

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 156 of 2019

STATE

V

- 1. ESAVA TOQAKAI**
- 2. TIMOCI TURAGA**

Counsel : Mr. A. Kumar for the State.
: Ms. A. Bilivalu [LAC] for both the Accused.

Date of Submissions : 06 November, 2020
Date of Sentence : 20 November, 2020

SENTENCE

1. Both the accused persons are charged with the following offences as per the information filed by the Director of Public Prosecutions dated 26th November, 2019:

COUNT 1

Statement of Offence

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

Particulars of Offence

ESAVA TOQAKAI AND TIMOCI TURAGA on the 12th day of August, 2019, at Tauvegavega, Ba in the Western Division, entered into the dwelling house of TJ Loloma, as a trespasser with intent to steal from therein.

COUNT 2

Statement of Offence

THEFT: Contrary to section 291 of the Crimes Act 2009.

Particulars of Offence

ESAVA TOQAKAI and **TIMOCI TURAGA** on the 12th day of August, 2019 at Tauvegavega, Ba, in the Western Division, dishonestly appropriated, 1 music box, 1 cosmetics bag and a passport, the properties of TJ Loloma with the intention of permanently depriving the said TJ Loloma of the said properties.

2. On 16th September, 2020 both the accused persons pleaded guilty to both counts mentioned above in the presence of their counsel.
3. Thereafter on 23rd October, 2020 both the accused persons admitted the summary of facts read by the state counsel. The summary of facts is as follows:
4. On 12th August, 2019 both the accused persons broke into the complainant's house by forcefully opening the door as a result they were able to steal the following items belonging to the complainant namely 1 music box, 1 cosmetics bag and one passport belonging to TJ Loloma.

5. The complainant returned from his training and found that the door of his house was open upon checking his house the above mentioned items were missing.
6. The matter was reported to the police and during investigation both the accused persons were arrested and caution interviewed.
7. The first accused admitted committing the offences at Q & A 37 to 49 of his caution interview and the second accused admitted committing the offences at Q & A 46 to 54 of his caution interview.
8. After considering the summary of facts read by the state counsel which was admitted by both the accused persons and upon reading their caution interview, this court is satisfied that both the accused persons have entered an unequivocal plea of guilty on their own freewill. This court is also satisfied that both the accused persons have fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused persons satisfy all the elements of the offences they are charged with.
9. In view of the above, this court finds both the accused persons guilty as charged and they are convicted accordingly.
10. The two offences with which both the accused persons have been convicted are founded on the same facts hence it is only proper that an aggregate sentence be imposed.
11. Section 17 of the Sentencing and Penalties Act states:

“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.”

12. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the offences both the accused persons are charged with.
13. Both counsel have filed written sentence and mitigation submissions for which this court is grateful.
14. The counsel for both the accused presented the following personal details and mitigation on behalf of both the accused:

Accused One - Esava Toqakai

- a) The accused is a first offender;
- b) He was 19 years of age at the time of the offending;
- c) He is single and a Yaqona farmer, he earns about \$1,000.00 a month;
- d) Pleaded guilty at the earliest opportunity;
- e) Substantial recovery of stolen items;
- f) Cooperated with the police;
- g) Apologises to the complainant;
- h) Remorseful for what he has done;
- i) Seek forgiveness of the court;
- j) Promises not to reoffend.

Accused Two - Timoci Turaga

- a) The accused is a first offender;
- b) He was 24 years of age at the time of the offending;

- c) He is in a defacto relationship and his partner is 9 months pregnant;
- d) Yaqona Farmer earning about \$1,000.00 per month;
- e) Pleaded guilty at the earliest opportunity;
- f) Substantial recovery of stolen items;
- g) Cooperated with the police;
- h) Apologises to the complainant;
- i) Remorseful for what he has done;
- j) Seek forgiveness of the court;
- k) Promises not to reoffend.

TARIFF

- 15. The maximum penalty of the offence of aggravated burglary is 17 years imprisonment.
- 16. The accepted tariff for this offence is a sentence between 18 months to 3 years imprisonment (*see Leqavuni v. State, Criminal Appeal No. AAU 106 of 2014 (26 February, 2016)*).
- 17. For the offence of theft the maximum penalty is 10 years imprisonment.
- 18. The tariff for the offence of theft is settled. In *Mikaele Ratusili v. State, Criminal Appeal no. HAA 011 of 2012 (1 August, 2012)* Madigan J. set out the tariff for theft as follows:

- “(i) For the 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.”

AGGRAVATING FACTORS

19. The following aggravating factors are obvious:

a) Invasion of property in the evening

It was after 6pm both the accused persons entered the house of the complainant when it was getting dark into evening. Both the accused persons were bold and undeterred.

b) Planning

There is some degree of planning involved they knew the complainant was not at home and they forcefully broke the door of the house to enter.

20. Considering the objective seriousness of the offending, I select 18 months imprisonment (lower range of the tariff) as the aggregate starting sentence of both the offences for both the accused persons. For the aggravating factors I increase the sentence by 3 years. The interim sentence of imprisonment now stands at 4 ½ years. For the early guilty plea, mitigation, and the remand period the interim sentence is reduced by 2 years.

21. The final aggregate sentence for the two offences is 2 ½ years imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties

Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.

22. In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraphs 22 and 23:

"[22] I accept that the Magistrates' Court has discretion to suspend a sentence if the final term imposed is 2 years or less. But that discretion must be exercised judiciously, after identifying special reason to suspend the sentence. The special reason can vary depending on the facts of each case.

[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to

be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

23. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing immediate imprisonment or a suspended sentence.
24. The accused persons are first offenders of comparatively good character, isolated offences committed, are in their early twenties, pleaded guilty at the earliest opportunity, are remorseful, cooperated with police during investigations and take full responsibility of their actions. I consider these special reasons as rendering immediate imprisonment inappropriate.
25. Both the accused persons are young offenders, with a bright future ahead of them, an imprisonment term will not augur well for their future, they have been in remand for about 3 months and 16 days which is in itself an adequate and appropriate punishment, an experience that will remind them of their misdeeds and act as a motivation to keep away from trouble. This court has taken into account rehabilitation over and above retribution.
26. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that the sentence is just in all the circumstances of the case.
27. In summary both the accused are sentenced to 2 ½ years imprisonment respectively as an aggregate sentence for both the offences which is suspended for 3 years. The effect of suspended sentence is explained to both the accused.

28. 30 days to appeal to be Court of Appeal.



Sunil Sharma
Judge

At Lautoka

20 November, 2020



Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for both the Accused persons.