

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 372 of 2018

STATE

V

PETERO NUKU

Counsel : Mr. Saif Shah for the State
Mr. Isireli Romanu for the Accused

Dates of Trial : 18-19 November 2020

Summing Up : 20 November 2020

Judgment : 23 November 2020

Sentence Hearing : 3 December 2020

Date of Sentence : 9 December 2020

SENTENCE

[1] Petero Nuku, you are charged with the following offences:

[COUNT 1]

Statement of Offence

ATTEMPTS TO COMMIT ARSON: Contrary to Section 363 of the Crimes Act 2009.

Particulars of Offence

PETERO NUKU, on the 30th day of December 2017, at Kadavu, in the Central Division, attempted to set fire to the dwelling house of **MARICA QOLI**.

[COUNT 2]

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375(1)(a)(i)(iv) and (2)(a) of the Crimes Act 2009.

Particulars of Offence

PETERO NUKU, on the 2nd day of January 2018, at Kadavu, in the Central Division, without lawful excuse and with intent to cause alarm threatened to burn **MARICA QOLI** inside her dwelling house.

- [2] You pleaded not guilty to the two charges and the ensuing trial was held over 2 days.
- [3] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that you had committed the offence you were charged with in Count 2. Accordingly, you were found not guilty and acquitted of the said charge. The trial proceeded in respect of Count 1.
- [4] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you guilty of Count 1. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors in respect of the said charge. Accordingly, this Court found you guilty and convicted you of the charge of Attempt to Commit Arson.
- [5] The complainant Marica Qoli, who is your wife, clearly testified to the incidents which took place on the day of offending. She said that you had asked her for some money for you and your friend to go by boat and to buy some more drinks. She had told you that she did not have any money. You had kept swearing at her. You had then pushed the complainant, who was standing inside the house. You had then spotted the gallon of benzine, which the complainant had hidden behind the door, so as to prevent you from travelling by boat at the time. You had then brought the benzine gallon into your kitchen where the gas burner was. You had then opened the benzine gallon and tried to switch on the gas burner. The complainant had to grab you and pull you out of the house.
- [6] The Victim Impact Statement of the complainant has been filed in Court. Therein, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions.
- [7] Section 4(1) 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. The factors are as follows:

4. — (1) *The only purposes for which sentencing may be imposed by a court are —*

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[8] I have duly considered the above factors in determining the sentence to be imposed on you.

[9] The offence of Arson is defined in Section 362 of the Crimes Act No. 44 of 2009 (Crimes Act), in the following manner:

“A person commits an indictable offence if he or she wilfully and unlawfully sets fire to —

(a) any building or structure (whether completed or not); or

(b) any vessel (whether completed or not); or

(c) any commercial plantation of trees;

(d) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

(e) a mine, or the workings, fittings or appliances of a mine.”

The maximum penalty for Arson is Imprisonment for life.

[10] Section 363 of the Crimes Act establishes the distinct offence of “Attempt to Commit Arson”. The offence is defined as follows:

“A person commits an indictable offence if he or she —

(a) attempts unlawfully to set fire to any such thing as is mentioned in section 362; or

(b) wilfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in section 362 is likely to catch fire from it.”

The offence of Attempt to Commit Arson in terms of Section 363 of the Crimes Act carries a maximum penalty of 14 years imprisonment.

- [11] Although not specifically stated in the “*Statement of Offence*”, considering the facts of this case, the first count against the accused would clearly fall under Section 363 (a) of the Crimes Act.
- [12] There is no predetermined or established tariff for the offence of Attempt to Commit Arson.
- [13] His Lordship Justice Rajasinghe in ***State v. Naivalu*** [2018] FJHC 510; HAC141.2018 (18 June 2018); held as follows:

“4. Arson is a serious offence, which carries a maximum penalty of life imprisonment. Burning down of any dwelling house or commercial property could adversely affect the occupants or the owners of those properties.

5. The Fiji Court of Appeal in ***Damodar Naidu and Others (1978 FLR 93)***, has imposed sentences of seven (7) and ten (10) years for burning down of a number of shops.

6. Justice Shameem in ***Lagi v The State [2004] FJHC 69; HAA0004J.2004S (12 March 2004)*** found that the tariff for the offence of arson is between 2 - 4 years, where her Ladyship held that:

“In this case the Respondent appears to have ensured that the house was empty when he lit the fire. However the fact that he accompanied a group of men who threatened the occupants, the fact that the arson was motivated by revenge and the serious consequences of the arson on the victims who were forced to leave the village they called home, called for a sentence within the 2-4 year range. With a starting point of 3 years imprisonment, reduction for the previous good character and other mitigation, and increase for the aggravating factors I have outlined, I see nothing wrong in principle, with a 3 year term. Arson is a most serious offence with a maximum sentence of life imprisonment. A family’s home and belongings were destroyed in the fire. The children of the family may never recover for the trauma of what they saw on the night of the 19th of January 1999.”

7. The Fiji Court of Appeal in ***Lesu v State [2014] FJCA 214; AAU58.2011 (5 December 2014)*** held that:

“Arson is an extremely serious offence and the maximum penalty is life imprisonment. Despite the serious penalty, as mentioned earlier, the Courts in Fiji for considered reasons have placed the tariff for arson between 2 years and 4 years imprisonment.”

8. Justice Temo in ***State v Raralevu - Sentence [2015] FJHC 374; HAC026.2013S (22 May 2015)*** has sentenced the accused for a period of four (4) years for burning down the house of his wife, where his Lordship observed that:

"Arson", as an offence, is viewed seriously by the law makers of this country. It carried a maximum penalty of life imprisonment. Previous case laws had set a tariff between 2 to 4 years imprisonment (see Kelemedi Lagi & Others v State, Criminal Appeal Case No. HAA 0004 of 2004S, High Court, Suva, which was endorsed by the Fiji Court of Appeal in Niko Lesu and Sunia Vosataki v State, Criminal Appeal No. AAU 058 of 2011). However, the Fiji Court of Appeal, in Damodar Naidu & Another v Reginam, Fiji Law Report, Vol 24, 1978, pages 93 to 106, approved a sentence of 7 years imprisonment for accused no. 1 and 10 years imprisonment for accused no. 2, for burning down a number of shops in Rakiraki Town, in May 1977. Of course, the final sentence will depend on the mitigation and aggravating factors."

- [14] However, the tariff for the offence of Arson has now been settled to be a term of between 5 to 12 years imprisonment. In Isikeli Nakato & Another v. State [2018] FJCA 129; AAU74.2014 (24 August 2018); the Fiji Court of Appeal held (Per Justice Vincent Perera):

"Having considered the views expressed by the courts in the decisions cited above and the aforementioned tariffs, it is my considered view that the tariff for the offence of arson under section 362(a) of the Crimes Decree should be an imprisonment term between 5 to 12 years. In selecting the lower end of 5 years imprisonment, I have taken into account inter alia the nature of the offence under section 362(a) which is unlawfully setting fire to a building or a structure, the natural implications of that offence and the maximum penalty which is life imprisonment. Further, this tariff should be regarded as the range of the sentence on conviction after trial. A sentencer may inevitably arrive at a final sentence which is below 5 years imprisonment in applying the two-tier approach unless the aggravating circumstances are quite substantial. If the final sentence reached is one that is below 3 years imprisonment, then it would be at the discretion of the sentencer to opt for any sentencing option as provided under the Sentencing and Penalties Act."

- [15] His Lordship Justice Madigan in State v. Seru & Another [2016] FJHC 841; HAC32.2015 (21 September 2016); held:

"[15] There is no predetermined tariff for the crime of attempted arson but the accepted sentences for arson itself range from 2 years to 10 years. Two years has been held to be appropriate where there is no danger to human life and 4 years where there is such a danger. These are sentences passed for a crime with the maximum penalty of life imprisonment, and there is no reason why a tariff for attempted arson should be more."

[16] If then there is an attempt to burn down a building then an appropriate sentence would start from a term of two years. If the attempt is to harm persons inside the building or is reckless as to whether there would be harm to inhabitants then the sentence should be one of at least 4 years. If the attempt is an attempt to effect large scale arson, for example on a large scale shopping

*area or a sensitive Government building then the sentence could be in the range to 7 to 10 years. (See **Damodar Naidu & Anor v R.** C.A. (1978) FLR93)."*

- [16] In **State v. Bolaciri** [2019] FJHC 1184; HAC79.2019 (20 December 2019); this Court followed the tariff of 2 to 10 years imprisonment for the offence of Attempted Arson.
- [17] Considering all the above, and taking into consideration the facts and circumstances of the case, it is my opinion that the appropriate tariff for the instant case should be in the range of 2 to 10 years imprisonment.
- [18] 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."

- [19] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Petero, I commence your sentence at 2 years imprisonment for this offence.
- [20] The aggravating factors are as follows:
- (i) You are the husband of the complainant and you should be protecting her. Instead you have breached the trust expected from you.
 - (ii) The offending took place in your own dwelling house, which is considered your family home. This is a place where the complainant should have felt safe and secure.
 - (ii) The complainant and your 5 year old daughter were present inside the dwelling house at the time you attempted to set fire to it.

[21] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are nil previous convictions recorded against you.
- (ii) You have submitted that you are truly remorseful of your actions and you have assured that you will not re-offend.

- [22] Petero, considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence would be 5 years imprisonment.
- [23] I accept that you are a person of previous good character. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 2 years from your sentence. Now your sentence would be 3 years imprisonment.
- [24] Accordingly, I sentence you to a term of 3 years imprisonment.
- [25] The next issue for consideration is whether your sentence should be suspended.
- [26] 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.*
- [27] Petero you are now 40 years of age. Your date of birth is 7 October 1980. You are married to the complainant and have 3 children. You are said to be a farmer by occupation-planting and selling yaqona.
- [28] You have said that the offending took place because your wife refused to give you money when you had asked her for same. You say that you were intoxicated at the time and committed the offence on the spur of the moment.
- [29] It has been submitted on your behalf that in ***State v. Bolaciri (Supra)***, this Court had imposed a sentence of 2 years imprisonment, which term was suspended for 5 years, on a person who attempted to unlawfully set fire to the dwelling house of his aunt.
- [30] In ***Bolaciri*** the offender was 22 years of age, at the time of offending. He had entered a guilty plea at the first available opportunity during the proceedings. Therefore, ***Bolaciri’s*** case can be clearly distinguished from the instant case.
- [31] Petero, considering all the facts and circumstances of this case, including the nature and the gravity of the offending and your culpability and degree of responsibility for the offence, I am not inclined to suspend your sentence in its entirety.

[32] Accordingly, I am of the opinion that you should serve in custody a period of 18 months of the 3 year term of imprisonment that I am imposing on you, with effect from today. The balance period of 18 months would be suspended for a period of 5 years, to take effect from the day your custodial sentence of 18 months imprisonment is completed. You are advised of the effect of breaching a suspended sentence.

[33] Section 24 of the Sentencing and Penalties Act reads thus:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

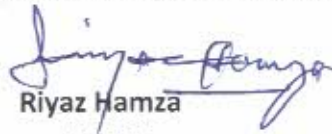
[34] Petero you were arrested for this case on 1 August 2018 and you were granted bail by this Court on 11 March 2019. Thereafter, you were again remanded into custody on 23 November 2020, the day on which this Court found you guilty and convicted you for this offence. Accordingly, you have been in remand custody for this case for approximately 8 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 8 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[35] Therefore, you should serve in custody only the balance period of 10 months imprisonment. I reiterate, that the balance period of your sentence, which is 18 months imprisonment, would be suspended for a period of 5 years, to take effect from the day your custodial sentence is completed.

[36] In terms of the provisions of Section 27 of the Domestic Violence Act No. 33 of 2009, I order a permanent Domestic Violence Restraining Order for the protection of the complainant in this case, with standard non-molestation conditions as stipulated in the said section.

[37] 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 9th Day of December 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : MIQ Lawyers, Barristers and Solicitors, Nasinu.