in that case would have properly reached before granting the discount for the early guilty plea is a term of 18 months. After adjusting the sentence for the early guilty plea where a discount of one-third was given, the proper sentence the court would have arrived at using the tariff of 18 months to 03 years is 12 months.

20. However, I do agree that a sentence of 12 months imprisonment is inadequate. This is the main reason why I have come to the conclusion that the range of 18 months to 03 years is not appropriate as the tariff for the offence of aggravated burglary and also the reason which prompted me to take the approach explained in the case of *Prasad* (supra) which is further explained in *Naulu* (supra). That approach was taken in the interest of justice and to ensure that the final sentence I would reach in aggravated burglary cases could be properly explained and justified.
21. The written submission filed by the prosecution also refers to the decision in the case of *Leqavuni v State* [2016] FJCA 31; AAU0106.2014 (26 February 2016). As I have said in *Naulu* (supra), in my view, the court of appeal did not set or endorse 18 months to 03 years as the tariff for the offence of aggravated burglary in the case of *Leqavuni* (supra). What the court said in that case referring to tariff was;
- "At the time of commission of this offence the tariff that was in operation was between 18 moths to 3 years."*
22. In my view, by way of the said statement, Basnayake J simply cited the tariff which was probably provided to His Lordship by one of the parties to the case. Interestingly, even at the time *Leqavuni* was decided, there were two tariffs identified by the High Court for the offence of aggravated burglary. That is, imprisonment of 18 months to 03 years [*State v Seninawanawa* [2015] FJHC 261; HAC138.2012 (22 April 2015)] and imprisonment of 02 years to 03 years [*State v Korodrau* [2014] FJHC 514; HAC219.2012S (11 July 2014)]. Therefore, it could be argued that the court of appeal in the said case had overlooked the fact that a tariff of 2 to 3 years was also in operation at the material time for the offence of aggravated burglary.
23. On the other hand, it is my view that the statement; *"At the time of commission of this offence the tariff that was in operation was between 18 moths to 3 years"* cannot be construed as setting or affirming the tariff for the offence of aggravated burglary. The observation

made in this statement is limited to the time the offence relevant to that case was committed and more importantly the said statement suggests that other tariffs could be in operation at other times. Thus, I am unable to accept the contention that the aforementioned statement made by Basnayake J. can be construed as an endorsement of the range of 18 months to 03 years as the tariff for the offence of aggravated burglary and that it has a binding effect as far as the tariff for the offence of aggravated burglary is concerned in view of the principles of *stare decisis*.

24. I note that the prosecution has also made certain submissions referring to the Definitive Guideline issued by the Sentencing Council of England and Wales. Initially, it is stated that the said guidelines may provide helpful guidance in relation to selecting an appropriate starting point and sentence range. But then again it is stated that the said guideline lies more on helping to identify the seriousness of the offence rather than the appropriate range and range is a matter for the local courts having regard to the local conditions. The said guideline was not submitted to this court but it is stated in the written submission that it is available online. The prosecutor's submission on the application of the aforementioned guideline in this jurisdiction lacks clarity and completeness.
25. In my considered view, a tariff should not be formulated for a particular offence by considering the said offence in isolation. Especially when it comes to the offence of aggravated burglary which is one of the several property offences under part 16 of the Crimes Act, the tariff should be formulated after considering the different maximum sentences provided in the Crimes Act and established tariffs for the other property offences in this jurisdiction.
26. Further, if it is considered necessary for a particular tariff to include the range of the sentence both upon a guilty plea as well as after trial, it would be necessary for the range to be expanded accordingly and also to set a fixed starting point. The starting

point should be taken as the minimum term an offender is likely to receive for committing a particular offence without taking into account any aggravating factors or mitigating factors involved in the actual offending. In other words, the starting point should be the sentence an offender should receive if there were no aggravating or mitigating circumstances involved in the offending. The lower end of the tariff should be one-third less than the starting point if it is considered that a one-third reduction is appropriate on an early guilty plea for the particular offence.

27. As an example, if the tariff for the offence of aggravated robbery to include the range of the sentence upon an early guilty plea and if it is decided that a sentencing court could grant a discount up to one-third upon a guilty plea for the offence of aggravated robbery, two options are available based on the expected outcome. They are;
- a) If it is expected that an offender should receive at least 8 years imprisonment even upon a guilty plea, the tariff should be identified as a term between 8 years to 24 years; and a term of 12 years imprisonment should be set as the starting point; or
 - b) If it is expected that an offender should receive at least 8 years imprisonment after trial, the tariff should be identified as a term between 5 years and 4 months (or 5 years) to 16 years; and should set the starting point at 8 years.

I wish to reiterate that I have made the above remarks only for the purpose of explaining my views in relation to formulating a tariff that would include the sentence upon an early guilty plea.

28. All in all, I must say that I welcome the effort put in by the prosecution in preparing the comprehensive sentencing submissions. However, I am not convinced that I should deviate from the approach I have taken in the case of *Prasad* (supra) and *Naulu* (supra).

29. I shall now turn my attention back to the instant case. The offences you are convicted of 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 against each of you for the two offences you have committed. Section 17 of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act") reads thus;

"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."

30. According to the summary of facts, there was pre planning. I would consider this as a common aggravating factor. I also note that the value of the items stolen is \$800 and the value of the items recovered is \$300.

Sentence of the first accused

31. You are 19 years old and unemployed. In your mitigation, apart from the fact that you have entered an early guilty plea you have submitted that;

- a) You are a first offender;
- b) You are remorseful;
- c) Part of the stolen items were recovered; and
- d) You have cooperated with the police.

32. I would select 06 years as the starting point of your aggregate sentence. Given the aforementioned aggravating factor I would add 01 year to your sentence. I would deduct 03 years in view of the above mitigating factors. Now your sentence is an imprisonment term of 04 years. In view of your early guilty plea through which you have saved this court's time and resources, you will be given a discount of one-third.

Accordingly, your final aggregate sentence is an imprisonment term of 02 years and 08 months. The non-parole period I would fix in view of the provisions of section 18 of the Sentencing and Penalties Act would be 02 years.

33. I consider it appropriate to partially suspend your sentence in terms of section 26(1) of the Sentencing and Penalties Act given that you are a young first offender. I order that you serve the first 02 months of your sentence forthwith and the remaining period of 02 years and 06 months is suspended for 05 years.
34. It is submitted that you have been in custody in view of this matter since 27/09/18. You have accordingly spent a period of 02 months and 01 week in custody. The time you have spent in custody shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act. Given the period you have spent in custody, the time you should serve before your sentence is suspended is regarded as served. Therefore, you shall be released forthwith.
35. I note that the value of the items (fish) stolen is \$800 but the value of the items recovered is \$300. Therefore, the owner had suffered a loss of \$500. You have admitted in your cautioned interview that you sold the fish for \$40 and used that money to buy a razor blade and food. Given these circumstances, I consider it appropriate to impose a fine against you. Your parents who were present in court on 03/12/18 have agreed that they have the capacity pay a fine of \$100 on behalf of you. Therefore, I hereby order that you pay a fine of \$100 within 03 months from today.
36. Accordingly, you are sentenced to an imprisonment term of 02 years and 08 months with a non-parole period of 02 years. You should serve 02 months of your sentence forthwith and the remaining period of 02 years and 06 months is suspended for 05 years. Given the period you have spent in custody, the time you should serve before

your sentence is suspended is regarded as served. You are fined \$100 and this fine should be paid to the High Court Criminal Registry on or before 04/03/19.

Sentence of the second accused

37. You are 19 years old. In your mitigation, apart from the fact that you have entered an early guilty plea you have submitted that;
- a) You are a first offender;
 - b) You are remorseful;
 - c) Part of the stolen items were recovered; and
 - d) You have cooperated with the police.
38. I would select 06 years as the starting point of your aggregate sentence. Given the aforementioned common aggravating factor I would add 01 year to your sentence. I would deduct 03 years in view of the above mitigating factors. Now your sentence is an imprisonment term of 04 years. In view of your early guilty plea through which you have saved this court's time and resources, you will be given a discount of one-third. Accordingly, your final aggregate sentence is an imprisonment term of 02 years and 08 months. The non-parole period I would fix in view of the provisions of section 18 of the Sentencing and Penalties Act would be 02 years.
39. I consider it appropriate to partially suspend your sentence in terms of section 26(1) of the Sentencing and Penalties Act given that you are a young first offender. I order that you serve the first 02 months of your sentence forthwith and the remaining period of 02 years and 06 months is suspended for 05 years.
40. It is submitted that you have been in custody in view of this matter since 27/09/18. You have accordingly spent a period of 02 months and 01 week in custody. The time you have spent in custody shall be regarded as a period of imprisonment already

served by you in terms of section 24 of the Sentencing and Penalties Act. Given the period you have spent in custody, the time you should serve before your sentence is suspended is regarded as served. Therefore, you shall be released forthwith.

41. I note that the value of the items (fish) stolen is \$800 but the value of the items recovered is \$300. Therefore, the owner had suffered a loss of \$500. You have admitted in your cautioned interview that you sold the fish for \$20 and used that money to buy a snacks and cigarette. Given these circumstances, I consider it appropriate to impose a fine against you. Your aunt who was present in court on 03/12/18 as your guardian has agreed that she has the capacity pay a fine of \$100 on behalf of you. Therefore, I hereby order that you pay a fine of \$100 within 3 months from today.
42. Accordingly, you are sentenced to an imprisonment term of 02 years and 08 months with a non-parole period of 02 years. You should serve 02 months of your sentence forthwith and the remaining period of 02 years and 06 months is suspended for 05 years. Given the period you have spent in custody, the time you should serve before your sentence is suspended is regarded as served. You are fined \$100 and this fine should be paid to the High Court Criminal Registry on or before 04/03/19.
43. In summary, the following sentence is imposed on each accused;
Imprisonment term of 02 years and 08 months with a non-parole period of 02 years. 02 months of the sentence to be served forthwith and the remaining period of 02 years and 06 months suspended for 05 years. In view of the period spent in custody the term to be served before the sentence is suspended is deemed to have been served. A fine of \$100 imposed which should be paid to the High Court Criminal Registry on or before 04/03/19.
44. The court clerk will explain you the effects of a suspended sentence.

45. Thirty (30) days to appeal to the Court of Appeal.



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera

JUDGE

Solicitors;

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