

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 179 of 2018

STATE

V

1. PITA TUKELE

2. NEMANI GUDRU MUA

3. TOMASI SERU TUICAKAU

Counsel : Ms. Bhavna Kantharia for the State
Ms. Lavenia David for the 1st Accused
Ms. Litiana Ratidara for the 2nd and 3rd Accused

Sentence Hearing : 22 June 2018

Sentence : 28 June 2018

SENTENCE

- [1] Pita Tukele, Nemani Gudru Mua and Tomasi Seru Tuicakau, when this matter was called before the High Court on 13 June 2018, the Director of Public Prosecutions (DPP) filed Consolidated Information (Consolidating Criminal cases HAC 179 of 2018 and 182 of 2018) and Disclosures. In terms of the Consolidated Information filed, the three of you were charged 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

PITA TUKELE, NEMANI GUDRU MUA & TOMASI SERU TUICAKAU on the 26th day of April 2018, at Suva, in the Central Division, entered into the **UNIVERSITY OF THE SOUTH PACIFIC FITNESS CENTRE** 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

PITA TUKELE, NEMANI GUDRU MUA & TOMASI SERU TUICAKAU on the 26th day of April 2018, at Suva, in the Central Division, dishonestly appropriated 1x Toshiba brand laptop with charger valued at \$999 and an ANZ Goodman Fielder cheque number 04659 worth \$450; all to the total value of \$1,449, the properties of the **UNIVERSITY OF THE SOUTH PACIFIC** with intention of permanently depriving the **UNIVERSITY OF THE SOUTH PACIFIC** of its properties.

COUNT 3

Statement of Offence

ATTEMPTED AGGRAVATED BURGLARY: Contrary to Sections 44 & 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

PITA TUKELE, NEMANI GUDRU MUA & TOMASI SERU TUICAKAU on the 26th day of April 2018, at Suva, in the Central Division, attempted to enter into the **UNIVERSITY OF THE SOUTH PACIFIC WOT EVA BAR** as trespassers, with intent to commit theft therein.

- [2] When this matter first came up before me, on 20 June 2018, the three of you were ready to take your pleas. You pleaded guilty to all three counts in the Consolidated Information. Court was satisfied that you fully understood the nature of the charges against you and the consequences of your pleas. Court found that you pleaded guilty on your own free will and free from any influence.
- [3] Thereafter, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty pleas to be unequivocal. I found that the facts support all elements of the three counts in the Information, and found the three counts proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own pleas and I convicted the three of you of the three counts as charged.
- [4] I now proceed to sentence the three of you.
- [5] The Summary of Facts filed by the State was that:
1. *The complainant's in this matter are:-*
 - (a) *Salome Tabuatalei hereinafter known as 'PW1', 58 years old, employed at USP Gym Centre of Mcfalan Road, Raiwai.*
 - (b) *Gleen Pope hereinafter known as 'PW2', 60 years old, Group Manager, Campus Life The University of the South Pacific of MG54B, Laucala Bay, Suva.*
 2. *The accused's are:*
 - (iii) *Pita Tukele hereinafter known as 'A1', 20 years old, USP Student residing at Lot 23, Church Street, Stage 1, Cunningham.*
 - (iv) *Nemani Gudru Mua hereinafter known as 'A2', 19 years old, USP student, residing at Lot 4, Yasiyasi Road, Nadera.*
 - (v) *Tamasi Seru Tuicakau hereinafter known as 'A3', 19 years old, unemployed, residing at Lot 20, Davullevu Housing.*
 3. *There is no relationship between the accused's and the complainants.*
 4. *On 26th April 2018, at about 4.35 am, PW1 noted that the alarm inside USP gym was switched on. He opened the gym and switched on the lights and saw that the netting for one of the windows was cut from outside and the louver blades were removed. PW1 then called his boss and also informed the security about the break-in and the matter was reported at Totogo Police Station.*

COUNT 1: AGGRAVATED BURGLARY

5. **PITA TUKELE – A1** in his record of interview states that between 25th April 2018 at around 8pm and 26th April 2018 at around 4.35am, he was at USP and he was with A2 and A3.

A1 further states that they all went to break into the USP fitness centre (refer to Q35 AND 36 – record of interview of Pita Tukele).

A1 then stated that he removed four (4) louver blades from the left wing and they all jumped into the gym (refer to Q & Ans. 39 to 41 of the record of interview of Pita Tukele).

6. **NEMANI GUDRU MUA – A2** in his record of interview states that on 26th April 2018 at about 4.35am he together with A1 and A3 were sleeping at Aimless Park located at USP complex (refer to Q & Ans. 24 to 29 of the record of interview of Nemani Gudru).

A2 states that around 1am he together with A1 and A3 went to the fitness centre, led by A1, to break into the fitness centre (refer to Q & Ans. 36 to 39 of the record of interview of Nemani Gudru).

A2 stated that they climbed over the fence and A1 cut the window netting using a scissors and then A1 removed 4 louver blades and they all went inside the fitness centre (refer to Q & Ans. 41 to 48 of the record of interview of Nemani Gudru).

A2 further stated that whilst in the fitness centre they headed to the counter and A1 found a laptop with charger and a cheque at the counter and then they all went outside through the same route they had entered into (refer to Q & Ans. 51 to 62 of the record of interview of Nemani Gudru).

7. **TOMASI SERU TUICAKAU – A3** in his record of interview stated that he met A1 & A2 on the 25th April 2018 at 11pm and he asked them for money because he wanted to visit his mum in hospital. However, they did not have money. A1 and A2 then approached another friend at a park at USP but were unsuccessful.

A1 and A2 then asked him to follow them which he did. He went to USP gym with A1 and A2 (refer to Q & Ans. 48 of the record of interview of Tomasi Seru Tuicakau).

At USP gym, A1 & A2 climbed over it and A3 followed them. A1 and A2 busted the netting and removed the louver blades and went inside whilst he was told to remain outside and look out for anyone who comes around.

After a while, A1 and A2 came outside carrying their knapsack bags. They said for them to go back to the park at USP. Hence they went back to the park. A1 and A2 then took a nap while A3 played games with another. After sometime, they took a cab to town where they were walking down McArthur Road when they were stopped by Police and taken to Police Station. At the Police Station they were all questioned and bags searched where they found a laptop, charger and a bank cheque (refer to Q & Ans. 48 to 59 of the record of interview of Tomasi Seru Tuicakau).

COUNT 2: THEFT

- B. On the above mentioned date and time, the named accused persons stole the following items from the fitness centre, the property of University of the South Pacific:*

(a) 1 x Toshiba brand laptop with charger valued at \$999.00

(b) 1 x ANZ Goodman Fielder Cheque number 04659 worth \$450.00

On 26th April 2018, at about 4.50am, PC 5049 Selema and SC 4331 Kelepi Kalonisau were on mobile patrol at Carnarvon Street, when they saw 3 i-Taukei youths (the accuseds) walking down from McArthur Street. The accuseds were acting in a suspicious manner. They got off the vehicle, approached them and searched them. Upon search, a Toshiba brand laptop, 3 x black jacket, 2 x face cover, 1 x pompom and an ANZ Goodman Fielder cheque worth \$450.00 was found on them. The accuseds were then escorted to Totogo Police Station.

The accuseds persons had stolen the above listed items with intent to permanently deprive The University of the South Pacific of its properties.

The stolen items were later identified by PW1 as the property of University of the South Pacific at the Police Station and same is exhibited in under the RCE No. 92/4/18.

- 9. The three named accused persons were then charged for the offence of Aggravated Burglary contrary to section 313 (1) (a) and Theft contrary to section 291 of the Crimes Act, 2009.*

COUNT 3 – ATTEMPTED AGGRAVATED BURGLARY

- 10. On 26th April 2018, between 4am to 5am, all the accused persons attempted to break into the University Student bar (Wot Eva Bar) after breaking into the adjacent University of the South Pacific Fitness Centre and stealing a laptop and*

a company cheque. The accused's entered the Wot Eva Bar by cutting grills and then tried to enter the bar when the alarm got triggered and they fled. PW2, found that the University of the South Pacific Wot Eva Bar was broken into and reported the matter to the Police whereby the accused's were questioned and all admitted to having attempted to break into the Wot Eva Bar. The damage to the property is estimated at \$657.45 (copies of quotation are attached hereto marked "A").

11. **PITA TUKELE – A1** stated that they used a stone to hit the padlock at the Wot Eva Bar till it got damaged and opened (refer to Q & Ans. 34 of the record of interview of Pita Tukele dated 1/5/18).

A1 further stated that after damaging the padlock they removed the service counter grill and pushed the board that is used to cover the entrance inside to gain entry but they could not enter the bar as when they pushed the board the alarm got triggered and they had to flee the scene (refer to Q & Ans. 38 to 39 of the record of interview of Pita Tukele, dated 1/5/18).

12. **NEMANI GUDRU MUA – A2** stated that he, Pita and Tomasi then discussed about student bar and then all of them decided to break into the bar (refer to Q & Ans. 23 of the record of interview of Nemani Gudru Mua, dated 1/5/18).

A2, further stated that Pita brought a stone and hit a padlock for the grill and broke it and thereafter they took out the 3 grills and placed it aside. Pita then pushed open the counter entrance and one of the layers of the counter enter came off and when the counter entrance was forced opened, the security alarm triggered and they ran away (refer to Q & Ans. 25 to 28 of the record of interview of Nemani Gudru Mua, dated 1/5/18).

13. **TOMASI SERU TUICAKAU – A3** in his record of interview stated that A1 and A2 jumped the fence into the student bar and he could hear the sound like somebody knocking the board and also steel but could not see properly because he was guarding a bit far. He then heard the alarm went on and saw A1 and A2 running out and Pita (A1) told him to take the lead back to the Park (refer to Q & Ans. 29 to 31 of the record of interview of Tomasi Seru Tuicakau, dated 1/5/18).

14. All three accused persons have nil previous convictions; copy of their previous conviction is annexed hereto marked "B".

15. Copies of the accused's record of interview are annexed hereto marked "C".

[6] Pita, Nemani and Tomasi you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[7] Section 4 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. I have duly considered these factors in determining the sentence to be imposed on you.

- [8] In terms of Section 313 (1) of the Crimes Act No. 44 of 2009 (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.

- [9] Section 44 of the Crimes Act deals with the provisions with regard to 'Attempts'. For ease of reference Sections 44 (1) and 44 (2) are reproduced below:

44. — (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

- [10] Accordingly, the offence of Attempted Aggravated Burglary in terms of Section 44 read with 313 (1) of the Crimes Act would also carry 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. Mikeale 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] The same tariff would be applicable for Attempted Aggravated Burglary as well.

[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] Considering the fact that the theft in this case involved property valued at \$1,449.00, it is my opinion that the appropriate tariff in this case should be in the range of 2 months to 3 years imprisonment.

[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 offences, Pita, Nemani and Tomasi, I commence your sentences at 18 months for the first count of Aggravated Burglary and the third count of Attempted Aggravated Burglary.
- [19] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Pita, Nemani and Tomasi, I commence your sentences at 6 months 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 paid scant regard to the fact that you were committing these offences on property belonging to the University of South Pacific, where two of you are following a course of higher studies.
 - (iii) You trespassed on this property late in the night.
 - (iv) There was some degree of pre-meditation in committing these offences.
 - (v) You are now convicted of multiple offending.
 - (vi) You have caused damage to property of the University of South Pacific.
- [21] In mitigation you have submitted as follows:
- (i) That you are first offenders 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 cooperated 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 sought forgiveness from this court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions.
 - (iv) All the stolen property has been recovered.
 - (v) That you entered a guilty plea at the first available opportunity.
 - (vi) You have agreed to compensate the University of South Pacific for the damage you caused to its property.
- [22] Considering the aforementioned aggravating factors, I increase your sentences by a further 3 years. Now your sentences for counts one and three would be 4 years and 6 months. Your sentences for count two would be 3 years and 6 months.

[23] I accept that you are all persons of previous good character and that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 2 years from your sentences. Now your sentences for counts one and three would be 2 years and 6 months. Your sentences for count two would be 1 year and 6 months.

[24] I accept that you entered a guilty plea at the first available opportunity. In doing so, you saved precious time and resources of this Court. For your early guilty pleas I grant you each a further discount of 6 months for counts one and three. 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 years imprisonment.

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

Count 3 - Attempted Aggravated Burglary contrary to Section 44 read with Section 313 (1) (a) of the Crimes Act – 2 years imprisonment.

I order that all three sentences of imprisonment to run concurrently. Therefore, your final total term of imprisonment will be: 2 years 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] Pita you are 21 years of age (DOB: 8 April 1997). You are said to be a second year student at the University of the South Pacific, at Laucala Campus, enrolled in a Bachelor of Arts Program, majoring in Geography and Pacific Vernacular. You have been suspended for one semester since the commission of this offence.
- [29] Pita you are said to be have been brought up by your mother. Your father had abandoned your mother when you were very small. You have been supported by your maternal uncle who paid for your university school fees. Approximately 5 months ago, your mother moved to Bua village to assist your older brother and his children. Since then you have been looked after by your mother's family. You say that you hope to pursue a career in Geography and provide for your mother.
- [30] Nemani you are 20 years of age (DOB: 13 December 1997). You are said to be residing with your parents and 3 siblings at Lot 4, Yasiyasi Road, Nadera. You have studied up to Form 6. You are currently a student at the University of the South Pacific enrolled in a Foundation Course in Business Studies. You are a private student and your father is paying your tuition fees. You say that you wish to pursue a career in the field of Business or Commerce.
- [31] Tomasi you are 19 years of age (DOB: 5 January 1999). You are said to be residing with your parents and a sibling at Lot 20, Qiqi Place, Waila 3B, Davuilevu Housing. You have studied up to Form 6. You are unemployed.
- [32] All three of you have admitted that what you did was wrong, and taken full responsibility for your actions. You have also admitted that the offences were committed due to lack of good judgment on your part. You have also promised that you would lead a crime free life if you are granted a non-custodial sentence.
- [33] All three of you were arrested on the 27 April 2018, and were kept in custody until 30 April 2018. You were then produced before the Magistrate's Court of Suva and granted bail.
- [34] 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...."

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

"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."

[36] I have considered the following circumstances:

- All three of you are young offenders;
- 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 this Court;
- You have assured Court that you will not re-offend.
- You entered guilty pleas at the first available opportunity;
- You have agreed to compensate the University of South Pacific for the damage you caused to its property.

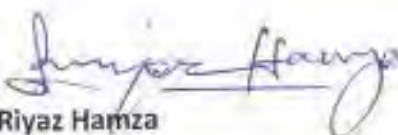
Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentences. However, to deter the three of you and other persons from committing offences of the same or similar nature, and also to protect the community, I suspend your sentence for a period of 5 years. All three Accused are advised of the effect of breaching a suspended sentence.

[37] In the result, your final sentences would be 2 years imprisonment, which term of imprisonment is suspended for a period of 5 years.

[38] In addition, I order that each of you pay a sum of \$220.00 as compensation for the damages you caused to the property of the University of South Pacific. The said sum of monies are to be paid at the High Court Criminal Registry, Suva, during the course of business today.

[39] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 28th Day of June 2018

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